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A TREATISE

ON THE

LAW OF MUNICIPAL CORPORATIONS

VOLUME FOUR

COMMENTARIES

ON THE LAW OF

MUNICIPAL CORPORATIONS.

BY

JOHN F. DILLON, LL.D.,

AUTHOR OF "THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA"; PRESIDENT OF THE AMERICAN BAR ASSOCIATION, 1891-1892; FORMERLY CIRCUIT JUDGE OF THE UNITED STATES FOR THE EIGHTH JUDICIAL CIRCUIT; CHIEF JUSTICE OF THE SUPREME COURT OF IOWA, AND PROFESSOR OF LAW IN COLUMBIA UNIVERSITY.

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THE LAW OF MUNICIPAL CORPORATIONS

CHAPTER XXVII

MUNICIPAL TAXATION

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§ 1350 (735). **Subject outlined.** — We have elsewhere had occasion to refer to the subject of taxation in relation to the powers

and duties of municipalities.[1] This is the principal source of the revenues by which municipal expenses are borne, and debts and liabilities paid.[2] And it is, as we shall hereafter see, by virtue of a branch of this great power that *local assessments* upon property benefited, or legislatively declared to be benefited, are imposed, in order to meet the cost of making local improvements of a public nature within the municipality, adjoining or near the property assessed. It does not belong to the present work to treat at length of the power of taxation by the State, and the limitations upon it. We shall confine ourselves to a consideration of the subject as connected with municipal corporations, and to the peculiarities which are impressed upon the power when exercised by municipalities under authority conferred upon them by the legislature.[3]

[1] *Ante*, chap. i. § 16, note; chap. ii. § 42; chap. iv. §§ 103, 105, 106, 113, 123; chap. vii. §§ 248, 249; chap. viii. § 322; chap. xv. §§ 661–667; chap. xxii. § 1011; *post*, chap. xxix., on Mandamus.

[2] Lyon *v.* Elizabeth, 43 N. J. L. 158.

[3] The constitutional aspects of the subject have been well treated by Mr. Sedgwick (Statutory and Const. Law, chap. x.), by Mr. Hare (treatise on American Constitutional Law), and by Judge Cooley (Const. Lim. chap. xiv., and in his valuable work on Taxation). Mr. Desty has published his treatise on the American Law of Taxation (2 vols. pp. 1427), in which, with characteristic industry, he has examined, as he states, "about 10,000 cases, and has exhausted, as he believes, the reports of the courts of last resort in all of the States and Territories." Mr. Burroughs' work on the Law of Taxation with its Supplement, digests, as he states, 4578 cases relating to taxation, Federal, State, and Municipal. Judson on Taxation is the production of an able lawyer who has studied the subject with diligence, and whose work is one of great practical value to the profession. Gray on the Limitations of the Taxing Power and Public Indebtedness, 1906, is a useful compendium on the subjects indicated by its title. These and other special treatises must be referred to for details on many points relating to a subject so vast. Perhaps its vastness may make a chapter which confines its treatment within the limited scope indicated in the text, the more convenient, if not more useful. Mr. Blackwell's treatise on the subject of Tax Titles is well known to the profession, and one chapter of that work is upon the subject of tax sales by municipal and other corporations.

The power to tax all the property and vocations within the State is an essential attribute of its sovereignty; there is no restraint upon its exercise, when within constitutional limits. Robinson, *In re*, 12 Nev. 263; North Missouri R. Co. *v.* Maguire, 20 Wall. (U. S.) 46; Hagar *v.* Yolo County, 47 Cal. 222; Coite *v.* Society for Sav., 32 Conn. 173; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316; St. Louis *v.* Wiggins Ferry Co., 11 Wall. (U. S.) 423; Perkins *v.* Milford, 59 Me. 315; Davenport *v.* Miss. & Mo. R. Co., 16 Iowa, 348; Van Antwerp, *In re*, 56 N. Y. 261; Pullen *v.* Wake County Comm'rs, 66 N. Car. 361. *Infra*, § 1375. The constitutional inhibition against taking private property for public use without compensation applies only to property taken under the right of eminent domain, not to taxation. Norris *v.* Waco, 57 Tex. 635. *Infra*, § 1353.

§ 1351 (736). **Taxes defined: Scope of Taxing Power.** — The *taxing power* of the State consists in its authority to levy and collect taxes and assessments which are in the nature of special taxes. Taxes (including, in the term, assessments) are burdens or charges imposed by the legislature, or under its authority, upon persons and property, to raise money for public, as distinguished from private purposes, or to accomplish some end or object public in its nature.[1] There can be no legitimate taxation to raise money unless it be destined for the uses or benefits of the government or some of its municipalities, or divisions, invested with the power of auxiliary or local administration. A *public use or purpose* is of the essence of a tax.[2] Theoretically, the taxpayer is compensated for the taxes he

[1] Citizens' Sav. & Loan Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 664; Meriwether *v.* Garrett, 102 U. S. 472, 513; Morgan's L. & T. R. & S. S. Co. *v.* Louisiana Board of Health, 118 U. S. 455, 461; Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190; New Jersey *v.* Anderson, 203 U. S. 483, 492; Perry *v.* Washburn, 20 Cal. 318; Dranga *v.* Rowe, 127 Cal. 506; New London *v.* Miller, 60 Conn. 112, 116; State *v.* Montague, 34 Fla. 32, 36; Savannah *v.* Cooper, 131 Ga. 670; De Clerq *v.* Barber Asphalt Pav. Co., 167 Ill. 215, 218; Shurtleff *v.* Chicago, 190 Ill. 473, 476; McClelland *v.* State, 138 Ind. 321; Hanson *v.* Vernon, 27 Iowa, 28, 47; Judd *v.* Driver, 1 Kan. 455, 462; Opinion of Justices, 58 Me. 591; Brewer Brick Co. *v.* Brewer, 62 Me. 62, 70; Lake Shore & M. S. R. Co. *v.* Grand Rapids, 102 Mich. 374; Matter of Hun, 144 N. Y. 472, 477; Yeatman *v.* Foster County, 2 N. Dak. 421, 425; Exchange Bank of Columbus *v.* Hines, 3 Ohio St. 1, 10; Philadelphia Assoc. Dist. F. *v.* Wood, 39 Pa. 73, 83; Foster *v.* Stevens, 63 Vt. 175, 184.

In Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 197, Mr. Justice *Brewer*, in differentiating taxes and special assessments or special taxes, said, "Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property owners within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property and the promotion of those various schemes which have for their object the welfare of all. 'The public revenues are a portion that each gives of his property in order to secure or enjoy the remainder.' Montesq., Spirit of the Laws, book xiii. chap. i."

[2] Parkersburg *v.* Brown, 106 U. S. 487, 501; Cole *v.* La Grange, 113 U. S. 1; People *v.* McCreery, 34 Cal. 432; Stockton & V. R. Co. *v.* Stockton, 41 Cal. 147, 149; Doyle *v.* Austin, 47 Cal. 353, 360; English *v.* People, 91 Ill. 566; McClelland *v.* State, 138 Ind. 321, 332; Hanson *v.* Vernon, 27 Iowa, 28; Warren *v.* Henly, 31 Iowa, 31, *per Beck*, J.; Allen *v.* Jay, 60 Me. 124; Brewer Brick Co. *v.* Brewer, 62 Me. 62; Thorndike *v.* Camden, 82 Me. 39; Lowell *v.* Boston, 111 Mass. 454; Bristol *v.* Johnson, 34 Mich. 123; Glasgow *v.* Rowse, 43 Mo. 479; Elizabethtown Water Co. *v.* Wade, 59 N. J. L. 78; Weismer *v.* Douglas, 64 N. Y. 91, 99; Hilbish *v.* Catherman, 64 Pa. 154; Feldman *v.* Charleston, 23 S. Car. 57; State *v.* Tappan, 29 Wis. 664.

pays in the protection afforded to him and his property by the government which imposes the tax; but the substantial foundation of

"I concede," says *Black*, C. J., in Sharpless *v.* Philadelphia, 21 Pa. St. 147, 167, "that a law authorizing taxation for any other than public purposes is void. . . . A tax for a *private* purpose is unconstitutional, though it pass through the hands of public officers." Hilbish *v.* Catherman, 64 Pa. St. 154, 159. "A tax for a private purpose," says *Lowe*, J., in State *v.* Wapello County, 13 Iowa, 388, 405, "is a solecism in language." What is a *public purpose* sufficient to support the power has been much discussed during late years, particularly in connection with the authority conferred upon municipalities to aid in the building of railways. See chap. viii. *ante;* §§ 313, 317, 321 *et seq.* In the case of Cit. Sav. & Loan Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, it was held to be beyond the legislative competency to authorize municipalities to aid enterprises essentially private; that taxes can be levied only for public purposes. The opinion of Mr. Justice *Miller* is the ablest and most satisfactory discussion of the subject to be found in the books. With striking and characteristic force Mr. Justice *Miller* says: "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

The expression "public purpose" or "public use" is not to be taken in any narrow sense, but as distinguished from *private* purpose or uses; and therefore the Supreme Court of *Wisconsin* has properly held that, in the absence of special constitutional restriction, the legislature may authorize a town or other municipality to levy taxes therein for public purposes not strictly of a municipal character, but from which the public have received or will receive some direct advantage; or where the tax is to be expended in defraying the expenses of the government, or in promoting the peace, good order, and welfare of society, or in paying claims founded upon natural justice and equity, or upon gratitude for public services or expenditures, or in discharging the obligations of charity and humanity. State *v.* Tappan, 29 Wis. 664. See interesting views on this subject by *Folger*, J., in Weismer *v.* Douglas, 64 N. Y. 91, and by *Appleton*, C. J., in Brewer Brick Co. *v.* Brewer, 62 Me. 62; Eureka Basin W. & M. Co., *In re*, 96 N. Y. 42; English *v.* People, 91 Ill. 566.

Public purposes for which taxes may be levied have been held to include the following: *Irrigation*, Fallbrook Irrig. Dist. *v.* Bradley, 164 U. S. 112, 160; *contribution* by town towards establishment of *State reform school*, Livingston County *v.* Darlington, 101 U. S. 407; Cole *v.* La Grange, 113 U. S. 1, 7; *memorial hall* to be used and maintained as a memorial to the *soldiers and sailors* of the War of the Rebellion, Kingman *v.* Brockton, 153 Mass. 255; *Soldiers' and sailors' monument* in public park, Parsons *v.* Van Wyck, 56 N. Y. App. Div. 329.

Private purposes which do not justify taxation have been held to include the following: *Reimbursement* of township trustee for *money lost through bank failure*, McClelland *v.* State, 138 Ind. 321; reimbursement of township treasurer for money taken from him by robbery, Bristol *v.* Johnson, 34 Mich. 123; *reimbursement* of tax collector for amount *of note improperly accepted for taxes* and accounted for as money, Thorndike *v.* Camden, 82 Me. 39; *bounty for planting trees*, Deal *v.* Mississippi County, 107 Mo. 464; *donation or bonus to private manufacturing corporation*, Citizens' Sav. & Loan Assoc. *v.* Topeka, 20 Wall. (U. S.) 655; Cole *v.* La Grange, 113 U. S. 1; Bissell *v.* Kankakee, 64

the power is political, civil, or governmental necessity, and taxes are largely, if not wholly, as Mr. Mill insists, sacrifices for the public good, "equality of sacrifice" being the rule dictated by justice.[1]

Ill. 249; English *v.* People, 91 Ill. 566; Central Branch Union Pac. R. Co. *v.* Smith, 23 Kan. 745; Allen *v.* Jay, 60 Me. 124; Weismer *v.* Douglas, 64 N. Y. 91.

Statutes authorizing towns and cities to *pay bounties to soldiers* have been upheld because the raising of soldiers is a public duty. Middleton *v.* Mullica, 112 U. S. 433; Taylor *v.* Thompson, 42 Ill. 9; Agawam *v.* Hampden, 130 Mass. 528, 534; State *v.* Richland, 20 Ohio St. 362; Hilbish *v.* Catherman, 64 Pa. 154. But in *New York* a statute authorizing taxation to pay any drafted men who served personally in the Civil War, or furnished a substitute, or paid commutation, a specific sum of money transcends the taxing power of the legislature. Bush *v.* Orange County, 159 N. Y. 212. See also Taber *v.* Erie County, 131 N. Y. 432; Perkins *v.* Milford, 59 Me. 315; Moulton *v.* Raymond, 60 Me. 121; Freeland *v.* Hastings, 92 Mass. 570; Mead *v.* Acton, 139 Mass. 341; Kelly *v.* Marshall, 69 Pa. 319; Ferguson *v.* Landram, 1 Bush (Ky.), 548.

A tax for the *endowment and support of a State university* is for a public purpose and valid, but a tax for the use and benefit of a class of students therein to enable them to support themselves is for a private purpose and beyond the legislative power. State *v.* Switzler, 143 Mo. 287; Simmons Medicine Co. *v.* Ziegenhein, 145 Mo. 368. See and compare Burr *v.* Carbondale, 76 Ill. 455, holding valid municipal bonds in aid of the Southern Illinois University, and Merrick *v.* Amherst, 12 Allen (Mass.), 500, where the court affirmed the power of the legislature under the Constitution of *Massachusetts* to authorize the town of Amherst to raise $50,000 for the Agricultural College located therein. But in Jenkins *v.* Andover, 103 Mass. 94, a statute permitting a town to tax itself for the benefit of a *private* incorporated academy was held invalid. See Lowell *v.* Boston, 111 Mass. 454, 463, as to validity of aid to owners of land in Boston, the buildings upon which were burned in the great fire in that city of November 9 and 10, 1872. *Ante*, §§ 318, 319, 1351, note; Commercial Nat. Bank of Cleveland *v.* Iola, 2 Dillon C. C. 353; *ante*, §§ 321–323; Page *v.* Graham, 57 Ill. 144; State *v.* Dodge County, 8 Neb. 129; Desty Taxation, § i. p. 1, § viii. p. 14. Mr. Hare (1 Am. Const. Law, 278–287) discusses the question what constitutes a public use or purpose. Also Gray (1 Lim. on Taxing Power), chap. iv.

The act of the legislature of *Georgia*, authorizing the levy and collection of a tax to compensate lot-owners in a certain town for damages sustained by the removal of the county seat to another town, was held valid and constitutional. Wilkinson *v.* Cheatham, 43 Ga. 258; Cooley Const. Lim. chap. xiv. 487 *et seq.* Where the legislature authorized the city of Charleston *to issue its bonds and lend them to persons desiring to rebuild in the district destroyed by the great fire* in 1866, it was held that, as authority to issue bonds necessarily involved the power to levy taxes to pay them, and as the taxing power of the legislature could only be exercised under the Constitution of that State for a public purpose, and as the object named was private and not public, the act of the legislature was unconstitutional and the bonds void. Feldman *v.* Charleston, 23 S. Car. 57. To the same effect see Lowell *v.* Boston, 111 Mass. 454. See *ante*, § 319, note; *post*, § 1372, note.

[1] Mill Political Economy, vol. ii. pp. 370, 372; Warren *v.* Henly, 31 Iowa, 31, opinion of *Beck*, J.; Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 198; Union Refrigerator Transit Co. *v.* Lynch, 18 Utah, 378.

Equality, indeed, so far as practicable, is inherent in the very idea of a *tax*, as distinguished from arbitrary exaction, and in many of the States is enjoined, as we shall presently perceive, by constitutional provision.

§ 1352 (737). **Elements of Public Use and of Apportionment.** — Whatever limitations exist upon the legislative authority to wield, in its full scope, the taxing power of the State at its will, must be sought in the nature of the power itself, as thus briefly explained, and in express or implied restrictions of the National and State Constitutions.[1] Subject to constitutional restrictions, it is *within the power of the legislature* of a State to ascertain the public burdens to be borne and the persons or classes of persons who ought to bear them, and its determination, within the limits of the Constitution, is not judicially reviewable.[2] Subject always to any special con-

[1] Birmingham *v.* Klein, 89 Ala. 461, 465, citing text; Genet *v.* Brooklyn, 99 N. Y. 296, 306; People *v.* Fitch, 148 N. Y. 71, 77.

[2] Weston *v.* Charleston, 2 Pet. (U. S.) 449; Lane County *v.* Oregon, 7 Wall. (U. S.) 71; Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533; New Orleans *v.* Clark, 95 U. S. 654; Marion County *v.* Coler, 23 U. S. App. 699; Carroll *v.* Perry, 4 McLean (U. S.), 25; Hare *v.* Kennerly, 83 Ala. 608, 610; Hanna *v.* Allen County, 8 Blackf. (Ind.) 352; De Pauw *v.* New Albany, 22 Ind. 204; Talman *v.* Butler County, 12 Iowa, 531; Warren *v.* Henly, 31 Iowa, 31, *per Beck*, J.; Atchison, T. & S. F. R. Co. *v.* Peterson, 5 Kan. App. 103, quoting text; Williams *v.* Cammack, 27 Miss. 209; North Missouri R. Co. *v.* Maguire, 49 Mo. 482, 490; Young *v.* Hall, 9 Nev. 212; State *v.* Newark, 26 N. J. L. 515; People *v.* Brooklyn, 4 N. Y. 419; Sun Mutual Ins. Co. *v.* New York, 8 N. Y. 241, 251; Guilford *v.* Chenango County, 13 N. Y. 143; Brewster *v.* Syracuse, 19 N. Y. 116, 118; Litchfield *v.* Vernon, 41 N. Y. 123; People *v.* Dayton, 55 N. Y. 367, 389; Scoville *v.* Cleveland, 1 Ohio St. 126, 135; Kirby *v.* Shaw, 19 Pa. 258; Pittsburgh, Ft. W. & C. R. Co. *v.* Commonwealth, 66 Pa. 73; State *v.* Stephens, 4 Tex. 137; Parkersburg *v.* Tavenner, 42 W. Va. 486; *ante*, §§ 114, 115, 121, 123, 127, and authorities there cited.

In Genet *v.* Brooklyn, 99 N. Y. 296, 306, *Andrews*, J., said: "The purposes for which a tax shall be levied; the extent of taxation; the apportionment of the tax; upon what property or class of persons the tax shall operate; whether the tax shall be general or limited to a particular locality; and in the latter case the fixing of a district of assessment; the method of collection, and whether the tax shall be a charge upon both person and property, or only on the land, are matters within the discretion of the legislature, and in respect to which its determination is final. . . . There is no constitutional guarantee [in the Constitution of New York] that taxation shall be just and equal, although a law plainly departing from the principle of equality in the distribution of public burdens would be justly obnoxious as contrary to natural equity, and as practical confiscation, but the remedy must ordinarily be found in an appeal to the justice of the legislature." "I admit that the power to tax is unbounded by an express limit in the Constitution" of *Pennsylvania;* "but nevertheless taxation *is* bounded in its exercise by

stitutional restrictions, *the legislature has the power to fix for itself a taxing district without any hearing* of the parties as to benefits, for the purpose of assessing upon the lands within the district the cost of a local public improvement or other expenditure. The legislature when it fixes the district itself is supposed to have made proper inquiry and to have finally and conclusively determined the fact of benefits to the lands included in the district, and the citizen has no constitutional right to any other or further hearing upon that question.[1] The right which a taxpayer or property owner may have *is to a hearing* after the special assessment district has been fixed upon the question of what is termed *the apportionment of the tax, i. e.* the amount of the tax, if any, which he is liable to pay.[2]

its own nature, essential characteristics, and purpose." *Per Agnew*, J., in Washington Av., *In re*, 69 Pa. St. 352, 363; Erie *v.* Reed's Ex., 113 Pa. St. 468. The power of taxation is never to be taken to be surrendered by intendment or implication. Birmingham *v.* Klein, 89 Ala. 461.

[1] Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112, 174; Genet *v.* Brooklyn, 99 N. Y. 296, 306; New York Prot. Episc. Pub. School *v.* Davis, 31 N. Y. 574, 583; Matter of Van Antwerp, 56 N. Y. 261, 265; Spencer *v.* Merchant, 125 U. S. 345; Bauman *v.* Ross, 167 U. S. 548; Voris *v.* Pittsburg Plate Glass Co., 163 Ind. 599; Cleveland, C. C. & St. L. R. Co. *v.* Porter, 210 U. S. 177, 185, aff'g 38 Ind. App. 226. As to necessity for *notice* and *hearing*, see Gray, Lim. Taxing Power, pp. 555–579; *infra*, § 1365.

[2] Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112, 174.

In *New Jersey* it is the settled rule that a tax can only be levied in either of two ways. (1) By *special assessment* upon property benefited to the extent of the benefit only, and (2) by *a general tax* upon property or subjects of taxation within the State or a political subdivision or municipality having powers of local government. See *post*, § 1434. State *v.* Newark, 37 N. J. L. 415, known as the *Agens Case*, *post*, § 1435. In the absence of any constitutional provision to the contrary, a *State may treat its entire territory* as composing but a *single taxing district*, and deal with all property therein as within the district and subject to taxation accordingly. Michigan Cent. R. Co. *v.* Powers, 201 U. S. 245, aff'g 138 Fed. Rep. 223.

The *Barrett Paving Law of Indiana*, the general scheme of which is that a taxing district is created by the legislature of the property along the line of the improvement and extending back therefrom one hundred and fifty feet, and that back-lying property, — *i. e.*, property fifty feet distant from the street and within one hundred and fifty feet, — is so far benefited that it shall be made liable if the abutting fifty feet "prove insufficient" to pay the cost of the improvement, held to be constitutional as to abutting property owners, Shaefer *v.* Werling, 188 U. S. 516; Hibben *v.* Smith, 191 U. S. 310; and also as to back-lying property owners, Cleveland, C. C. & St. L. R. Co. *v.* Porter, 210 U. S. 177, aff'g 38 Ind. App. 226.

In *Kentucky*, under the Constitution then in force, it was held that the legislature might authorize any subdivision of a county to subscribe to the stock of a railroad and to issue bonds therefor, and might authorize the county to impose a special tax on the district making such subscription; or it might create a political district with corporate powers; or it might authorize magisterial districts, constable districts, or carve out a special district, which might so act and upon which a special tax might be imposed. Carter County *v.* Sinton, 120 U. S. 517; Hancock *v.* Louisville & N. R. Co., 145 U. S. 409, 414; Breckinridge County *v.* McCracken, 22 U. S. App. 115, 121; Lexington *v.* McQuillan, 9 Dana (Ky.), 513; Shelby County

Taxation implies, as we have seen, an imposition for a *public* use; and it also implies that the imposition shall be upon some

Court *v.* Shelby R. Co., 5 Bush (Ky.), 225; Allison *v.* Louisville, H. C. & W. R. Co., 10 Bush (Ky.), 1; Kreigor *v.* Shelby R. Co., 84 Ky. 66. But the boundaries of a district plainly and specifically described in the statute to be taxed for a local improvement cannot be enlarged by construction. The power to levy an assessment for a local improvement exists only where it is clearly and distinctly conferred by legislative authority, and if not so conferred the assessment is void. If there is any necessity to resort to construction at all, it must be in favor of the property owner rather than against him. *Per O'Brien*, J., in Nehasane Park Assoc. *v.* Lloyd, 167 N. Y. 431, 436, citing Sharp *v.* Speir, 4 Hill (N. Y.), 76; Matter of Second Avenue M. E. Church, 66 N. Y. 395; Stebbins *v.* Kay, 123 N. Y. 31.

Where a statute authorized the commissioners to levy a *tax of fifteen cents on each one hundred acres of land* in a certain taxing district for the *construction of a public highway*, the legislature not only created a special taxing district, but also provided that all lands within that district should be taxed at the amount specified per acre without any regard to the value of the lands or the benefit to be derived from the improvement. The statute did not give to the landowner a hearing or an opportunity to be heard in regard to the apportionment of the tax. Without deciding the question of the validity of the statute, because it was unnecessary to the decision of the case, *O'Brien*, J., remarked: "It has been generally understood that a fixed and arbitrary sum assessed by statute upon property, and imposed without reference to some system of just and equal apportionment, and without any opportunity to the owner to be heard, cannot be upheld." Nehasane Park Assoc. *v.* Lloyd, 167 N. Y. 431, 439, citing Stuart *v.* Palmer, 74 N. Y. 183; McLaughlin *v.* Miller, 124 N. Y. 510; Remsen *v.* Wheeler, 105 N. Y. 573; Spencer *v.* Merchant, 125 U. S. 345; Norwood *v.* Baker, 172 U. S. 269; Jones *v.* Tonawanda, 158 N. Y. 438. The legislature, in the exercise of the taxing power, may impose a tax to build a bridge, or to pay debts incurred for one already constructed, for the public accommodation; and the legislature (in the absence of constitutional restriction upon its power) may define how large that local community shall be that is made subject to the tax, whether the State, or a county, or a city, or one or more of its wards. Shaw *v.* Dennis, 10 Ill. 405, 416; Philadelphia *v.* Field, 58 Pa. St. 320, referred to *ante*, § 121.

Authority to tax property *outside* of corporate limits, to pay bonds issued in aid of a railroad, sustained. Langhorne *v.* Robinson, 20 Gratt. 661. See also Waterville *v.* Kennebec County, 59 Me. 80. But in Wells *v.* Weston, 22 Mo. 384, followed in Cameron *v.* Stephenson, 69 Mo. 372, it was held that the legislature cannot constitutionally authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the limits of the corporation. In St. Charles *v.* Nolle, 51 Mo. 122, *Adams*, J., *arguendo*, approves Wells *v.* Weston, and admits that it is inconsistent with Langhorne *v.* Robinson, *supra*. Although the act authorizing an issue of municipal bonds provided for the levy of a special tax on all the *real estate* within the municipal township making the subscription, still it is competent for the legislature, after the issue of the bonds, to amend the act and provide that the levy for that purpose shall be made *on personal as well as real property*, and a *mandamus* will issue in the proper case, on the relation of the bond creditor, commanding the levy to be made on both classes of property. Cape Girardeau County Court *v.* Hill, 118 U. S. 68; *infra*, chap. xxix. In Hare *v.* Kennerly, 83 Ala. 608, where a tax was levied under the provisions of an act adopting and carrying into effect a plan "for the adjustment and settlement of the then existing indebtedness of the city of Mobile," which had been abolished by the legislature, objection was made that the *State* levied the tax, and not the *city of Mobile*, and that under art. x. § 7 of the Constitution which prescribed a limit upon the rate of taxation in municipal corporations, and made special provision as to the rate of taxation in Mobile, the city alone was empowered to levy it. In answer

system of *apportionment*, so as to secure uniformity among those who are, or ought to be, subject to the particular tax or assessment;[1] and hence we may readily conceive of acts of the legislature demanding arbitrary and unequal sacrifices of citizens which could not be sustained as legitimate exercises of the taxing power. But where the imposition is properly a tax, and no constitutional limitation is violated, the power of the legislature is supreme, and without any theoretical bounds. "If the right to impose a tax exists," says the Supreme Court of the United States,[2] "it is a right which, in its nature, acknowledges no limit"; and the reason is, that the needs of the public or of the government can ordinarily have no bounds set to them. Unless, therefore, there is some limit fixed in the Constitution, the State may, by general or uniform law or rule, tax the property within the State to its full value; in other words, it has unlimited power over the *rate* of taxation and the *objects* (the property, persons, business, or things subject to be taxed) of taxation.

§ 1353 (738). **Taxation and Eminent Domain discriminated.** — The power of *taxation* and the power of *eminent domain*, subject to both of which all private property is held, although they both originate in political necessity, are in their nature materially different. For taxes paid, or money exacted under the taxing power, no direct specific compensation is made; but where property is *taken* under the right of eminent domain, this can be done, as we have already seen, only to the limited extent required by the particular object or enterprise in favor of which it is exercised, and then only on the condition of making to the owner direct and full compensation in money for the *particular* and *unequal* sacrifice which he would otherwise be obliged to make for the public benefit. Most of the courts have concurred in the view that the usual constitutional provision prohibiting the taking of private property for public use with-

to this objection the court said: "The fallacy of this suggestion consists in the assumption that these several provisions of the constitution are *grants* of the power to tax, instead of *limitations* upon the exercise of such power inherent in the legislative branch of the government." And the levy of the tax by the State under the provisions of the above-mentioned act relating to the indebtedness of Mobile was held valid and in accordance with the constitutional provision relating to taxation by municipal corporations (§ 7 of art. x. Constitution of 1875).

[1] 1 Hare Am. Const. Law, 308, 310; 1 Desty Taxation, § 10, p. 28, and cases *infra*, § 1443.

[2] Weston *v.* Charleston, 2 Pet. (U. S.) 449; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 431; Hanson *v.* Vernon, 27 Iowa, 28, 49; Meriwether *v.* Garrett, 102 U. S. 472, noted more fully *ante*, chap ix.; Munday *v.* Rahway, 43 N. J. L. 338.

out compensation is a limitation on the exercise by the State of the right of eminent domain, and not a limitation on the taxing power.[1]

§ 1354 (742.) **Federal Limitations on the Taxing Power.** — The prohibition upon the States to pass *laws impairing the obligation of contracts is a limitation upon the taxing power of the State,* as well as upon its other legislative powers; and it disables a city, when it borrows money and issues an absolute promise to repay it, from passing an ordinance directing its officers to retain the amount of a tax levied by the city upon such debt, out of the interest thereon as the same falls due.[2]

§ 1355 (743). **Same Subject; Imports and Exports; Instrumentalities of Federal Government.** — The *power of the States,* and of their municipalities, to levy taxes is *subject to certain other express and implied restrictions in the Federal Constitution.* Thus States cannot, without the consent of Congress, lay any imposts or duties *on imports or exports* except what may be absolutely necessary for executing their inspection laws; nor can they, without the consent of Congress, lay any duty on tonnage, as they are expressly prohibited from so doing by the Constitution.[3]

[1] People *v.* Brooklyn, 4 N. Y. 419. The difference between *taxation* and *eminent domain* is here discriminated with great clearness and precision in the learned opinion of Mr. Justice *Ruggles.* See also Gilman *v.* Sheboygan, 2 Black (U. S.), 510; Hanson *v.* Vernon, 27 Iowa, 28, 54; Stewart *v.* Polk County, 30 Iowa, 1, 9; Moale *v.* Baltimore, 5 Md. 314 (opening street); Williams *v.* Detroit, 2 Mich. 560, 565; People *v.* Salem, 20 Mich. 452, 477; Roberts *v.* Smith, 115 Mich. 5; Howell *v.* Buffalo, 37 N. Y. 267, 270; Litchfield *v.* Vernon, 41 N. Y. 123; Genet *v.* Brooklyn, 99 N. Y. 296, 306; Dyker Meadow Land Co. *v.* Cook, 3 N. Y. App. Div. 164, 168, aff'd 159 N. Y. 6; Northern Indiana R. Co. *v.* Connelly, 10 Ohio St. 165; *ante,* § 1350, note.

[2] Murray *v.* Charleston, 96 U. S. 432. *Miller* and *Hunt,* JJ., dissented, on the ground that the contract was made subject to the then existing power of taxation in the city, which entered into and became part of the contract. See also Case of State Tax on Foreign-held Bonds, 15 Wall. 300; Northern Cent. R. Co. *v.* Jackson, 7 Wall. (U. S.) 262, for instances of taxing powers which are held to impair the obligation of contracts. Desty Taxation, § 30, pp. 136–141. A State tax upon bonds of a debtor within the State held by a person outside of the State, is unconstitutional, though secured by a mortgage of land within the State. Cleveland, P. & A. R. Co. *v.* Pennsylvania (*sub nom.* State Tax on Foreign-held Bonds), 15 Wall. (U. S.) 300. Local assessment acts held not to be in conflict with the 14th Amendment to the Federal Constitution. *Post,* § 1365.

[3] Brown *v.* Maryland, 12 Wheat. (U. S.) 419. As to tolls and wharfage, see *ante,* § 273.

The term "imports" as used in the clause of Federal Constitution which declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports and exports," does not refer to articles carried from one State to another, but only to articles imported from *foreign* countries to the United States. Woodruff *v.* Parham, 8 Wall. (U. S.) 139; Brown *v.* Houston, 114 U. S. 622, 628; American Steel & Wire Co. *v.* Speed, 192 U. S. 500. Under the provision of

The rights or privileges which are *guaranteed to an importer* by this clause of the Federal Constitution are as follows: The payment of duties to the United States gives to the importer the right to sell the thing imported, and such right *to sell* cannot be forbidden or impaired by a State. A tax upon the thing imported during the time it retains its character as an import and remains the property of the importer in his warehouse, in the original form or package in which it was imported, is a duty on imports within the meaning of the Constitution. The State cannot, in the form of a license or otherwise, tax the right of the importer *to sell*, but when the importer has so acted upon the goods imported that they have become incorporated or mixed with the general mass of property in the State, such goods have then lost their distinctive character *as imports*, and have become from that time subject to State taxation, not because they are the products of other countries, but because they are property within the State in like condition with other property that should contribute, in the way of taxation, to the support of the government which protects the owner in his person and estate.[1]

the Federal Constitution that "No tax or duty shall be laid on articles *exported* from any State," no burden by way of tax or duty can be cast upon the exportation of articles, but that does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest on all property similarly situated. The exemption attaches to the export, and not to the article before its exportation. Cornell *v.* Coyne, 192 U. S. 418, 427. See also Turpin *v.* Burgess, 117 U. S. 504, 506. A *license tax* upon the business of a *buyer of cotton for export* is a duty upon exports within the meaning of the Federal Constitution. State *v.* Allgeyer, 110 La. 839.

As to passenger tax. Smith *v.* Turner, 7 How (U. S.) 283; Crandall *v.* Nevada, 6 Wall. (U. S.) 35; Smith *v.* Marston, 5 Tex. 426; State *v.* Fullerton, 7 Rob. (La.) 210; Rabassa *v.* New Orleans, 3 Martin, o. s. (La.) 218; Norris *v.* Boston, 4 Met. (Mass.) 282; *ante*, § 261, note; Reading R. Co. *v.* Pennsylvania (*sub nom.* State Freight Tax), 15 Wall. (U. S.) 232; Same *v.* Same (*sub nom.* State Tax on Railway Gross Receipts), 15 Wall. (U. S.) 284. The United States Congress may, as the local legislature of the District of Columbia, tax different classes of property situated there, at different rates. Gibbons *v.* District of Columbia, 116 U. S. 404 (sustaining an act which discriminated between city and rural lands), *citing* Loughborough *v.* Blake, 5 Wheat. (U. S.) 318; Welch *v.* Cook, 97 U. S. 541; Mattingly *v.* District of Columbia, 97 U. S. 687.

[1] In May *v.* New Orleans, 178 U. S. 496, 507, Mr. Justice *Harlan* summarizes the decisions of the United States Supreme Court in Brown *v.* Maryland, 12 Wheat. (U. S.) 419, in the language stated in the text. In May *v.* New Orleans, 178 U. S. 496, the plaintiffs imported goods and sold them. In each box, or case in which the imports were made, were many packages, each separately marked and wrapped. It was held that the *box or case was the original package*, and that the goods lost their distinctive character as imports and became subject to local taxation when the boxes or cases were opened and the goods were offered for sale in the separate packages. May *v.* New Orleans, 178 U. S. 496.

An *Irish corporation* established a warehouse and place of business in *New York for the sale of their imported goods*. The business was of a permanent character; the goods were constantly received and sold and replaced by other goods. Cash was deposited in New York and was subject to use as the needs of the business might require. In this business it took notes

The power of taxation by the States *does not extend to the instruments of the Federal government*, or to the constitutional means employed by Congress to carry into execution the powers conferred in the Federal Constitution.[1]

for sales of such goods. These notes were not directly transmitted to its home office in Dublin, but were held for collection in connection with the business in New York, and while the bulk of the proceeds might be sent abroad, sufficient sums were retained to meet the expenses of the business and pay duties on subsequent importations of goods. It was held that the amount receivable on notes and open accounts and the cash on hand had lost the distinctive character which would protect them under the provision of the Federal Constitution prohibiting imposts or duties on imports, and had become capital invested in business in New York and subject to taxation there. Burke *v.* Wells, 208 U. S. 14, aff'g 184 N. Y. 275. See also People *v.* Wells, 183 N. Y. 264, rev'g 104 N. Y. App. Div. 629.

The greater part of the business of a corporation of *New Jersey* consisted in *importing* chemicals and dyestuffs from Europe and selling the same in original packages. A small portion of its business, however, representing about one-seventh thereof, consisted in selling broken packages of its imported goods, and also some domestic goods. It was held that it was *subject to the franchise tax* imposed by *New York* upon foreign corporations for the privilege of doing business in the State, because, although it was engaged in interstate commerce, it was partly engaged in domestic commerce, and its business was therefore within the taxing power of the State. People *v.* Roberts, 36 N. Y. App. Div. 597, aff'd 167 N. Y. 617.

[1] McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 424; Osborn *v.* Bank of United States, 9 Wheat. (U. S.) 738; Weston *v.* Charleston, 2 Pet. (U. S.) 449, rev'g 1 Harper Eq. (S. Car.) 340; First Nat. Bank of Louisville *v.* Commonwealth, 9 Wall. (U. S.) 353; Van Brocklin *v.* Tennessee, 117 U. S. 151, 155; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 504; United States *v.* Rickert, 188 U. S. 432, 438; Desty Taxation, § 20, p. 67, and cases.

"*The inability of the States to tax the official agencies of the Federal Government*, whether in the form of banks chartered under its authority, or of obligations issued by it as a means of providing a revenue, or for the payment of its debts, was applied in McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, to a stamp tax upon notes of the United States Bank; in Weston *v.* Charleston, 2 Pet. (U. S.) 449, and in Bank of Commerce *v.* New York City, 2 Black (U. S.), 620, to stock issued for loans made to the Government of the United States; in the Bank Tax Case, 2 Wall. (U. S.) 200, to a tax laid on banks on a valuation equal to their capital stock, when their property consisted of stocks of the Federal Government; in The Banks *v.* The Mayor, 7 Wall. (U. S.) 16, to certificates of indebtedness of the United States issued to the creditors of the Government for supplies in carrying on the Civil War; in Bank *v.* Supervisors, 7 Wall. (U. S.) 26, to notes of the United States intended to circulate as money; and in Van Brocklin *v.* Tennessee, 117 U. S. 151, to land purchased by the United States for the amount of a direct tax thereon." *Per* Mr. Justice *Brown* in Hibernia Sav. & Loan Soc. *v.* San Francisco, 200 U. S. 310, 313, 314.

To the effect that the *bonds of the United States* are not subject to taxation by a State, or by its authority, see People *v.* Home Ins. Co., 29 Cal. 533; Newark City Bank *v.* Assessor, 30 N. J. L. 13; Fox *v.* Haight, 31 N. J. L. 399, 409; Jewell *v.* Hart, 31 N. J. L. 434; Mut. L. & C. Ins. Co. *v.* Haight, 34 N. J. L. 128; International & L. Assur. Co. *v.* Haight, 35 N. J. L. 279. For purposes of taxation, the premium on United States bonds was held to be exempt, being a part of the bond. See People *v.* Com'rs of Taxes, 90 N. Y. 63, distinguishing People *v.* Com'rs of Taxes, 76 N. Y. 64, 76. Gray, Lim. Taxing Power, sec. 755.

Lands held by the United States for the benefit of the Indian races are instrumentalities of the United States Government and cannot be taxed before allotment and the issuance of patents, or even after allotment and the issuing

§ 1356 (744). **Interstate Commerce: Hawkers and Peddlers, Drummers and Canvassers.** — The legislature of the State, if it is not restricted or prohibited by the Constitution of the State, may tax or may authorize municipal corporations to tax *hawkers and peddlers* selling goods, wares, and merchandise that are *physically within the State* at the time of sale, although such goods, wares, and mer-

of a patent, and until the expiration of the trust, when the patent declares that the government shall hold the lands in trust for the Indian allottee and his heirs for a period of twenty-five years. United States *v.* Rickert, 188 U. S. 432. The public lands of the United States are not subject to taxation by a State or by its authority, before the location of the land warrant. Doty *v.* Bassett, 44 Kan. 754. Lands held by the Federal Government are not subject to special assessment for a local improvement. Fagan *v.* Chicago, 84 Ill. 227; Whitaker *v.* Deadwood, 23 S. Dak. 538; 122 N. W. Rep. 590. As to the exemption of *public lands* of the United States and the time when the interest of any person entering thereon becomes taxable, see Kansas Pac. R. Co. *v.* Prescott, 16 Wall. (U. S.) 603; Union Pac. R. Co. *v.* McShane, 22 Wall. (U. S.) 444; Tucker *v.* Ferguson, 22 Wall. (U. S.) 527; Colorado Co. *v.* Pueblo County, 95 U. S. 259; Northern Pac. R. Co. *v.* Traill County, 115 U. S. 600; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496; Hussman *v.* Durham, 165 U. S. 144; United States *v.* Milwaukee, 100 Fed. Rep. 828; Price *v.* Dennis, 159 Ala. 625; 49 So. Rep. 249; State *v.* Itasca Lumber Co., 100 Minn. 355; Johnson *v.* Crook County, 53 Oreg. 329; 100 Pac. Rep. 294.

A State may tax different estates in lands to the respective owners thereof. Where a *dry-dock* had been *conveyed* to a corporation *by the United States*, with a condition subsequent, for a breach of which the title might revert to the government, and with the stipulation that the United States should have a continuing right to use the dock for certain purposes, it was held that the estate or interest of the corporation might be taxed to it. Baltimore Shipbuilding & D. D. Co. *v.* Baltimore, 195 U. S. 375, aff'g 97 Md. 97. The *estate of the lessee* of land belonging to the United States in Hot Springs Reservation is subject to taxation by the State. *Ex parte* Gaines, 56 Ark. 227.

The power of the Federal Government to procure money on the credit of the United States cannot be burdened, impeded, or in any way affected by the action of any State. Hence a *tax upon the property of a bank in which United States securities* are included is beyond the power of the State. Home Sav. Bank *v.* Des Moines, 205 U. S. 503, discussing and citing authorities.

The principle that a city cannot tax the agencies which the Federal Government employs in its governmental operations does *not apply to obligations such as checks and warrants intended for immediate use*, and designed merely to stand in the place of money, until presented at the Treasury and the money actually drawn thereon. A tax thereon is virtually a tax upon the money which may be drawn immediately upon their presentation. So held where a savings and loan association had in its possession two checks or orders of the treasurer of the United States for interest accrued upon certain registered bonds of the United States, payable to the association, and a tax was levied upon the amount represented by these checks. Hibernia Sav. & Loan Soc. *v.* San Francisco, 200 U. S. 310. There is nothing in the *exemption of government bonds from taxation* which prevents them from being seized for taxes due on property not exempt. Scottish Union & N. Ins. Co. *v.* Bowland, 196 U. S. 611, 632.

The Pacific railroads: The Union Pacific R. Co. and the Central Pacific R. Co., chartered by Congress and made government agencies, are, nevertheless, taxable by the States in respect of property situate therein. Union Pac. R. Co. *v.* Penniston, 18 Wall. (U. S.) 5; Thomson *v.* Union Pac. R. Co., 9 Wall. (U. S.) 579; Union Pac. R. Co. *v.* Lincoln County, 1 Dillon C. C. R. 314; *post*, § 1398; State *v.* Central Pac. R. Co., 10 Nev. 47; People *v.* Central Pac. R. Co., 43 Cal. 398.

chandise may have been brought from another State.[1] But in imposing a license tax upon a hawker or peddler, there must be *no*

[1] Howe Machine Co. *v.* Cage, 100 U. S. 676, aff'g 9 Baxt. (Tenn.) 518; Emert *v.* Missouri, 156 U. S. 296, aff'g 103 Mo. 241; Corfield *v.* Coryell, 4 Wash. C. C. 380; American Harrow Co. *v.* Shaffer, 68 Fed. Rep. 750; Wiley *v.* Parmer, 14 Ala. 627; Hall *v.* State, 39 Fla. 637; Burr *v.* Atlanta, 64 Ga. 225; Wiggins *v.* Chicago, 68 Ill. 372; Graffty *v.* Rushville, 107 Ind. 502; South Bend *v.* Martin, 142 Ind. 31; State *v.* Wheelock, 95 Iowa, 577; Rash *v.* Farley, 91 Ky. 344; State *v.* Montgomery, 92 Me. 433; Ward *v.* Morris, 4 H. & McH. (Md.) 340; Keller *v.* State, 11 Md. 525; Oliver *v.* Washington Mills, 11 Allen (Mass.), 268; Commonwealth *v.* Ober, 12 Cush. (Mass.) 493, 495, 497; People *v.* Russell, 49 Mich. 617, 619; Muskegon *v.* Zeeryp, 134 Mich. 181; People *v.* Smith, 147 Mich. 391; Muskegon *v.* Hanes, 149 Mich. 460; Tracy *v.* State, 3 Mo. 3; State *v.* North, 27 Mo. 464; Wynne *v.* Wright, 1 Dev. & B. L. (N. Car.) 19; Cowles *v.* Brittain, 2 Hawks (N. Car.), 204; Wilmington *v.* Roby, 8 Ired. L. (N. Car.) 250; Whitfield *v.* Longest, 6 Ired. L. (N. Car.) 268; Plymouth *v.* Pettijohn, 4 Dev. (N. Car.) 591; Warren *v.* Geer, 117 Pa. St. 207; Commonwealth *v.* Gardner, 133 Pa. St. 284; State *v.* Charleston, 10 Rich. L. (S. Car.) 240; State *v.* Pinckney, 10 Rich. L. (S. Car.) 474; Charleston *v.* Ahrens, 4 Strob. (S. Car.) 241; Howe Machine Co. *v.* Cage, 9 Baxt. (Tenn.) 518; Saulsbury *v.* State, 43 Tex. Crim. Rep. 90 (overruling French *v.* State, 42 Tex. Crim. Rep. 222, and Kirkpatrick *v.* State, 42 Tex. Crim. Rep. 459); State *v.* Harrington, 68 Vt. 622, quoting text; State *v.* Richards, 32 W. Va. 348; Morrill *v.* State, 38 Wis. 428. In Howe Machine Co. *v.* Cage, 100 U. S. 676, aff'g 9 Baxt. (Tenn.) 518, the company, a corporation of Connecticut, manufactured sewing machines in Connecticut, and had an office in Tennessee. It sent an agent into one of the counties of Tennessee to sell or peddle machines. The agent travelled through the country in a wagon for the purpose of exhibiting and offering for sale the company's machines. The machines offered for sale and sold by him were manufactured in Connecticut, and brought into Tennessee for sale. He paid under protest a tax required of him under the State of Tennessee for the privilege or license to peddle or sell machines in the county in question. The Supreme Court of Tennessee construed the statute as levying a tax without discrimination on all peddlers of sewing machines without regard to the place of growth or produce of material, or of manufacture. The *license tax* was sustained by the Supreme Court of the United States. In Emert *v.* Missouri, 156 U. S. 296, aff'g 103 Mo. 241, the defendant was an agent of the Singer Manufacturing Company, a New Jersey corporation; as such agent and having no peddler's license, he was engaged in going from place to place in a Missouri county with a horse and wagon soliciting orders for the sale of the company's sewing machines and having with him in the wagon one of those machines, the property of the company, manufactured by it at its works in New Jersey and which it had forwarded and delivered to him for sale on its account. He offered this machine for sale to various persons at different places, and, finding a purchaser, sold and delivered it to him. It was held that *a license tax imposed on peddlers* of goods going from place to place within the State to sell them was not, as applied to the defendant, an interference with interstate commerce and was valid. Mr. Justice *Gray*, who delivered the opinion of the court, pointed out that there was nothing to show that the defendant ever offered for sale any machine that he did not have with him at the time; that his dealings were neither accompanied nor followed by transfer of goods, or of any order for their transfer, from one State to another. Therefore he declared these dealings "were neither interstate commerce, in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the State. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State." The learned justice referred to previous decisions at length, and *distinguished*

discrimination or undue burden placed upon goods and merchandise brought from other States, or from foreign countries, in favor of the goods, wares, and merchandise of the State exercising the power to license and tax. If there be such discrimination, the tax is a burden upon interstate commerce, and is unlawful.[1] But the

the case of Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, on the ground that in that case the person taxed was a drummer, who was selling goods which were not within the State, and which were delivered by his principal from its manufactory or warehouse in another State.

"*Hawkers and Peddlers*" defined. Graffty *v.* Rushville, 107 Ind. 502; State *v.* Hodgdon, 41 Vt. 139; Emert *v.* Missouri, 156 U. S. 296, cited *supra*. A "*drummer*" or "*commercial traveller*" who sells from samples goods which are to be delivered by his principal is not a "peddler" (Kansas City *v.* Collins, 34 Kan. 434); but one who sells milk from house to house has been held to be a peddler. Chicago *v.* Bartee, 100 Ill. 57.

A foreign corporation sent to Virginia a car-load of harrows. *Agents and canvassers in Virginia* loaded the harrows on wagons and sold them to farmers, delivering from the wagon. It was held that the agents were not merely canvassers or drummers, or engaged in selling goods by sample, but, inasmuch as *the goods had become a part of the general mass of property in Virginia*, and were therefore subject to its taxing powers, the agents were subject to tax as persons selling manufactured implements or machines by retail. American Harrow Co. *v.* Shaffer, 68 Fed. Rep. 750. An ordinance which exacts a license fee of *peddlers*, does not interfere with interstate commerce when the peddler is a resident who takes subscriptions for goods of his principal, a corporation of another State, but fills the orders from a general stock kept by his principal within the State. Muskegon *v.* Zeeryp, 134 Mich. 181. A corporation, which was admitted to do business in *Michigan*, conducted a *general retail business* at twelve points in the State. An agent, going from house to house, sold groceries at retail by sample. A part of his orders were filled from stock kept in the State and the remainder by goods ordered from his principal without the State. It was held that he was engaged in commerce within the State, and was liable to the license tax. People *v.* Smith, 147 Mich. 391. A person who distributes articles of merchandise from town to town on approval, *the articles having been shipped previously from another State in bulk*, to be returned or paid for at a later date to another employee is not engaged in interstate commerce and is subject to a license tax. Muskegon *v.* Hanes, 149 Mich. 460.

[1] Welton *v.* Missouri, 91 U. S. 275; Webber *v.* Virginia, 103 U. S. 344; Georgia Packing Co. *v.* Macon, 60 Fed. Rep. 774; *Ex parte* Thomas, 71 Cal. 204. In Ward *v.* Maryland, 12 Wall. (U. S.) 418, a statute of *Maryland* requiring all traders residing within the State to take out licenses at certain rates, and subjecting to indictment and penalty persons not residents of the State who, without taking out a license at a higher rate, should sell or offer for sale by card, sample, or trade list within the limits of the city of Baltimore, any goods, wares, or merchandise whatever, other than agricultural products and articles manufactured in the State, was held to be unconstitutional, because it imposed a *discriminating tax* upon the residents of other States. In Welton *v.* Missouri, 91 U. S. 275, a statute of *Missouri* by which "whoever shall deal in the selling of patent or other medicines, goods, wares, or merchandise, except books, charts, maps, and stationery, which are not the growth, produce, or manufacture of this State, by going from place to place to sell the same, is declared to be a peddler," and which prohibited, under a penalty, dealing as a peddler, without taking out a license, and paying a certain sum therefor, but required no license for selling, by going from place to place, any goods, the growth, produce, or manufacture of the State, was held, *by reason of such discrimination*, to be unconstitutional and void, as applied to a peddler within the State selling sewing machines manufactured without the State. Mr. Justice *Field*, in delivering judgment, said:

power to license and tax the occupation of hawkers and peddlers is only justified by the decisions on the ground that their occupation

"The commerce power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even if it has entered the State, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches on this power in this respect, and is, therefore, in our judgment, unconstitutional and void." In Cook *v.* Pennsylvania, 97 U. S. 566, in which a *tax upon auctioneers* measured by the amount of their sales was held to be invalid as to sales by auction of imported goods in the original package, the statute under which the tax was imposed made *a discrimination* against imported as compared with domestic goods.

In Webber *v.* Virginia, 103 U. S. 344, 347, 350, the court, speaking by Mr. Justice *Field*, affirmed the doctrine that "the right conferred by the patent laws of the United States to inventors to sell their inventions and discoveries does not take the tangible property, in which the invention or discovery may be exhibited or carried into effect, from the operation of the tax and license laws of the State," and the reason why a tax imposed by a statute of *Virginia*, on persons selling, without license, patented articles not owned by them, was held to be invalid, as applied to sales of sewing machines manufactured in another State, was that the statute made "a clear *discrimination in favor* of home manufacturers and against the manufacturers of other States." In Walling *v.* Michigan, 116 U. S. 446, 460, the statute of *Michigan*, which was held to be an unconstitutional restraint of interstate commerce, *imposed different taxes* upon the business of selling or soliciting the sale of intoxicating liquors, according as the liquors were manufactured within the State, or were to be sent from another State; and the Supreme Court of the United States, speaking by Mr. Justice *Bradley*, declared that the police power of the State "would be a perfect justification of the act, if it did not discriminate against citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the national legislature."

Discriminating taxes. An ordinance of a city, passed under a general power conferred by its charter, which exacts a license for selling goods, and fixes one rate of license for selling goods which are within the corporate limits, or *in transitu* to the city, and another and much larger license for selling goods which are not in the city, or *in transitu* to it, is invalid, because it is unjust, unequal, partial, oppressive, and in restraint of trade. *In re* Frank, 52 Cal. 606. The *Washington* statute which provides that every person who canvasses or sells by sample certain specified articles "*after shipment to the State*" shall pay in advance a yearly license fee *discriminates* against interstate commerce, and is void. Bacon *v.* Locke, 42 Wash. 215. A provision of a State statute which does not apply to any resident merchant in a county, but imposes a penalty on any person peddling or selling certain merchandise without a license, is *discriminatory* in its effect and is void under the Fourteenth Amendment as a denial of the equal protection of the laws. *Ex parte* Deeds, 75 Ark. 542. A statute which imposes a tax on peddlers, except peddlers of such *commodities* as are *manufactured or raised by themselves within the State, discriminates* against interstate commerce and is void. Ames *v.* People, 25 Colo. 508. A State statute which by its terms permits the licensing of citizens of the State, but prohibits the issuing of licenses to aliens desiring to peddle goods, *discriminates* against aliens and is void. State *v.* Montgomery, 94 Me. 192. A State statute which imposes a privilege tax on lumber dealers, but excepts therefrom sawmill operators who do not ship lumber out of the State, discriminates against interstate commerce and is void. Adams *v.* Mississippi Lumber Co., 84 Miss. 23. A statute which imposed an annual license tax on the wholesale liquor establishments of nonresidents, and required the manufacturers of liquors within the State to pay a manufacturer's tax, but exempted them from the wholesale tax, held to *discriminate against non-*

has relation *to property which is within the State* and is, therefore, subject to the police and taxing power of the State. A *mere drummer or canvasser*, who comes into the State as the agent or representative of a manufacturer or dealer, who is domiciled in another State, and who solicits orders by sample or otherwise for goods, wares, and merchandise which are not within the State, but are to be shipped to the purchaser by his principal from the State of his domicil, is strictly a person whose occupation or business is interstate commerce; and inasmuch as the articles of property which are the subject of the transactions are not, whilst he is pursuing such occupation or business and prior to delivery to the purchaser, within the jurisdiction of the taxing power of the State, no occupation or privilege tax can be imposed upon such drummer, because such a tax is a regulation of interstate commerce.[1] The principle which exempts

residents in favor of residents, and therefore an unconstitutional regulation of interstate commerce. State *v.* Zophy, 14 S. Dak. 119. An ordinance which is void for *discriminating* against citizens of other States will not be made valid by the fact that the discrimination is also against the citizens of the State who reside outside the city. Fecheimer *v.* Louisville, 84 Ky. 306.

A territorial statute which imposes a license fee as a condition upon which coal oil may be sold in the Territory is unconstitutional, so far as it applies to *sales in the original package* by the importer of coal oil produced and refined without the Territory. *In re* Wilson, 10 N. Mex. 32.

[1] Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489; Corson *v.* Maryland, 120 U. S. 502; Asher *v.* Texas, 128 U. S. 129; Brennan *v.* Titusville, 153 U. S. 289; Caldwell *v.* North Carolina, 187 U. S. 622, rev'g 127 N. Car. 521; Rearick *v.* Pennsylvania, 203 U. S. 507; *In re* Spain, 47 Fed. Rep. 208; *In re* Houston, 47 Fed. Rep. 539; *In re* Nichols, 48 Fed. Rep. 164; *In re* Rozelle, 57 Fed. Rep. 155; *Ex parte* Hough, 69 Fed. Rep. 330; *In re* Tinsman, 95 Fed. Rep. 648; *Ex parte* Green, 114 Fed. Rep. 959; Wrought Iron Range Co. *v.* Johnson, 84 Ga. 754; McClelland *v.* Marietta, 96 Ga. 749; *In re* Kinyon, 9 Idaho, 642; Emmons *v.* Lewiston, 132 Ill. 380; Bloomington *v.* Bourland, 137 Ill. 534; McLaughlin *v.* South Bend, 126 Ind. 471; Huntington *v.* Mahan, 142 Ind. 695; State *v.* Hanaphy, 117 Iowa, 15; Fort Scott *v.* Pelton, 39 Kan. 764; State *v.* Hickox, 64 Kan. 650; Commonwealth *v.* Pearl Laundry Co., 105 Ky. 259, 266; Simmons Hardware Co. *v.* McGuire, 39 La. An. 848; McClellan *v.* Pettigrew, 44 La. An. 356; Pegues *v.* Ray, 50 La. An. 574; People *v.* Bunker, 128 Mich. 160; Overton *v.* Vicksburg, 70 Miss. 558; *Ex parte* Rosenblatt, 19 Nev. 439; State *v.* Bracco, 103 N. Car. 349; Wrought Iron Range Co. *v.* Campen, 135 N. Car. 506; Baxter *v.* Thomas, 4 Okla. 605; State *v.* Rankin, 11 S. Dak. 144, 149; Hurford *v.* State, 91 Tenn. 669; *Ex parte* Holman, 36 Tex. Crim. Rep. 255; Talbutt *v.* State, 39 Tex. Crim. Rep. 64; Adkins *v.* Richmond, 98 Va. 91; State *v.* Lichtenstein, 44 W. Va. 99; Clements *v.* Casper, 4 Wyo. 494.

In Hatch *v.* Reardon, 204 U. S. 152, the Supreme Court of the United States, affirming the judgment of the Court of Appeals of New York, held that the *New York Stamp Act of* 1905, *providing for a tax on transfers of stock*, did not violate either the Fourteenth Amendment or the commerce clause of the Constitution of the United States, and that it was competent for the State of New York to impose a stamp tax on sales in New York of shares of stock of a *foreign* corporation owned by *non-residents;* and the case was distinguished by the court from the *Telegraph* and *Drummer* cases.

Although it is a clearly recognized doctrine that a State may prescribe

the agents of non-resident manufacturers and dealers from taxation applies, although the agent be a resident of the State which seeks to tax the occupation or privilege, and although he represents and solicits orders, not only for one, but for several non-resident principals, so long as he does not act for or seek orders on behalf of any resident.[1]

the terms, as to tax, filing of certificate of incorporation, or otherwise, *upon which a foreign corporation not engaged in interstate commerce may be admitted to do business within its limits*, such terms cannot be imposed upon or exacted as a condition precedent to the right of a foreign corporation to be represented by a sales agent or canvasser within its limits, if the duties of the agent or canvasser are confined to obtaining orders to be filled by shipments from the home office of the corporation. Kirven *v.* Virginia-Carolina Chem. Co., 145 Fed. Rep. 288; Ware *v.* Hamilton Brown Shoe Co., 92 Ala. 145; Gunn *v.* White Sewing Mach. Co., 57 Ark. 24; Coit *v.* Sutton, 102 Mich. 324; Wilcox Cordage & Supply Co. *v.* Mosher, 114 Mich. 64; Rock Island Plow Co. *v.* Peterson, 93 Minn. 356; McNaughton *v.* McGirl, 20 Mont. 124; Slayton-Jennings Co. *v.* Specialty Paper Box Co., 69 N. L. J. 214; Harvard Co. *v.* Wicht, 99 N. Y. App. Div. 507; Toledo Commercial Co. *v.* Glen Mfg. Co., 55 Ohio St. 217; Mearshon *v.* Pottsville Lumber Co., 187 Pa. 12; Wolff Dryer Co. *v.* Bigler, 192 Pa. 466; *In re* Hovey's Estate, 198 Pa. 385; People's B. & L. Assoc. *v.* Berlin, 201 Pa. 1, 6; Allen *v.* Tyson-Jones Buggy Co., 91 Tex. 22; Miller *v.* Goodman, 91 Tex. 41. A general dealer in Chicago, *who ships sewing machines by express* to residents of North Carolina to be delivered C. O. D. is engaged in interstate commerce and is not liable to the license tax imposed by the North Carolina statute on "every manufacturer of sewing machines, and every person or persons or corporation engaged in the business of selling the same in this State." Norfolk & W. R. Co. *v.* Sims, 191 U. S. 441, rev'g 130 N. Car. 556.

A *department store* having a store in New York sold goods for delivery to customers in Atlantic Highlands, New Jersey. These goods were sent to Atlantic Highlands in original packages, where the employees of the department store put them into wagons belonging to the store and delivered them to customers. A license tax was imposed on every truck transporting merchandise in Atlantic Highlands. It was held that the entire transaction, from the time of the purchase in New York to the time of delivery to the customer, constituted interstate commerce; and that the ordinance imposing the license tax was not applicable to the wagons of the department store delivering the goods, as these wagons were solely engaged in interstate commerce. Simpson-Crawford Co. *v.* Atlantic Highlands, 158 Fed. Rep. 372.

[1] Stockard *v.* Morgan, 185 U. S. 27; Adkins *v.* Richmond, 98 Va. 91.

In Stockard *v.* Morgan, 185 U. S. 27, certain agents, resident in Tennessee, of corporations and individuals, residents in other States, sought to enjoin the collection of a tax imposed upon them under a statute of *Tennessee*, viz., a privilege tax on the occupation of *merchandise brokers*. The ground upon which the injunction was asked was that the agents were not liable for the tax because they were agents and brokers exclusively for the sale of property of non-resident principals, and did no business of any kind for residents of the State. The only ground upon which the tax upon the complainants could be differentiated from that involved in the case of Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, referred to *supra*, was that in that case the agent was a non-resident, while in the case before the court the agents were residents of Tennessee. The court, however, held that although the complainants were residents of Tennessee, the decision in the Robbins case controlled; and that their occupation as agents for non-residents was not subject to a privilege tax by the State of Tennessee. Mr. Justice *Peckham*, who delivered the opinion of the court, said, "In this case the complainants did not represent or assume to repre-

Various decisions are to be found by courts of different States which purport to sustain a tax imposed upon canvassers or drummers selling goods to be afterwards brought within the State, where the goods have been shipped in bulk to the agent or drummer or to a distributing agent, and have been by him delivered to the purchaser instead of being shipped directly to the purchaser from without the State;[1] but *any supposed ground of distinction* based upon the fact that the goods are shipped to the salesman or distributing

sent any residents of the State of Tennessee, and each of the complainants represented only certain specific parties, firms, or corporations, all of whom were non-residents of Tennessee. They did no business for the general public. We attach no importance to the fact that in the Robbins case the individual taxed resided without the State. He was taxed by reason of his business or occupation while within it, and the tax was held to be a tax upon interstate commerce. Nor does the fact that the complainants acted for more than one person residing outside of the State affect the case. If while so acting and soliciting orders within the State for the sale of property for one non-resident of the State, the person so soliciting was exempt from taxation on account of that business, because the tax would be upon interstate commerce, we do not see how he could become liable for such tax because he did business for more than one individual, firm, or corporation, all being non-residents of the State of Tennessee. The fact that the State, or the court, may call the business of an individual, when employed by more than one person outside of the State, to sell their merchandise upon commission, a 'brokerage business,' gives no authority to the State to tax such a business as complainants. The name does not alter the character of the transaction, or prevent the tax thus laid from being a tax upon interstate commerce."

[1] A person sold floor brooms to forty-six different purchasers. He ordered the articles in his own name from a non-resident manufacturer without mentioning the names of the purchasers. The goods were shipped to him and the package received by him. He delivered the brooms to the purchasers. It was held that, though he claimed to act as the agent of the non-resident manufacturer, the sales were made by him as *principal* and not as *agent* of the non-resident manufacturer, and therefore he was not engaged in interstate commerce. Croy *v.* Obion County, 104 Tenn. 525. Defendant, as agent of manufacturers of lightning rods in another State, made sales and deliveries which included putting up the rods whenever the purchaser required. No extra charge was made therefor. The rods were shipped in bulk to the agent, who broke the package and distributed them. It was held that the defendant was an itinerant putting up lightning rods under a statute taxing the occupation; that the connection between the business taxed and the sale of articles manufactured in another State was so remote in its effect as not to constitute an interference with interstate commerce; and that the manner of sale and delivery divested the business of every feature of interstate commerce, the original packages having necessarily been broken before delivery to the purchasers. State *v.* Gorham, 115 N. Car. 721. A corporation of Illinois obtained orders in Tennessee through a salesman. The goods were to be paid for on delivery, if found to be as represented. The salesman classified the orders and advised the principal of the aggregate of the different classes. They were thereupon shipped to the salesman in bulk. The court regarded the goods as the property of the seller until the packages were broken and the articles selected and delivered, and held that the transactions did not constitute interstate commerce and were subject to a privilege tax. Loverin & B. Co. *v.* Tansil, 118 Tenn. 717. To the same effect, Racine Iron Co. *v.* McCommons, 111 Ga. 536; *In re* Pringle, 67 Kan. 364.

agent in bulk and by him assorted and delivered to the purchasers, has been rejected by the Supreme Court of the United States, which has declared that the grounds of distinction are not sufficient to remove the transactions from the domain of interstate commerce.[1] Where the question of the power of the State to levy a privilege or occupation tax arises in a controversy with a drummer or canvasser, representing a non-resident, *the fact that no discrimination is made* between domestic and foreign drummers, and that all are

[1] Caldwell *v.* North Carolina, 187 U. S. 622, rev'g 127 N. Car. 521; Kehrer *v.* Stewart, 197 U. S. 60, aff'g on other grounds 117 Ga. 969; Rearick *v.* Pennsylvania, 203 U. S. 507; Stratford *v.* Montgomery, 110 Ala. 619; Stone *v.* State, 117 Ga. 292; Huntington *v.* Mahan, 142 Ind. 695; Rock Island Plow Co. *v.* Peterson, 93 Minn. 356; Overton *v.* Vicksburg, 70 Miss. 558.

In Caldwell *v.* North Carolina, 187 U. S. 622, rev'g 127 N. Car. 521, an Illinois corporation obtained orders for portraits and picture frames through an agent in North Carolina. In filling the orders, it shipped the pictures and frames in separate packages for convenience in packing and delivering to its own agent. The agent placed the pictures in their proper places or frames and delivered them to the purchasers. The court held that the method of shipment, whether on the theory that the articles were not in a completed condition when brought within North Carolina, or on the theory that they were not shipped directly to the purchasers, but to the selling agent of the corporation, did not render the transaction other than one in interstate commerce. Mr. Justice *Shiras* said: "It certainly cannot be pretended that, if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed, either on the vendor out of the State or on the purchaser within the State. If the pictures and the frames intended for them had been shipped directly to the purchasers, whether in the same or separate packages, such a transaction would, beyond question, be interstate commerce beyond the reach of the taxing power of the State. It is too plain for argument that the supposed incomplete condition of articles of commerce, if shipped directly to the purchasers, cannot subject them to the license tax. . . . Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two, instead of one agency, in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to State taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate. Transactions between manufacturing companies in one State, through agents, with citizens of another constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from State taxation, but if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution. It cannot escape observation that efforts to control commerce of this kind, in the interest of the States where the purchasers reside, have been frequently made in the form of statutes and municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this court."

taxed alike, is not material. Interstate commerce, as a business or occupation, cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State.[1]

§ 1357. **Interstate Commerce; General Principles.** — Important *limitations upon the taxing power of the State* result from the clause of the Federal Constitution giving to Congress the power to regulate commerce between the States. The Constitution of the United States having given the Congress the power to regulate commerce, not only with foreign nations, but among the several States, *that power is necessarily exclusive* whenever the objects of it are national in their character, or admit only of one uniform system or plan of regulation.[2] No State can compel a party, individual, or

[1] Robbins *v.* Shelby County Taxing District, 120 U. S. 489, 497; Leloup *v.* Port of Mobile, 127 U. S. 640, 649.

[2] Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 492, *per* Mr. Justice *Bradley;* Fargo *v.* Michigan, 121 U. S. 230, 246; Philadelphia & So. S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 336, 346; Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347, 357; Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465, 497; Leloup *v.* Port of Mobile, 127 U. S. 640, 648; Asher *v.* Texas, 128 U. S. 129, 131; Stoutenburgh *v.* Hennick, 129 U. S. 141, 148; Leisy *v.* Hardin, 135 U. S. 100, 110; Lyng *v.* Michigan, 135 U. S. 161; McCall *v.* California, 136 U. S. 104, 109; *In re* Rahrer, 140 U. S. 545, 555; Crutcher *v.* Kentucky, 141 U. S. 47, 58; Brennan *v.* Titusville, 153 U. S. 289, 304; Interstate Commerce Com'n *v.* Brimson, 154 U. S. 447, 471; United States *v.* E. C. Knight Co., 156 U. S. 1, 21; Schollenberger *v.* Pennsylvania, 171 U. S. 1; Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211; Stockard *v.* Morgan, 185 U. S. 27; Atlantic & Pac. Tel. Co. *v.* Philadelphia, 190 U. S. 160, 162; Western Un. Tel. Co. *v.* Kansas, 216 U. S. 1; Pullman Co. *v.* Kansas, 216 U. S. 56.

"Commerce with foreign countries and among the States, strictly considered, *consists in intercourse and traffic,* including in these terms navigation and the transportation and transit of persons and property as well as the purchase, sale, and exchange of commodities." Mobile County *v.* Kimball, 102 U. S. 691, 702.

A late case sums up the long line of Federal decisions on what constitutes interstate commerce as follows: Interstate commerce comprehends "intercourse for the purposes of trade in any and all its forms, including transportation, purchase, *sale and exchange of commodities between the citizens of different States,* and the power to regulate it *embraces all the instruments by which such commerce may be conducted.*" Hopkins *v.* United States, 171 U. S. 578, 597. Chief Justice *Marshall's* famous definition of commerce in Gibbons *v.* Ogden, 9 Wheat. (U. S.) 11, is that "Commerce is intercourse," and comprehends "*every species of commercial intercourse.*" Carriage of *lottery tickets* from one State to another is interstate commerce. Lottery Case, 188 U. S. 321. The occupation of "emigrant agent," *i. e., a person who hires laborers in the State for employment without the State,* is not interstate commerce and may be taxed by the State. Williams *v.* Fears, 110 Ga. 584, aff'd 179 U. S. 270. *Contra,* Joseph *v.* Randolph, 71 Ala. 499. The *business of dealing in futures* for speculation or on commission, *e. g.,* contracts for the future delivery of cotton, is not interstate commerce, and may be taxed by the State, when interstate shipments are not obligatory, although in many cases delivery may be made by interstate shipments. Ware *v.* Mobile County, 209 U. S. 405, aff'g 146 Ala. 163.

Natural gas brought to the surface and placed in pipes for transportation is a commercial commodity, the sub-

corporation *to pay for the privilege* of engaging in interstate commerce.[1]

A *tax upon the seller of goods is a tax upon the goods themselves*, and a tax upon goods sold in one State delivered to a common carrier and consigned to the purchaser in the State seeking to exercise the taxing power is an illegal interference with interstate commerce. Hence, a privilege tax upon the agent of a packing house in Georgia, so far as it applies to meats shipped to him from Illinois for distribution to purchasers from the principal, is a burden on interstate commerce and is void.[2] But if the individual or corporation is engaged in a domestic or local as well as an interstate business, the State may impose, or authorize a municipal corporation to impose, a privilege or occupation tax on that part of the business which is wholly within the State and local in its nature.[3]

ject of interstate commerce, and *is not taxable* by the State. State *v.* Indiana & O. Oil, G. & M. Co., 120 Ind. 575. But compare Jamieson *v.* Indiana Nat. Gas & O. Co., 128 Ind. 555.

[1] Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 211; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34; Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489; Fargo *v.* Michigan, 121 U. S. 230, 245; Philadelphia & So. S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 336; Leloup *v.* Port of Mobile, 127 U. S. 640, 645; Asher *v.* Texas, 128 U. S. 129; Lyng *v.* Michigan, 135 U. S. 161, 166; McCall *v.* California, 136 U. S. 104, 115; Crutcher *v.* Kentucky, 141 U. S. 47, 58; Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194, 220; Atlantic & Pac. Tel. Co. *v.* Philadelphia, 190 U. S. 160, 162; Pennsylvania R. Co. *v.* Knight, 192 U. S. 21, 26; Fargo *v.* Hart, 193 U. S. 490; Western Un. Tel. Co. *v.* Kansas, 216 U. S. 1; Pullman Co. *v.* Kansas, 216 U. S. 56; Clyde S. S. Co. *v.* Charleston, 76 Fed. Rep. 46 (license tax on corporation whose vessels stop at a port in a State during voyage invalid); Adams *v.* Mississippi Lumber Co., 84 Miss. 23; People *v.* Miller, 178 N. Y. 194.

"We have repeatedly held that *no State has the right to lay a tax on interstate commerce* in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." Lyng *v.* Michigan, 135 U. S. 161, 166. An ordinance of *New Orleans* assessing a tax upon persons owning and running tow-boats to and from the Gulf of Mexico and New Orleans held not to be a tax upon such boats as property, and not to be a tax upon the income derived from the business, but to be a regulation of commerce, contrary to art. i. § 8, of the Constitution of the United States, and hence void. Moran *v.* New Orleans, 112 U. S. 69.

[2] Kehrer *v.* Stewart, 197 U. S. 60, 65; s. c. 117 Ga. 969.

Neither the State courts nor the legislatures, by giving a tax a particular name, or by the use of some form of words, can take away the duty of the Federal Supreme Court to consider the nature and effect of a tax, and if it *bears upon interstate commerce so directly as to amount to a regulation* it cannot be saved by name or form. Galveston, H. & S. A. R. Co. *v.* Texas, 210 U. S. 217.

[3] Pacific Express Co. *v.* Seibert, 142 U. S. 339; Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692; Osborne *v.* Florida, 164 U. S. 650, aff'g 33 Fla. 162; Pullman Co. *v.* Adams, 189 U. S. 420; Allen *v.* Pullman's Pal. Car Co., 191 U. S. 171; Kehrer *v.* Stewart, 197 U. S. 60, aff'g 117 Ga. 969; Armour Packing Co. *v.* Lacy, 200 U. S. 226, aff'g 134 N. Car. 567; Hardee *v.* Brown, 56 Fla. 377; 47 So. Rep. 834. So far as a State privilege or occupation tax on agents of packing houses doing business within the State is concerned, in carrying on a domestic business the

The *construction of the court* of last resort of the State that the statute only imposes a tax on domestic or local business of the person or corporation taxed *will be accepted* by the Federal courts as a part of the statute itself, and as binding on the Federal courts.[1] The immunity from taxation of the privilege or occupation of engaging in interstate commerce does not prevent a State from imposing ordinary *taxes upon property having a situs* within its territory and employed in interstate commerce.[2] The *franchise of a corpora-*

agent of a packing house of another State is not to be distinguished from the ordinary butcher who slaughters cattle and sells their carcasses, and in principle it makes no difference that the cattle were slaughtered in another State and their carcasses sent to the State where the tax was laid for sale and consumption in the ordinary course of trade. Upon arrival there, they became a part of the taxable property of the State. Kehrer *v.* Stewart, 197 U. S. 60, aff'g 117 Ga. 969, cited *infra*. The tax imposed by the *North Carolina statute on merchants* and other dealers of one-tenth of one per cent of their purchases is not a tax on property, but *is a tax upon the occupation* of buying and selling goods in the State. It relates to the conduct of business in the State only, and is not void although the merchandise bought and sold is purchased from persons in other States. State *v.* French, 109 N. Car. 722.

In Kehrer *v.* Stewart, 197 U. S. 60, 69, where a *privilege tax* on the *Georgia agent* of an *Illinois* packing company was sustained as affecting only local or domestic business, Mr. Justice *Brown* said: "If the amount of domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in Crutcher *v.* Kentucky, 141 U. S. 47; but if the agent carried on a definite, though a minor, part of his business in the State by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment. The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business." A *license fee* of $5 on each *telephone instrument* operated and maintained and used exclusively within the city limits relates to local business only, and is not void as interfering with interstate commerce. Ogden City *v.* Crossman, 17 Utah, 66.

[1] Osborne *v.* Florida, 164 U. S. 650; Allen *v.* Pullman's Pal. Car Co., 191 U. S. 171; Kehrer *v.* Stewart, 197 U. S. 60; Armour Packing Co. *v.* Lacy, 200 U. S. 226, aff'g 134 N. Car. 567; *infra*, § 1360. But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. In all such matters the Federal judiciary will not regard mere forms, but will look through form to the substance of things. Western Un. Tel. Co. *v.* Kansas, 216 U. S. 1, 27. See also Galveston, etc., R. Co. *v.* Texas, 210 U. S. 217, 227; Pullman Co. *v.* Kansas, 216 U. S. 56, rev'g 57 Kan. 664.

[2] State Tax on Railway Gross Receipts, *Re*, 15 Wall. (U. S.) 284, 293; Delaware Railroad Tax, *Re*, 18 Wall. (U. S.) 206, 232; Western Union Tel. Co. *v.* Texas, 105 U. S. 460, 464;

tion, although that franchise is the business of interstate commerce, is, as a part of its property, subject to taxation, providing, at least, the franchise is not derived from the United States.[1] And the property within the State of a person or corporation engaged in interstate commerce *may be taxed at its value as it is*, in its organic relations, and as a part of a system, although the system may extend into and be operated in other States, and the value of the property may be augmented by the value of the commerce in which it is engaged.[2] As to *railroad, telegraph, sleeping car, and express companies*, engaged in interstate commerce, it has many times been held by the Supreme Court of the United States that their property, in the several States through which their lines or

Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 211; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530; Marye *v.* Baltimore & O. R. Co., 127 U. S. 117, 123; Leloup *v.* Port of Mobile, 127 U. S. 640, 649; Pullman's Pal. Car Co. *v.* Pennsylvania, 141 U. S. 18; Massachusetts *v.* Western Union Tel. Co., 141 U. S. 40; Pittsburgh, C., C. & St. L. Co. *v.* Backus, 154 U. S. 421; Western Union Tel. Co. *v.* Taggart, 163 U. S. 1; Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194, 220, 227; s. c. 166 U. S. 185, 222, 223; Atlantic & Pac. Tel. Co. *v.* Philadelphia, 190 U. S. 160, 163; Fargo *v.* Hart, 193 U. S. 490.

[1] Delaware Railroad Tax, *Re*, 18 Wall. (U. S.) 206, 232; Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688, 696; New York, L. E. & W. R. Co. *v.* Pennsylvania, 158 U. S. 431, 437; Central Pac. R. Co. *v.* California, 162 U. S. 91; Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 18; Western Union Tel. Co. *v.* Missouri, 190 U. S. 412; Atlantic & Pac. Tel. Co. *v.* Philadelphia, 190 U. S. 160, 163. The validity of the *Massachusetts statute* imposing an "excise tax" on the franchises of domestic and foreign telegraph corporations was sustained as an excise tax as to domestic corporations, and also as to foreign corporations doing business in that State. Commonwealth *v.* Hamilton Mfg. Co., 12 Allen, 298; Commonwealth *v.* Cary Improvement Co., 98 Mass. 19, 22; Commonwealth *v.* Berkshire Ins. Co., 98 Mass. 25; Manufacturers' Ins. Co. *v.* Loud, 99 Mass. 146; Boston Mfg. Co. *v.* Commonwealth, 144 Mass. 598. See on this subject Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530. *Quære*, whether in this last case the tax was regarded as a "property" or as a "franchise" tax.

[2] Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194; s. c. 166 U. S. 185; Western Un. Tel. Co. *v.* Missouri, 190 U. S. 412, aff'g 165 Mo. 502; Fargo *v.* Hart, 193 U. S. 490, 499; Galveston, H. & S. A. R. Co. *v.* Texas, 210 U. S. 217, 225. "Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. As the property of companies engaged in such commerce may be taxed, Pullman's Pal. Car Co. *v.* Pennsylvania, 141 U. S. 18, and may be taxed at its value as it is in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194; s. c. 166 U. S. 185; Fargo *v.* Hart, 193 U. S. 490, 499. So it has been held that a tax on the property and business of a railroad operated within the State might be estimated *prima facie* by gross income, computed by adding to the income derived from business within the State the proportion of interstate business equal to the proportion between the road over which the business was carried within the State to the total length of the road over which it was carried. Wisconsin & M. R. Co. *v.* Powers, 191 U. S. 379." *Per* Mr. Justice *Holmes* in Galveston, H. & S. A. R. Co. *v.* Texas, 210 U. S. 217, 225.

business extend, may be valued as a unit for purposes of taxation, taking into consideration the uses to which it is put and all the elements making up the aggregate value, and that a proportion of the whole, fairly and properly ascertained, may be taxed by the particular State, without violating any Federal restriction.[1]

§ 1358. **Interstate Commerce; Property in Transit.** — The products of the State, although intended for commerce with and transportation to another State, are a part of the general mass of the property within the State and are not the subject of interstate commerce, *until actually started in the course of transportation* to another State, or delivered to a carrier for such transportation, and until then they are taxable by the State in which they are produced.[2] But property which is the subject of commerce between the States is *exempt* from local taxation *after it has been placed in transit* from one State to another and whilst such transit continues.[3] The *beginning of the*

[1] Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530; Pullman's Pal. Car Co. *v.* Pennsylvania, 141 U. S. 18; Massachusetts *v.* Western Union Tel. Co., 141 U. S. 40; Maine *v.* Grand Trunk R. Co., 142 U. S. 217; Pittsburgh, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 421; Cleveland, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 439; Western Union Tel. Co. *v.* Taggart, 163 U. S. 1; Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194, 220. It has been held that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole, Pittsburgh, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 421; or taking as the basis of assessment such proportion of the capital stock of a sleeping car company as the number of miles of railroad over which its cars are run in a particular State bears to the whole number of miles traversed by them in that and other States, Pullman's Pal. Car Co. *v.* Pennsylvania, 141 U. S. 18; or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State, Western Union Tel. Co. *v.* Taggart, 163 U. S. 1.

[2] Coe *v.* Errol, 116 U. S. 517. *Logs had been cut*, and had been drawn down during the winter from Wentworth's Location in New Hampshire, to Errol, in that State. Thence they were intended to be floated down the Androscoggin River to the State of Maine, to be manufactured and sold. The timber thus cut always lay over one season, being about a year, at Errol. It was held that, whilst the logs were located at Errol, and before transportation commenced on the Androscoggin River, they were property situated in Errol, subject to the taxing laws of the State, and were not the subject of interstate commerce. Coe *v.* Errol, 116 U. S. 517. *Ice cut from a pond* and stored in New Hampshire by a non-resident ice-dealer awaiting transportation out of the State at some indefinite future time is taxable in the town where it is located as his stock in trade. Winkley *v.* Newton, 67 N. H. 80.

[3] Norfolk & W. R. Co. *v.* Sims, 191 U. S. 441, rev'g 130 N. Car. 556; *infra*, § 1361. A *flock of sheep* driven from a point in Utah across Wyoming to Nebraska for the purpose of shipment by rail from the latter point held to be property engaged in interstate commerce, and exempt from taxation in Wyoming under a statute taxing all live-stock brought into the State "for the purpose of being grazed." Kelley *v.* Rhoads, 188 U. S. 1. *Coal*

transit which constitutes interstate commerce is defined to be the point of time when an article is committed to a carrier or other agency for transportation to the State of its destination, or started on its ultimate passage.[1] The *ending of the transit* which constitutes interstate commerce is the point of time when merchandise arrives at its destination.[2] The ending of the transit implies that the property has lost its distinctive character as the subject of interstate commerce, and become commingled with the property in the State, and subject to the taxing power of the State.[3] But merchandise

mined in Pennsylvania and sent by rail *to Elizabethport, New Jersey*, where it was deposited on the wharf for separation and assortment for the purpose of being shipped by water to other markets for the purpose of sale, was held not subject to taxation in New Jersey. State *v.* Engle, 34 N. J. L. 425, 435. The court said: "Delay within the State, which is no longer than necessary for convenience of transshipment for its transportation to its destination, will not make it property within the State for the purpose of taxation." Where coal was shipped from Pennsylvania to a port in New Jersey and remained there no longer than was necessary to obtain vessels to transport it to other places, it was held to be in course of transportation and not subject to the taxing power of the State. Lehigh & W. Coal Co. *v.* Carrigan, 39 N. J. L. 36.

Neither the *stopping in transit* of an interstate shipment of grain for the purpose of cleaning and preparing the grain for further transportation, nor a change of ownership at the place of stoppage, will change the character of the shipment as interstate commerce. Gulf, C. & S. F. R. Co. *v.* State, 32 Tex. Civ. App. 1. Shipment from one point in the State to an agent at another point within the State to be immediately reshipped by him is interstate commerce. Cutting *v.* Florida R. & N. Co., 46 Fed. Rep. 641.

[1] Coe *v.* Errol, 116 U. S. 517; General Oil Co. *v.* Crain, 209 U. S. 211, 229. See also The Daniel Ball, 10 Wall. (U. S.) 557, 565.

[2] Brown *v.* Houston, 114 U. S. 622; General Oil Co. *v.* Crain, 209 U. S. 211, 229.

[3] Brown *v.* Houston, 114 U. S. 622, aff'g 33 La. An. 843; May *v.* New Orleans, 178 U. S. 496; Burke *v.* Wells, 208 U. S. 14, aff'g 184 N. Y. 275; Darnell *v.* Memphis, 208 U. S. 213, rev'g 116 Tenn. 424; Kehrer *v.* Stewart, 197 U. S. 60, 65; Price Co. *v.* Atlanta, 105 Ga. 358; Myers *v.* Baltimore County, 83 Md. 385; Standard Oil Co. *v.* Fredericksburg, 105 Va. 82; Pittsburg & S. Coal Co. *v.* Bates, 40 La. An. 266, aff'd 156 U. S. 577. *Coal shipped from Pittsburg to New Orleans* in boats to be sold by agents of the owner at the point of destination, immediately on arrival at its destination becomes a part of the general mass of property in the State and may be taxed by it. So held of coal on which a tax was levied immediately after its arrival at New Orleans, but while it was still in the boats in which it was shipped. Brown *v.* Houston, 114 U. S. 622, 632. Mr. Justice *Bradley* said: "It [the tax] was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal and use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the State, and as such it was taxed for the current year, as all other property in the city of New Orleans was taxed." Plaintiffs purchased *cattle in the West*, and shipped them to Baltimore, where plaintiffs had stock yards. In the course of plaintiff's business, the cattle always arrived on Wednesday, and rarely remained in the yards longer than one day. The cattle were sold by plaintiffs, sometimes for shipment abroad, and sometimes for domestic use. Plaintiffs also made sales on commission, their gross annual sales amounting to about $2,000,000. In respect

may cease to be interstate commerce *at a point intermediate* between the place of shipment and its ultimate destination; if it be kept at such point for the use and profit of the owners, and not merely because of a natural delay in transportation, it becomes subject to the taxing and police power of the State.[1] But although property

of the cattle purchased and sold by them from their yards, the plaintiffs were taxed in Baltimore on the sum of $20,000 on "stock in trade—capital stock." It was held that *cattle so purchased and brought to Baltimore for sale acquired a situs* there for purposes of taxation, and that after their arrival for sale they ceased to be the subject of interstate commerce. Myers *v.* Baltimore County, 83 Md. 385.

[1] General Oil Co. *v.* Crain, 209 U. S. 211, aff'g 117 Tenn. 82; American Steel & Wire Co. *v.* Speed, 192 U. S. 500; Merchants' Transfer Co. *v.* Des Moines, 128 Iowa, 732. *Coal in barges* shipped from Pittsburg, Pa., to Baton Rouge, La., was stopped about nine miles above destination. It was held that it had ceased to be interstate commerce and was subject to taxation by the State of Louisiana. Pittsburg & S. Coal Co. *v.* Bates, 156 U. S. 577. Where *logs are put into a river*, not merely for the purpose of transferring them from one State to another, but for the purpose of saving, protecting, preserving, and sorting them, and it is not the intention to take all the logs down the river at the opening of the stream, but only to take down each season the number that can be used, which is less than the total quantity, the logs in the river cannot be regarded as property engaged in interstate commerce so as to be exempt from local taxation. Diamond Match Co. *v.* Ontonagon, 188 U. S. 82.

The American Steel and Wire Company, a New Jersey corporation, having its place of business in Chicago and owning and operating various plants in States other than Tennessee, had selected Memphis, Tenn., as a distributing point for the purpose of facilitating the sale and delivery of goods manufactured by it. It made an arrangement in Memphis with a corporation engaged at Memphis in the transfer of merchandise. By this arrangement the transfer company was to take charge of the products when shipped to Memphis, consigned to the Steel Company, store them in a warehouse there, assort them and make delivery to the persons to whom the goods were sold by the Steel Company. A general *merchant's privilege tax* was levied upon the American Steel and Wire Company in Memphis. In a suit to recover the tax as unlawfully levied, it was averred that the Transfer Company in performing its contract with the Steel Company was in no sense a merchant, but only a carrier and that the Steel Company, in storing and delivering its goods at Memphis, was not a merchant in Memphis, but was simply a manufacturer delivering in the original packages goods made in other States to the persons who had bought them. It was also alleged in substance that the goods in the warehouse at Memphis were merely in transit from the point of manufacture outside of Tennessee to the persons to whom they had been previously sold. It was held *that the goods were not in transit*, but on the contrary had reached their destination at Memphis, and were there held in store at the risk of the Steel Company to be sold and delivered as contracts for that purpose were completely consummated, and that therefore the tax did not interfere with interstate commerce. American Steel & Wire Co. *v.* Speed, 192 U. S. 500.

Oil was shipped from another State to Tennessee where it was *stored for convenience of distribution*. It was reshipped from tank cars and barrelled at the place of storage. It was held that, although it came from another State and was ultimately intended for sale and distribution in other States, it was subject to the police and taxing power of Tennessee. General Oil Co. *v.* Crain, 209 U. S. 211, aff'g 117 Tenn. 82. *Logs in rafts* sent from Wisconsin to Burlington, Iowa, by the Mississippi River, a part of which was stopped at a place in Illinois, called Boston Harbor, to be there kept until needed at Burlington for mill purposes, were held to be subject to taxation in Illinois. Burlington Lumber Co. *v.* Willitts, 118 Ill. 559.

which is the subject of interstate commerce may have reached its destination, and may have become a part of the general mass of the property of the State, *the State may not discriminate against it* by reason of its foreign origin and impose upon it a burden of taxation greater than that imposed upon similar domestic property.[1]

§ 1359. **Interstate Commerce; Railroad Companies.** — A railroad company, as a common carrier of passengers and freight, is an instrument of commerce, and its business is commerce itself. The *transportation of passengers and freight by rail* from one State to another is interstate commerce within the meaning of the provision of the Federal Constitution which confers on Congress exclusive jurisdiction of that subject.[2] Being interstate commerce, the *busi-*

[1] Welton *v.* Missouri, 91 U. S. 275; Cook *v.* Pennsylvania, 97 U. S. 566; Webber *v.* Virginia, 103 U. S. 344; Walling *v.* Michigan, 116 U. S. 446; Darnell *v.* Memphis, 208 U. S. 213, rev'g 116 Tenn. 424; Georgia Packing Co. *v.* Macon, 60 Fed. Rep. 774; Ames *v.* People, 25 Colo. 508; Bacon *v.* Locke, 42 Wash. 215. See also Guy *v.* Baltimore, 100 U. S. 434; Minnesota *v.* Barber, 136 U. S. 313; Brimmer *v.* Rebman, 138 U. S. 78; Voight *v.* Wright, 141 U. S. 62. A statute of *Virginia* providing for the inspection of fresh meat from animals slaughtered one hundred miles or more from the place of sale and providing that the inspector should receive as his compensation one cent a pound, to be paid by the owner of the meat, was held void on the ground that it was a regulation in restraint of interstate commerce; and that the inspection fees exacted were a discriminating tax against residents of other States. Brimmer *v.* Rebman, 138 U. S. 78. A statute of *Tennessee* exempted from taxation growing crops and manufactured articles from the produce of the State in the hands of the manufacturer. Held to be a discrimination against property which was the product of other States, and invalid as a burden on interstate commerce. Darnell *v.* Memphis, 208 U. S. 113, rev'g 116 Tenn. 424.

[2] Passenger Cases, 7 How. (U. S.) 283; Crandall *v.* Nevada, 6 Wall. (U. S.) 35; State Freight Tax Case, 15 Wall. (U. S.) 232; Western Un. Tel. Co. *v.* Texas, 105 U. S. 460, 464; Wabash, St. L. & P. R. Co. *v.* Illinois, 118 U. S. 557; People *v.* Wemple, 138 N. Y. 1; People *v.* Miller, 178 N. Y. 194. The *business of ferrying* across a navigable stream is necessarily commerce among the States, and a State tax cannot be levied on the stock of the company merely as such without reference to the property of the company or its business within the State. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196. *The Gloucester Ferry case*, after thorough and critical reconsideration, was unanimously affirmed in St. Clair County *v.* Interstate, S. & C. Transfer Co., 192 U. S. 454. In this last case it was held that Illinois could not require the Ferry Company to pay a license tax for transporting railroad cars over the Mississippi River between Missouri and Illinois, although the Ferry Company owned in St. Clair County, Illinois, "permanent landing places, with cradles and roadways leading thereto, from which it operated its steamboats and barges," &c. Mr. Justice *White's* opinion in the St. Clair County Case will be found to be exceedingly instructive.

Where a city grants permission to an electric railway company exclusively engaged in the transportation of interstate freight and passengers, to use certain of its streets by running its cars over the tracks of a local street railway company, *it cannot impose a specific annual tax* on the business of such railway company for the privilege of running its cars in the city streets. Such a tax is, under these circumstances, an interference with interstate commerce. Augusta *v.* Augusta & A. R. Co., 130 Ga. 815. A statute of a State requiring *railroad engineers* to

ness of such transportation cannot be subjected to *taxation* by any State. Hence a State tax upon such companies of a fixed sum levied in respect of each ton of freight carried is unconstitutional as a regulation of interstate commerce so far as it relates to goods carried through the State, or between points within the State and places beyond its boundaries.[1] Similarly, a *tax upon receipts* from such transportation is a tax on the commerce out of which the receipts arise, and a State statute levying a tax upon the gross receipts of railroads for the carriage of freight and passengers through the State, or to or from another State, is unconstitutional as a tax upon interstate commerce.[2] And an *occupation or license tax* cannot be

submit to examination and to obtain a license, is a proper exercise of the police power of the State, and is not a regulation of interstate commerce, even when applied to engineers of trains running to or from points without the State. Smith *v.* Alabama, 124 U. S. 465; Nashville, C. & St. L. R. Co. *v.* Alabama, 128 U. S. 96.

[1] State Freight Tax Case, 15 Wall. (U. S.) 232; Reading R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 232; Erie R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 282; People *v.* Wemple, 138 N. Y. 1.

[2] Fargo *v.* Michigan, 121 U. S. 230 (distinguishing State Tax on Railway Gross Receipts, *Re*, 15 Wall. (U. S.) 284); Philadelphia & So. S. S. Co. *v.* Pennsylvania, 122 U. S. 326; Galveston, H. & S. A. R. Co. *v.* Texas, 210 U. S. 217, rev'g 100 Tex. 153; Northern Pac. R. Co. *v.* Raymond, 5 Dak. 356; Rutland R. Co. *v.* Central Vt. R. Co., 63 Vt. 12; s. c. 159 U. S. 630. See also McHenry *v.* Alford, 168 U. S. 651, 670; People *v.* Miller, 178 N. Y. 194. But compare Northern Pac. R. Co. *v.* Barnes, 2 N. Dak. 310, 351.

The imposition of a *State tax on the gross receipts of a steamship company* derived from fares and freights for the transportation of persons and goods between different States, and between the States and foreign countries, and from the charter of its vessels for the same purpose, amounts to a regulation of, or interference with interstate and foreign commerce in violation of the Federal Constitution, although the company is organized under the laws of the State attempting to levy the tax. Philadelphia & So. S. S. Co. *v.* Pennsylvania, 122 U. S. 326 (questioning State Tax on Railway Gross Receipts, *Re*, 15 Wall. (U. S.) 284).

A statute which imposes upon railroads in the State "an annual tax for the year 1905, and for each calendar year thereafter, *equal to one per centum of its gross receipts*, if such line lies wholly within the State," is a burden on interstate commerce in violation of the Federal Constitution as to a line which is wholly within the State, but which connects with other lines and which derives a part of its gross receipts from the carrying of passengers and freight coming from or destined to points without the State. Galveston, H. & S. A. R. Co. *v.* Texas, 210 U. S. 217, rev'g 100 Tex. 153 (following Philadelphia & So. S. S. Co. *v.* Pennsylvania, 122 U. S. 326, and distinguishing Maine *v.* Grand Trunk R. Co., 142 U. S. 217). Mr. Justice *Holmes*, who delivered the opinion of the court, said: "It appears sufficiently, perhaps, from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand, the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the State courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to

imposed on agencies of such companies established solely as an aid to inducing persons to travel over lines between different States.[1] But it has also been held that the fact that the railroad company is engaged in interstate commerce does not prevent a State within which its lines, or some part thereof, are situated from imposing an annual tax for the privilege of exercising its franchises there, and that the amount of such a tax may be determined by the amount of its gross transportation receipts, or the proportion thereof, that the line within the State bears to the entire system of the company.[2]

consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. Stockard v. Morgan, 185 U. S. 27, 37; Asbell v. Kansas, 209 U. S. 251, 254, 256. We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States. The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt, or anything to qualify the plain inference from the statute taken by itself. On the contrary, we rather infer from the judgment of the State court and from the argument on behalf of the State that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'"

[1] McCall v. California, 136 U. S. 104 (agency in San Francisco of line of railroad between Chicago and New York); Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114 (office in Philadelphia for use of officers, stockholders, agents, and employees of railroad having lines in Virginia and West Virginia). But a *license tax* imposed by a city on a railroad company doing business within its limits in respect of business done entirely within the city, or between the city and points within the State, and expressly stated to have no application to interstate business has been sustained. York v. Chicago, B. & Q. R. Co., 56 Neb. 572; Knoxville & O. R. Co. v. Harris, 99 Tenn. 684; Anniston v. Southern R. Co., 112 Ala. 557. See also Norfolk & W. R. Co. v. Suffolk, 103 Va. 498.

[2] Maine v. Grand Trunk R. Co., 142 U. S. 217; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 388; Cumberland & P. R. Co. v. State, 92 Md. 668. But compare Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, rev'g 100 Tex. 153, where Maine v. Grand Trunk R. Co., *supra*, is qualified and explained.

In Maine v. Grand Trunk R. Co., 142 U. S. 217, Mr. Justice *Field*, who delivered the opinion of the court, said: "The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchise within the State of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the State to levy there can be no question. . . . The privilege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present year or past years. . . .

"The court below held that the im-

And a State may levy a *tax upon the gross receipts* of the company for tolls received by it from other similar companies for the use of its tracks within the State, although such railroad may extend into other States, and the property carried, in respect of which the tolls were paid, may be interstate commerce. Such a tax was regarded as one on the property of the company, though measured by a reference to the tolls received.[1]

The *property* of railroad companies having a *situs within* the territory of the State imposing the tax is subject to the taxing power of the State, and a tax thereon is not an unlawful interference with interstate commerce, although the property may be used therein.[2]

position of the taxes was a regulation of commerce, interstate and foreign, and therefore in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the State as to the value of the privilege were limited to receipts of certain past years instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred."

[1] In New York, L. E. & W. R. Co. *v.* Pennsylvania, 158 U. S. 431, 438, the State imposed a tax of eight-tenths of one per cent upon the gross receipts of the Erie Company for tolls and transportation. The Delaware & Hudson Canal Co., by agreement with the Erie Company, used a branch located wholly in Pennsylvania, and paid tolls to the Erie Company for such use. The business of the Canal Company on this branch was almost entirely interstate in its character. The Buffalo, R. & P. Co. used a part of another branch, the part used being situated partly in Pennsylvania and partly in New York. The court below held that the entire tolls paid to the Erie Company by the Canal Company were subject to the tax imposed by Pennsylvania, but that the tolls paid by the Buffalo Company should be apportioned, and only the proportion applicable to the part of the branch used which was situated in Pennsylvania should be taxed. The result was that the entire amount of the toll received by the Erie Company for use of the tracks in Pennsylvania was taxed, without regard to the nature of the traffic in respect of which they were paid. This decision was sustained by the Supreme Court of the United States, Mr. Justice *Shiras* saying: "The tax complained of is not laid on the transportation of the subjects of interstate commerce, or on receipts derived therefrom, or on the occupation or business of carrying it on. It is a tax upon the corporation on account of its property in a railroad, and which tax is measured by a reference to the tolls received."

[2] Marye *v.* Baltimore & O. R. Co., 127 U. S. 117; Pittsburgh, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 421; Cleveland, C., C. & St. L. R. Co. *v.*

In *assessing for the purpose of taxation* a part of a railroad within a State, the assessing board may ascertain the value of the whole line both within and without the State as a single property, and may then determine the value of that part which is within the State *upon a mileage basis.* That process is not a valuation of property outside of the State.[1] And the assessing board, in order to keep within the limits of State jurisdiction, need not treat the part of the railroad within the State as an independent line disconnected from the part without, and place upon that property only the value which can be given to it if operated separately from the balance of the road; but may give to the part of the railroad within the State the value which is created by and results from the combined operation of all parts of the railroad as one continuous line.[2] The assessment of the part of a railroad within a State, *upon a mileage basis,* as a part of an entire system extending beyond the State, is not the placing of a burden upon interstate commerce beyond the power of the State, simply because the value of the railroad as a whole is created partly, and perhaps largely, by the interstate commerce in which it is engaged.[3]

Backus, 154 U. S. 439; New York, L. E. & W. R. Co. *v.* Pennsylvania, 158 U. S. 431, 439; Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150; Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 623; Covington & C. Bridge Co. *v.* Kentucky, 154 U. S. 204, 212; Pittsburgh, C., C. & St. L. R. Co. *v.* West Virginia Board of Public Works, 172 U. S. 32.

A State may impose *a tax on rolling-stock* of a corporation habitually used and employed within its limits, and the tax may be assessed and collected although the specific and individual items of property so used and employed are not continuously the same but are constantly changing, according to the exigencies of the business. The lawfulness of a tax upon vehicles of transportation used by common carriers may have to be considered in particular instances with reference to commerce among the States, but the mere fact that they are employed as vehicles of transportation in the interchange of interstate commerce will not render their taxation invalid. Marye *v.* Baltimore & O. R. Co., 127 U. S. 117, 123, *per* Mr. Justice *Matthews.* See also Columbus Southern R. Co. *v.* Wright, 151 U. S. 470, aff'g 89 Ga. 574. But rolling-stock of a non-resident corporation *passing through the State* for purposes of interstate traffic cannot be taxed by the State. Bain *v.* Richmond & D. R. Co., 105 N. Car. 363. Although the corporation is organized for purposes of and is solely engaged in interstate commerce, *franchises granted to it* and exercised within by the State, *e. g.*, the franchise or privilege of constructing a bridge over a navigable stream forming the boundary of the State, *may be taxed as property* situated within the State. Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150. See also Central Pac. R. Co. *v.* California, 162 U. S. 91; Keokuk & H. Bridge Co. *v.* Illinois, 175 U. S. 626.

[1] Pittsburgh, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 421; Cleveland, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 439. See also State *v.* Back, 72 Neb. 402; Ames *v.* People, 26 Colo. 83; People *v.* State Board of Equalization, 205 Ill. 296.

[2] Cleveland, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 439, 444; Michigan Cent. R. Co. *v.* Powers, 201 U. S. 245, aff'g s. c. *sub nom.* Michigan Railroad Tax Cases, 138 Fed. Rep. 223. See also Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673; Chicago & N. W. R. Co. *v.* State, 128 Wis. 553.

[3] Cleveland, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 439, 445.

A railroad company, which is engaged in interstate commerce, is amenable to State regulation and State taxation as to any service which is wholly performed within the State, and not as a part of interstate commerce, although connected therewith.[1]

§ 1360. **Interstate Commerce; Express Companies.** — Express companies, engaged in the transportation of goods and merchandise from one State to another, are governed by the same principles as railroad and telegraph companies engaged in a similar business.

[1] Pennsylvania R. Co. *v.* Knight, 192 U. S. 21, aff'g 171 N. Y. 354.

Terminal Cab Service. The Pennsylvania Railroad Company maintained *a cab service* in New York City for the convenience of travellers arriving in or departing from that city over its lines in New Jersey. The charges for this service were separate from those for further transportation, and no part of its receipts from the cab service was received as compensation for any service outside of New York. A franchise tax was assessed by the State authorities on the company for the privilege of carrying on this cab business. It was held that the cab service was only incidental to interstate commerce and was not necessarily interstate commerce itself, and that the tax levied was a valid exercise of the taxing powers of the State. Pennsylvania R. Co. *v.* Knight, 192 U. S. 21, 26. Mr. Justice *Brewer*, who delivered the opinion of the court, said: "It is true that a passenger over the Pennsylvania Railroad to the city of New York does not in one sense fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint the company's cab service is simply one element in a continuous interstate transportation, and as such would be excluded from State, and be subject to national control. The State may not tax for the privilege of doing an interstate commerce business. Atlantic & Pac. Tel. Co. *v.* Philadelphia, 190 U. S. 160. On the other hand, the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. The party receiving it owes no legal duty of crossing the State line. Undoubtedly, a single act of carriage or transportation wholly within a State may be part of a continuous interstate carriage or transportation. Goods shipped from Albany to Philadelphia may be carried by the New York Central Railroad only within the limits of New York, and yet that service is an interstate carriage. By reason thereof the nation regulates that carriage, including the part performed by the New York company. But it does not follow therefrom that the New York company is wholly relieved from State regulation and State taxation, for a part of its work is carriage and transportation begun and ended within the State. So the Pennsylvania company, which is engaged largely in interstate transportation, is amenable to State regulation and State taxation as to any of its service, which is wholly performed within the State and not as a part of interstate transportation. Wherever a separation in fact exists between transportation service wholly within the State and that between the States, a like separation may be recognized between the control of the State and that of the nation. Osborne *v.* Florida, 164 U. S. 650; Pullman Co. *v.* Adams, 189 U. S. 420. As we have seen, the cab service is rendered wholly within the State and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a State, it is presumably subject to State control. The burden is on him who asserts that, though actually within, it is legally outside the State; and unless the interstate character is established, locality determines the question of jurisdiction."

It is not within the power of a State to impose upon an express company organized under the laws of another State *a license tax for the privilege or occupation* of engaging within the State in the transportation of merchandise to or from other States.[1] But taxes or license fees in good faith imposed on such companies *exclusively* on express business carried on *wholly within the State* are not open to objection on the ground that they are a burden and restriction upon such commerce.[2] It is also within the power of the State to impose a tax on the *gross receipts* of a foreign express company so far as such receipts are derived *solely* from express business transacted *entirely within* the State.[3]

The *construction of the statute* imposing the tax is usually a matter for the determination of the State court, and a construction by that court of a statute as imposing a tax on an express company only for the privilege or occupation of transacting a domestic or local business is binding on the United States Supreme Court, and will, as a rule, be followed in determining the validity of the tax.[4]

[1] Crutcher *v.* Kentucky, 141 U. S. 47, rev'g 89 Ky. 6; Fargo *v.* Hart, 193 U. S. 490; *In re* Bell, 25 U. S. App. 379; United States Express Co. *v.* Hemmingway, 39 Fed. Rep. 60; Webster *v.* Bell, 68 Fed. Rep. 183; Southern Express Co. *v.* Ensley, 116 Fed. Rep. 756; Commonwealth *v.* Smith, 92 Ky. 38; State *v.* Northern Pac. Express Co., 27 Mont. 419.

A statute of *Kentucky* prohibited agents of any express company not incorporated under the laws of Kentucky from carrying on the business of transportation in the State "without first obtaining a license from the auditor of public accounts to carry on such business." Before any license should issue, a copy of the charter of the company was required to be filed, with a statement under oath of the assets and liabilities of the company, and showing that the company possessed a capital of at least $150,000. It was held that this statute was a prohibition against carrying on interstate as well as domestic or local business, and as applied to an express company engaged in interstate commerce was invalid; that the statute could not be sustained as an exercise of the power of the State to prescribe the terms on which foreign corporations might be admitted to transact business within the State; and that it could not be justified as an exercise of the police power of the State. Crutcher *v.* Kentucky, 141 U. S. 47, rev'g 89 Ky. 6.

[2] Crutcher *v.* Kentucky, 141 U. S. 47, 59; Osborne *v.* Florida, 164 U. S. 650, aff'g 33 Fla. 162; Hardee *v.* Brown, 56 Fla. 377; 47 So. Rep. 834. An ordinance providing that every express company shall pay an occupation tax for business *done exclusively within the city* does not apply to a company which does no business that begins and ends within the city limits. Leavenworth *v.* Smith, 5 Kan. App. 165.

[3] Pacific Exp. Co. *v.* Seibert, 142 U. S. 339.

[4] Osborne *v.* Florida, 164 U. S. 650, aff'g 33 Fla. 162; *supra*, § 1357. A statute of *Florida* provided that "all express companies *doing business in this State* shall pay in cities of 15,000 inhabitants or more a license of $200; in cities of 10,000 to 15,000 inhabitants, $100; in cities of 5,000 to 10,000 inhabitants, $75; in cities of 3000 to 5000 inhabitants, $50; in cities of 1000 to 3000 inhabitants, $25; in towns and villages of less than 1000 and more than 50 inhabitants, $10." The statute prohibited the transaction of business without paying the tax, and provided a penalty by fine or imprisonment for so doing. The agent of an express company organized under the laws of Georgia was prosecuted

The *property of an express company*, both tangible and intangible, situated within the limits of the State exercising the power of taxation is subject to the taxing power of such State although it may be employed in interstate commerce.[1] And in *assessing the property within the State*, the entire property of the corporation, tangible and intangible, may be considered as a unit, and the tax levied on the proportionate value thereof within the State as determined by the value of the capital stock of the corporation.[2] But the tax on

criminally for a violation of the statute. He claimed that the company he represented transacted interstate as well as domestic or local business, and that the tax was void as imposing a tax or burden on the privilege of transacting interstate commerce. The Supreme Court of Florida construed the statute as having no application to, or effect upon, the business of the company which was interstate in its character, and as applying to and affecting only its business done within the State, or local or domestic in its character. It also held that, under the statute, so long as the express company confined its operations to express business that consisted of interstate or foreign commerce, it was wholly exempt from the license tax, but that, under the provisions of the statute, if the company engaged in business within the State of a local nature as distinguished from an interstate or foreign kind of commerce, it became subject to the statute so far only as concerned its local business, notwithstanding it might at the same time engage in interstate or foreign commerce. The Supreme Court of the United States held that this construction of the statute by the State court was binding upon it, and that, so construed, the statute did not violate the Federal Constitution. Osborne *v.* Florida, 164 U. S. 650.

[1] Adams Express Co. *v.* Ohio, 165 U. S. 194; s. c. 166 U. S. 185; American Express Co. *v.* Indiana, 165 U. S. 255; Adams Express Co. *v.* Kentucky, 166 U. S. 171. A *classification for purposes of taxation* of express companies carrying on the business of transportation on contracts for hire with railroad or steamboat companies is not void as discriminating in favor of companies and persons carrying express matter under other conditions. Pacific Exp. Co. *v.* Seibert, 142 U. S. 339. Classification of express companies with railroad and telegraph companies as units for the purpose of taxation does not deny the equal protection of the laws. Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194, 228; s. c. 166 U. S. 185.

[2] Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194; s. c. 166 U. S. 185; American Express Co. *v.* Indiana, 165 U. S. 255; Adams Express Co. *v.* Kentucky, 166 U. S. 171; Coulter *v.* Weir, 127 Fed. Rep. 897; Wells, Fargo & Co. *v.* Crawford County, 63 Ark. 576; *supra*, § 1359.

The Ohio Nichols law. By a statute of *Ohio* ("The Nichols Law") a State board of appraisers was created, which was charged with the duty of assessing the property in Ohio of telegraph, telephone, and express companies. Each such company, doing business in Ohio, was required to file a return with the auditor of State, setting forth, among other things, the number of shares of its capital stock; the par value and market or actual value of its shares; a statement in detail of the entire real and personal property of said companies and where located, and the value thereof as assessed for taxation. *Telegraph and telephone companies* were required to return, also, the whole length of their lines, and the length of so much of their lines as was without and was within the State, including the lines controlled and used, under lease or otherwise. *Express companies* were required to include in the return a statement of their entire gross receipts, from whatever source derived, for the year, of business done in Ohio, giving the receipts of each office in the State; also the whole length of lines of rail and water routes over which the companies did business, within or without the State. The rule prescribed by the statute to be followed by the board in making the assessment was that "in determining

the property of the express company will be invalid, if it is shown that the total valuation of its property wherever situated which is

the value of the property of said companies in this State to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid." As to telegraph and telephone companies, the board was required to *apportion* the valuation among the several counties through which the lines ran, in the proportion that the length of the lines in the respective counties bore to the entire length within the State; in the case of express companies, the apportionment was to be made among the several counties in which they did business, in the proportion that the gross receipts in each county bore to the gross receipts in the State. The amount thus apportioned was to be certified to the county auditor, and placed by him on the duplicate "to be assessed and the taxes thereon collected the same as taxes assessed and collected on other personal property." The rate of taxation to be the same as that on other property in the local taxing district. The valuation of all the real estate of the companies, situated in Ohio, was required to be deducted from the total valuation as fixed by the board.

Although *this scheme of taxation* necessarily treated the property of the express companies, both tangible and intangible, as a unit, and subjected the proportionate part of the property, intangible as well as tangible, to taxation in Ohio, and although the express companies were foreign corporations engaged in interstate commerce, the Supreme Court of the United States held that the proportionate part of the property of the companies, tangible and intangible, had a *situs* in Ohio for purposes of taxation, and that the tax was not invalid as a tax on interstate commerce. Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194; s. c. 166 U. S. 185. Mr. Chief Justice *Fuller*, who delivered the opinion of the court (165 U. S. 194, 221, 226), after referring to the decisions holding that the property of railroad, telegraph, and sleeping car companies in the several States might be valued as a unit, and a proper proportion of the whole taxed by the particular State, said: "Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter, but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use. The cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case [Pullman's Pal. Car Co. *v.* Pennsylvania, 141 U. S. 18]. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value might be reached by the State authorities on the basis indicated. No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons, and furniture, than that of railroad, telegraph, and sleeping car companies, to roadbed, rails, and ties, poles and wires, or cars. The unit is a unit of use and management; and the horses, wagons, safes, pouches, and furniture; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others. We repeat that while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very neces-

apportioned to the State exercising the taxing power, includes real and personal property not necessarily used in the actual business of the company which is permanently located and has a *situs* for purposes of taxation only in the State where the company is incorporated.[1]

§ 1361. **Interstate Commerce; Sleeping Car Companies.** — Drawing-room, sleeping, and other cars, owned by a non-resident corporation and run over the lines of a railroad for the use of passengers in their transit into, through, or out of a State, are, as to such passengers, engaged in interstate commerce, and *the State cannot impose a license or privilege tax* upon each car as a condition of the right to engage in such business.[2] But this protection does not extend to *domestic or local business* entirely within the State, although the cars may also be used in interstate commerce. If such cars are engaged in local or domestic business within the State, the State may impose a tax on the privilege of transacting such business, although the cars are also engaged in interstate commerce, provided always that the laws of the State permit the companies to abandon the local or domestic business if they see fit, and to confine the business done solely to interstate commerce.[3] But the cars of these

sities of the case — resulting from the very nature of the business. . . . The property of an express company distributed through different States is, as an essential condition of the business, united in a single specific use. . . . Assuming the proportion of capital employed in each of several States through which such a company conducts its operations has been fairly ascertained, while taxation thereon, or determined with reference thereto, may be said in some sense to fall on the business of the company, it is only indirectly. The taxation is essentially a property tax, and, as such, not an interference with interstate commerce. Nor, in this view, is the assessment on property not within the jurisdiction of the taxing authorities of the State and for that reason amounting to a taxing of property without due process of law. The property taxed has its actual *situs* in the State, and is, therefore, subject to the jurisdiction, and the distribution among the several counties is a matter of regulation by the State legislature."

[1] Fargo *v.* Hart, 193 U. S. 490.

[2] Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, aff'g 22 Fed. Rep. 276 (overruling Pullman Southern Car Co. *v.* Gaines, 3 Tenn. Ch. 587); Allen *v.* Pullman's Pal. Car Co., 191 U. S. 171; State *v.* Woodruff Sleeping & P. Car Co., 114 Ind. 155; People *v.* Miller, 178 N. Y. 194. A statute imposing a *privilege tax* on sleeping car companies, doing business in the State, of $500 on each car per annum, was held to apply to cars running through the State, as well as to those operated solely within the State, and to require a payment for the privilege of running the cars of the company, regardless of the fact of their use in interstate traffic or in that which is wholly within the border of the State, and therefore void as a regulation of interstate commerce. Allen *v.* Pullman's Pal. Car Co., 191 U. S. 171. See also Pullman Co. *v.* Kansas, 216 U. S. 56.

[3] Pullman Co. *v.* Adams, 189 U. S. 420, aff'g 78 Miss. 814; Allen *v.* Pullman's Pal. Car Co., 191 U. S. 171; Gibson County *v.* Pullman Southern Car Co., 42 Fed. Rep. 572. A statute of *Tennessee* imposed upon each sleeping car company "doing business in this State, for one or more passengers taken

companies, habitually and constantly operated over lines of railroad within a State, have a *situs* within the State for purposes of State taxation.[1] A tax may be imposed by the State on the value of the average number of the cars permanently and continuously operated within its limits, although such cars may be used in the transportation of interstate commerce.[2] A tax imposed on the capital of one of these companies employed within the State on the basis of the proportion of the capital stock of the company which the number of miles of railroad over which the cars are run within the State bears to the total number of miles within and without the State over which its cars are run, is, in substance and effect, a tax upon the property of the company within the State, and is not obnoxious as a regulation of interstate commerce.[3]

§ 1362. **Interstate Commerce; Telegraph Companies.** — The *telegraph is an instrument of commerce*, and telegraph companies are subject to the regulating power of Congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself.[4] Hence, so far

up at one point in this State and delivered at another point in this State and transported wholly within the State, per annum, $3000." The business was classified by the statute as a privilege. It was held that the tax was imposed solely upon domestic business, and was not a burden upon interstate commerce in violation of the Federal Constitution, the sleeping car company being entitled under the law of the State of Tennessee, as construed by the court, to refuse to afford its privileges to local traffic, if it so desired, and the payment of the tax, therefore, not being obligatory as a condition of engaging in interstate commerce. Allen *v.* Pullman's Pal. Car Co., 191 U. S. 171. But compare Pullman Co. *v.* Kansas, 216 U. S. 56.

[1] Pullman's Pal. Car Co. *v.* Pennsylvania, 141 U. S. 18, aff'g 107 Pa. 156; American Refrig. Transit Co. *v.* Hall, 174 U. S. 70; Union Refrig. Transit Co. *v.* Lynch, 177 U. S. 149, aff'g 18 Utah, 378; Dubuque *v.* Illinois Cent. R. Co., 39 Iowa, 56, 83. See also Comstock *v.* Grand Rapids, 54 Mich. 641. But they cannot be taxed within the State, if they are *only therein in transit* and are returned when empty to the business centre of the owner beyond the State. *In re* Union Tank Line Co., 204 Ill. 347; State *v.* Stephens, 146 Mo. 662; *supra*, § 1358.

[2] American Refrig. Transit Co. *v.* Hall, 174 U. S. 70; Union Refrig. Transit Co. *v.* Lynch, 177 U. S. 149, aff'g 18 Utah, 378. The *cars of a refrigerator company* which are permanently located and continuously employed in a State other than that where the company was organized and where it has its domicil, have no *situs* in the State of the domicil of the company, and are not subject to the taxing power of that State. Union Refrig. Transit Co. *v.* Kentucky, 199 U. S. 194, rev'g 118 Ky. 131.

[3] Pullman's Pal. Car Co. *v.* Pennsylvania, 141 U. S. 18, 25, aff'g 107 Pa. 156.

[4] Pensacola Tel. Co. *v.* Western Un. Tel. Co., 96 U. S. 1; Western Un. Tel. Co. *v.* Texas, 105 U. S. 460; Western Un. Tel. Co. *v.* Pendleton, 122 U. S. 347; Leloup *v.* Port of Mobile, 127 U. S. 640; Western Un. Tel. Co. *v.* Kansas, 216 U. S. 1; Stand-

as the transmission of *interstate messages* is concerned, the business of these companies is not subject to the taxing powers of the State, and a State tax on each message sent is unconstitutional as a burden or impost upon interstate commerce so far as it applies to messages transmitted beyond the State.[1] But *purely local or domestic business, i. e.*, messages sent from one point to another within the State, is subject to the taxing power of the State.[2] Nor can a State, as a *condition of doing business* within its jurisdiction, *exact a license tax* from a telegraph company, a large part of whose business is the transmission of messages from one State to another and between the United States and foreign countries, when the tax is imposed on the *whole business*, both State and interstate without discrimination.[3] But such a license tax is not an unlawful interference with interstate commerce when by the terms of the statute it is imposed *only* upon business done exclusively within the city imposing tax, and not including any business done to or from points without the

ard Underground Cable Co. *v.* Attorney General, 46 N. J. Eq. 270; Matter of Pennsylvania Tel. Co. 48 N. J. Eq. 91, 93; Ames *v.* Kirby, 71 N. J. L. 442, 445; Postal Tel. Cable Co. *v.* Richmond, 99 Va. 102; Index — *Telegraph and Telephone Companies.*

[1] Western Un. Tel. Co. *v.* Texas, 105 U. S. 460, rev'g 55 Tex. 314; Western Un. Tel. Co. *v.* Alabama, 132 U. S. 472, rev'g 80 Ala. 273; Western Un. Tel. Co. *v.* Kansas, 216 U. S. 1; Western Un. Tel. Co. *v.* Fremont, 39 Neb. 692; s. c. 43 Neb. 499. See also San Francisco *v.* Western Un. Tel. Co., 96 Cal. 140; Commonwealth *v.* Smith, 92 Ky. 38; Western Un. Tel. Co. *v.* State, 62 Tex. 630. In Western Un. Tel. Co. *v.* Texas, 105 U. S. 460, 464, 466, the court holds that interstate telegraph messages are commerce, and as such are beyond the power of the State to tax them in any form. Texas required every chartered telegraph company doing business in the State to pay a tax of one cent for every full rate message sent and one-half cent for every message less than full rate. The telegraph company sent over its lines through its offices in Texas 169,000 full rate and 100,000 less than full rate messages, a large portion of them going to places outside of the State. The company neglected to pay the tax and the State brought suit to collect it. The company defended on the ground that the imposition of the tax violated *the commerce clause of the Constitution.* The Supreme Court of the State sustained the law and directed judgment for the full amount without any reduction for messages sent out of the State. That judgment was reversed by the Supreme Court of the United States. That court held that telegraph companies occupy the same relation to commerce as a carrier of messages as a railway company does as a carrier of goods; both companies are instruments of commerce *and their business is commerce itself.* This is a tax on the messages sent as such, and so far as it operates on *messages sent out of the State it is a regulation of interstate and foreign commerce and beyond the power of the State.*

[2] Western Un. Tel. Co. *v.* Fremont, 39 Neb. 692; s. c. 43 Neb. 499. In Western Un. Tel. Co. *v.* Texas, 105 U. S. 460, 466, Mr. Chief Justice *Waite* said: "Any tax which the State may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another *exclusively within its own jurisdiction*, will not be repugnant to the Constitution of the United States."

[3] Leloup *v.* Port of Mobile, 127 U. S. 640; Western Un. Tel. Co. *v.* Kansas, 216 U. S. 1; Matter of Pennsylvania Tel. Co., 48 N. J. Eq. 91; Postal Tel. Cable Co. *v.* Richmond, 99 Va. 102. See also People *v.* Miller, 178 N. Y. 194.

State, and not including any business done for the government of the United States.[1] And a single tax, assessed pursuant to a statute of a State, upon *the receipts* of a telegraph company, which receipts are derived partly from interstate commerce and partly from commerce within the State, but which are returned and assessed in gross and without separation or apportionment, while not wholly invalid, is invalid in the proportion and to the extent that such receipts are derived from interstate commerce.[2]

But neither the nature of the business, nor the privileges conferred on telegraph companies by Acts of Congress authorizing the construction of their lines "through and over any portion of the public domain of the United States, over and along any of the military post-roads of the United States, and over, under, and across the navigable streams or waters of the United States," carry any exemption from the ordinary burdens of *taxation on poles, wires and other physical property* of such companies situated within the jurisdiction of the taxing power.[3] In *estimating the value of the*

[1] Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692; Moore *v.* Eufaula, 97 Ala. 670; State *v.* Rocky Mountain Bell Tel. Co., 27 Mont. 394; Western Un. Tel. Co. *v.* Fremont, 39 Neb. 692; s. c. 43 Neb. 499; Ogden City *v.* Crossman, 17 Utah, 66; Postal Tel. Cable Co. *v.* Richmond, 99 Va. 102; Postal Tel. Cable Co. *v.* Norfolk, 101 Va. 125; Western Un. Tel. Co. *v.* Wakefield, 69 Neb. 272.

[2] Ratterman *v.* Western Un. Tel. Co., 127 U. S. 411; Western Un. Tel. Co. *v.* Alabama, 132 U. S. 472, rev'g 80 Ala. 273.

[3] Western Un. Tel. Co. *v.* Massachusetts, 125 U. S. 530. See *ante*, §§ 1220, 1221, as to the Acts of Congress referred to in the text and their construction. Leloup *v.* Port of Mobile, 127 U. S. 640; Massachusetts *v.* Western Un. Tel. Co., 141 U. S. 40; Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688; Western Un. Tel. Co. *v.* Taggart, 163 U. S. 1; s. c. 141 Ind. 281; Western Un. Tel. Co. *v.* Norman, 77 Fed. Rep. 13; Western Un. Tel. Co. *v.* State, 146 Ind. 54, 57; Western Un. Tel. Co. *v.* State, 147 Ind. 274.

In Western Un. Tel. Co. *v.* Massachusetts, 125 U. S. 530, the company resisted the enforcement of a tax levied by the State of Massachusetts upon its capital stock, based upon an estimate of $750,952 as the taxable value of the shares of the corporation apportioned to that State. The mode by which this taxable valuation was arrived at was as follows: The State Treasurer ascertained from the officers of the telegraph company that the valuation of its entire capital stock was $47,000,000, from which were deducted credits proper to be allowed in determining the assessable value, leaving $38,713,924 as the total valuation of said stock liable to taxation. It was then ascertained that the total number of miles of line of said corporation in all the States and Territories was 146,052.60, of which 143,219.55 were without the limits of the State of Massachusetts, leaving 2833.05 miles within its boundaries. Taking these figures, the Treasurer of the State assessed the value of that portion of the capital stock of the company which, under this calculation, would fall within the State at the sum of $750,952. The tax on this sum was fixed at $10,618.46, but the company refused to pay it. It set up that of its 2833.05 miles of line within Massachusetts, 2334.55 miles were over, under, or across post-roads, made such by the United States, leaving only 489.50 miles not over or along such post-roads, on which the company offered to pay the proportion of the tax assessed by the State authorities. The Supreme Court of the United

property of a telegraph company situate within a State, it may be regarded not abstractly or locally, but as a part of a system operated in other States, although the value of the property within the State may be augmented by the fact that it is a part of an instrumentality of interstate commerce.[1] But in enforcing a valid tax imposed on property of a telegraph company within the State, *an injunction*

States held that the tax was within the power of the State and validly levied. Mr. Justice *Miller* said, with reference to the nature of the tax, "By whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation." He further said on this subject, "The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization *on account of property owned and used by it in Massachusetts*, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property." As to the claim for *exemption* in respect to lines constructed *on post-roads*, he said: "While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless, the company receiving the benefit of the laws of the State for the protection of its property and its rights, is liable to be taxed upon its real and personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

By a statute of *Mississippi* an annual tax of $3000 was imposed on each telegraph company operating within the State one thousand miles or more of wire, and on each telegraph company operating within the State less than one thousand miles of wire a tax of one dollar per mile, and the tax thus levied was "in lieu of all other State, county, and municipal taxes." The defendant company operated within the State 391.28 miles of wire, and a tax of $391.28 was levied thereon. Suit was brought against the company for two years' taxes. The court held that although the tax was in name a "privilege tax," and sustained by the courts of the State as such, yet it was in substance *a tax on property within the State*, and valid. Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688, 697. Mr. Chief Justice *Fuller* said: "In the case at bar the Supreme Court [of Mississippi], in its examination of the liability of the plaintiff in error for the taxes in question, said, 'It will be thus seen at once that this is a tax imposed upon a telegraph company, in lieu of all others, as a privilege tax, and its amount is graduated according to the amount and value of the property measured by miles. It is to be noticed that it is in lieu of all other taxes, State, county, municipal. The reasonableness of the imposition appears in the record, as shown by the second count of the declaration and its exhibits, whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if its property had been subjected to a single *ad valorem* tax.' This exposition of the statute brings it within the rule where *ad valorem taxes* are compounded or commuted for a just equivalent, determined by reference to the amount and value of the property. Being thus brought within the rule, the tax becomes substantially a mere tax on property and not one imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power."

[1] Western Un. Tel. Co. *v.* Missouri, 190 U. S. 412, aff'g 165 Mo. 502; *supra*, §§ 1359–1361.

cannot issue to restrain it from doing any business within the State by reason of its default in payment. The tax must be collected by other methods, such as the ordinary means of enforcing judgments.[1]

§ 1363. **Interstate Commerce; Intoxicating Liquors.** — It has often been held that State legislation which prohibits the manufacture of spirituous, malt, vinous, fermented, or other intoxicating liquors within the limits of the State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, or by the amendments thereto.[2] But such *intoxicating liquors are subjects of commercial intercourse*, exchange, barter, and traffic between nation and nation, and between State and State, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress, and the decisions of courts. Hence, prior to the enactment by Congress in 1890 of the Wilson Act, shortly to be referred to, it was not within the power of a State to prevent the introduction into its limits, or the sale therein in the original package, of liquors manufactured in and brought from another State, because such a statute was then an unauthorized interference with interstate commerce.[3] But by an act of Congress, commonly known as the *Wilson Act*, approved August 8, 1890,[4] it was enacted "that all fermented, distilled, or other intoxicating liquors or liquids, transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of police powers, to the same extent and in the same manner as though such liquids or liquors

[1] Western Un. Tel. Co. *v.* Massachusetts, 125 U. S. 530, 554; Matter of Pennsylvania Tel. Co., 48 N. J. Eq. 91.

[2] Bartemeyer *v.* Iowa, 18 Wall. (U. S.) 129; Beer Co. *v.* Massachusetts, 97 U. S. 25, 33; Tiernan *v.* Rinker, 102 U. S. 123; Mugler *v.* Kansas, 123 U. S. 623; Kidd *v.* Pearson, 128 U. S. 1; Eilenbecker *v.* Plymouth County, 134 U. S. 31; *In re* Rahrer, 140 U. S. 545, 556; Vance *v.* Vandercook Co. (No. 1), 170 U. S. 438, 444; Matter of Heff, 197 U. S. 488, 505. The *license exacted by the National Government*, as a condition of the sale of intoxicating liquors, is solely for the purpose of revenue and is not an attempted exercise of the police power. The regulation of the sale of intoxicating liquors, as an exercise of the police power, is a matter for State control. Matter of Heff, 197 U. S. 488, 505.

[3] Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465; Leisy *v.* Hardin, 135 U. S. 100; Lyng *v.* Michigan, 135 U. S. 161; Vance *v.* Vandercook Co. (No. 1), 170 U. S. 438, 444; Adams Express Co. *v.* Kentucky, 206 U. S. 129, 135; Adams Express Co. *v.* Kentucky, 214 U. S. 218, 222, rev'g 124 Ky. 182.

[4] 26 U. S. Stat. 313.

had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." This statute is a constitutional exercise of the legislative powers of Congress.[1] From the time such liquors are introduced into a State or Territory from another State, whether in original packages or otherwise, they are subject to the operation of such then existing laws as have been properly enacted in the exercise of its police powers.[2] Hence, from that time liquors, even in the hands of the consignee and in the original package, are subject to a law prohibiting the sale thereof and providing for the punishment of persons violating the provisions of the statute.[3] But this statute, properly construed, is not intended to operate upon intoxicating liquors *whilst in transit* from one State to another, and under its provisions a *State cannot prevent the delivery* within the State by the carrier to the consignee of such liquors *in the original package*, although, after such delivery, the State has the power to prohibit the sale thereof, even in the original package.[4] As an incident to its police power, *a license tax may be imposed* by the State upon the sale of liquors within the State; and under the Wilson Act the State may exact a license tax from a travelling salesman for the privilege of selling within the State liquors which are the product of and are to be brought from another State.[5] Under the Wilson Act, and by virtue of its police power, the State may also prohibit the sale of such liquors within its limits without the payment of a license tax, although such sale be made over the bar on board a steamship in navigable waters within the State and whilst the vessel is engaged in interstate commerce.[6]

§ 1364 (745). **State Taxes on Foreign Corporations.** — It is well settled that a corporation is not a *citizen* within the meaning of that provision of the Federal Constitution which declares that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.[7] In the same manner that a State

[1] *In re* Rahrer, 140 U. S. 545.

[2] *In re* Rahrer, 140 U. S. 545.

[3] *In re* Rahrer, 140 U. S. 545, rev'g 43 Fed. Rep. 556.

[4] Rhodes *v.* Iowa, 170 U. S. 412, rev'g 90 Iowa, 496; Vance *v.* Vandercook Co. (No. 1), 170 U. S. 438; American Express Co. *v.* Iowa, 196 U. S. 133, rev'g 118 Iowa, 447; Adams Express Co. *v.* Iowa, 196 U. S. 147; Pabst Brewing Co. *v.* Crenshaw, 198 U. S. 17; Heyman *v.* Southern R. Co., 203 U. S. 270, rev'g 118 Ga. 616; Adams Express Co. *v.* Kentucky, 206 U. S. 129; Adams Express Co. *v.* Kentucky, 214 U. S. 218, rev'g 124 Ky. 182. See also Scott *v.* Donald, 165 U. S. 58.

[5] Delamater *v.* South Dakota, 205 U. S. 93, aff'g 20 S. Dak. 23; Phillips *v.* Mobile, 208 U. S. 472, aff'g 146 Ala. 158. See also Reymann Brewing Co. *v.* Brister, 179 U. S. 445.

[6] Foppiano *v.* Speed, 199 U. S. 501.

[7] U. S. Const., art. iv. § 2; Paul *v.* Virginia, 8 Wall. (U. S.) 177; Phila-

may impose such conditions and qualifications as it deems proper upon the corporate existence and privileges of its own creations, so a corporation created by one State can transact business which is not interstate commerce, or federal in its character, in another State only with the consent, express or implied, of the latter State; and such consent may be accompanied by such conditions as the latter State may think fit to impose, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State free from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence.[1] Hence, in the case of foreign corporations, whose

delphia Fire Assoc. *v.* New York, 119 U. S. 110, 117; Pembina Min. Co. *v.* Pennsylvania, 125 U. S. 181; State *v.* Travelers' Ins. Co., 73 Conn. 255, 273; State *v.* Lathrop, 10 La. An. 398; Tolerton & S. Co. *v.* Barck, 84 Minn. 497; Daggs *v.* Orient Ins. Co., 136 Mo. 382, 397, aff'd 172 U. S. 557; Anglo-American Provision Co. *v.* Davis Prov. Co., 169 N. Y. 506, 511.

[1] Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404, 407; Paul *v.* Virginia, 8 Wall. (U. S.) 177; Ducat *v.* Chicago, 10 Wall. (U. S.) 410; St. Clair *v.* Cox, 106 U. S. 350, 356; Pembina Min. Co. *v.* Pennsylvania, 125 U. S. 181; Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 228; Ashley *v.* Ryan, 153 U. S. 436; Hooper *v.* California, 155 U. S. 648, 652, 655; Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688, 696; New York *v.* Roberts, 171 U. S. 658; Orient Ins. Co. *v.* Daggs, 172 U. S. 557, aff'g 136 Mo. 382; Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28; New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 401, aff'g 148 Mo. 583; Hancock Mut. L. Ins. Co. *v.* Warren, 181 U. S. 73, 76; Cable *v.* United States L. Ins. Co., 191 U. S. 288; Security Mut. L. Ins. Co. *v.* Prewitt, 202 U. S. 246; Oakland Sugar Mill Co. *v.* Wolf Co., 118 Fed. Rep. 239, 244; State *v.* Ins. Co. of North America, 115 Ind. 257; Scottish Un. & Nat. Ins. Co. *v.* Herriott, 109 Iowa, 606, 613, 616; Nelson *v.* Nederland L. Ins. Co., 110 Iowa, 600, 604; Phœnix Ins. Co. *v.* Welch, 29 Kan. 672; Moline Plow Co. *v.* Wilkinson, 105 Mich. 57; Pollock *v.* German F. Ins. Co., 132 Mich. 225; Tolerton & S. Co. *v.* Barck, 84 Minn. 497; Heilemann Brewing Co. *v.* Peimeisl, 85 Minn. 121; State *v.* Standard Oil Co., 194 Mo. 124, 149; McCully *v.* Chicago, B. & Q. R. Co., 212 Mo. 1, 55; State *v.* Fleming, 70 Neb. 523, 524; *Ex parte* Cohn, 13 Nev. 424, 426; Anglo-American Provision Co. *v.* Davis Prov. Co., 169 N. Y. 506, 510; Commonwealth *v.* New York, L. E. & W. R. Co., 129 Pa. 463, 476; State *v.* United States Mut. Accident Assoc., 67 Wis. 624, 630; Ashland Lumber Co. *v.* Detroit Salt Co., 114 Wis. 66.

A State may discriminate between her own corporations and those of other States desirous of transacting business within her jurisdiction, and the nature and degree of discrimination rests with the State, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union. Ducat *v.* Chicago, 10 Wall. (U. S.) 410. See also New York *v.* Roberts, 171 U. S. 658, 662; Scottish Un. & Nat. Ins. Co. *v.* Herriott, 109 Iowa, 606, 613. But although the State may impose different liabilities or conditions on foreign corporations from those imposed on domestic corporations, a *statute which provides that foreign corporations shall pay* a fee based on the capital stock for the privilege of entering the State and doing business therein, and thereupon shall be subject to all the liabilities and restrictions of domestic corporations, has been held to amount to a *contract with foreign corporations* complying therewith that they will not be subjected, during the period for which they are admitted, to greater liability than those imposed on domestic corporations; and a

business is not exclusively interstate commerce, a State, having the power to exclude entirely, has the power to impose, as a condition of the privilege of doing business within its boundaries, *the payment of a tax as a license fee* or a sum proportioned to the amount of its capital by way of tax on the franchise or privilege of transacting business within the State.[1] But it is important to bear in mind that

subsequent statute imposing a higher annual license fee on foreign than on domestic corporations for the privilege of continuing to do business was held to be *void as impairing the obligation of such contract* as to those corporations which had paid the entrance tax and received permits to do business. It was also held that such increased tax could not be justified under the power to alter, amend, and repeal reserved by the State Constitution. American Smelting & Refining Co. *v.* Colorado, 204 U. S. 103, rev'g 30 Colo. 275.

A single act of business within a State, as where a corporation of Ohio contracted in Colorado to manufacture machinery at its place of business in Ohio and to deliver it in Ohio, is not carrying on business within a State within the meaning of a statute requiring the filing of certificates showing the place of business of foreign corporations, &c., before doing business within the State. Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727. See also Allgeyer *v.* Louisiana, 165 U. S. 578; State *v.* Williams, 46 La. An. 922; Oakland Sugar Mill Co. *v.* Wolf Co., 118 Fed. Rep. 239, 245.

[1] Pembina Min. Co. *v.* Pennsylvania, 125 U. S. 181; Horn Silver Min. Co. *v.* State, 143 U. S. 305; Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 227, 228; New York *v.* Roberts, 171 U. S. 658; Singer Mfg. Co. *v.* Wright, 33 Fed. Rep. 121; Southern Cotton Oil Co. *v.* Wemple, 44 Fed. Rep. 24; Manchester Fire Ins. Co. *v.* Herriott, 91 Fed. Rep. 711, 719.

Decisions of State Courts: Phœnix Carpet Co. *v.* State, 118 Ala. 143; Southern Car & Foundry Co. *v.* State, 133 Ala. 624; American Smelting & Ref'g Co. *v.* People, 34 Colo. 240; Ducat *v.* Chicago, 48 Ill. 172; Cincinnati Mut. Health Assoc. *v.* Rosenthal, 55 Ill. 85; Western Un. Tel. Co. *v.* Lieb, 76 Ill. 172; Hughes *v.* Cairo, 92 Ill. 339; Walker *v.* Springfield, 94 Ill. 364; Raymond *v.* Hartford F. Ins. Co., 196 Ill. 329; State *v.* Ins. Co. of North America, 115 Ind. 257; State *v.* Fidelity & C. Co., 77 Iowa, 648; Scottish Un. & Nat. Ins. Co. *v.* Herriott, 109 Iowa, 606; Leavenworth *v.* Booth, 15 Kan. 627; Phœnix Ins. Co. *v.* Welch, 29 Kan. 672; Commonwealth *v.* Milton, 12 B. Mon. (Ky.) 212; Southern Bldg. & Loan Assoc. *v.* Norman, 98 Ky. 294; State *v.* Lathrop, 10 La. An. 398; State *v.* Fleming, 70 Neb. 523; State *v.* Ins. Co. of North America, 71 Neb. 320; Aachen & M. F. Ins. Co. *v.* Omaha, 72 Neb. 518; *Ex parte* Cohn, 13 Nev. 424; Tatem *v.* Wright, 23 N. J. L. 429; Lumberville Delaware Bridge Co. *v.* State Assessors, 55 N. J. L. 529, 535, 536; Tide-Water Pipe Co. *v.* State Assessors, 57 N. J. L. 516, aff'd 59 N. J. L. 269; People *v.* Wemple, 131 N. Y. 64; People *v.* Roberts, 152 N. Y. 59; aff'g 11 N. Y. App. Div. 310; People *v.* Barker, 157 N. Y. 159; People *v.* Roberts, 158 N. Y. 168, rev'g 29 N. Y. App. Div. 585; People *v.* Barker, 23 N. Y. App. Div. 524, aff'd 155 N. Y. 665; People *v.* Roberts, 36 N. Y. App. Div. 597; Commonwealth *v.* New York, L. E. & W. R. Co., 129 Pa. 463, rev'd 153 U. S. 628; Slaughter *v.* Commonwealth, 13 Gratt. (Va.) 767.

In Philadelphia Fire Assoc. *v.* New York, 119 U. S. 110, a *Pennsylvania* insurance company transacted business in *New York*, receiving, until 1882, certificates of authority to do so from the proper State officers, pursuant to the statutes of New York. A statute of New York declared that whenever a similar New York corporation should be required by the laws of another State to pay a greater license fee than the laws of New York then required from similar corporations of such other State, all companies of such other State should pay in New York a license fee equal to that imposed by such other State on New York companies. Pennsylvania passed a statute imposing such a license fee, and in 1882, after the plaintiff company had been ad-

the decisions of the United States Supreme Court uniformly recognize that *there are exceptions to the rule,* which exceptions embrace cases

mitted to transact business, the New York insurance department required the company to pay as a license fee a tax similar to that exacted by Pennsylvania from similar New York corporations. It was held that the insurance company could not, of right, come within the jurisdiction of New York until admitted by the State or on a compliance with the condition of admission imposed, viz., the payment of the license fee, and that the tax was properly levied.

In Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 227, 228, in sustaining a tax imposed upon a foreign corporation for the privilege of exercising its franchise within the State of *Maine,* Mr. Justice *Field,* who delivered the opinion of the court said: "As the granting of the privilege rests entirely within the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specified sum, or may apportion the amount exacted according to the value of the business permitted as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the State in determining what may be justly exacted for the privilege."

The *State of New York* may impose upon a corporation of *Michigan,* whose manufactory is situated in Michigan, but which has a warehouse and depot in New York where the company keeps on hand varying quantities of its manufactured produce for sale at wholesale in the original packages, a tax upon its franchise on business computed upon the amount of the capital stock employed within the State; and the fact that manufacturing corporations of New York are not subjected to this tax is not an illegal discrimination. The tax levied is not a tax upon interstate commerce. New York *v.* Roberts, 171 U. S. 658. Mr. Justice *Shiras,* who delivered the opinion of the court, said, "From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested." A State may impose a *license tax* upon a foreign corporation for the *privilege of keeping an office* within the State for its convenience. Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181. But *not* when the corporation is a railroad company *engaged in the transaction of interstate commerce.* McCall *v.* California, 136 U. S. 104; Norfolk & W. R. Co. *v.* Pennsylvania, 136 U. S. 114. See also Clyde S. S. Co. *v.* Charleston, 76 Fed. Rep. 46.

New York Tax Law on Foreign Corporations. Under the New York statute, jurisdiction to tax *foreign* corporations depends upon the existence of two concurring conditions, viz., that the corporation sought to be taxed shall be "doing business" in the State, and that its capital or some portion thereof shall be "employed within this State." People *v.* Campbell, 139 N. Y. 68; People *v.* Roberts, 154 N. Y. 1. The question whether a foreign corporation *does business within the State* must be determined from the actual character of the business carried on and not from the existence of any unexercised power reserved to it by its contracts, or by the fact that it possesses the natural and contractual right to carry on such business. People *v.* American Bell Tel. Co., 117 N. Y. 241. Where the business of a foreign corporation transacted within the State includes both the manufacture and sale of goods and is so conducted as to be intended by it to be a permanent and continuous business, the corporation is taxable under the statute. People *v.* Barker, 157 N. Y. 159, modifying 31 N. Y. App. Div. 263. Contribution by a foreign corporation to the capital stock of a limited partnership doing business in New York is the transaction of business and the investment of capital within the State within the meaning of the statute. People *v.* Roberts, 152 N. Y. 59, aff'g 11 N. Y. App. Div. 310. A foreign corporation *owning,*

where a corporation created by one State rests its right to enter another and to engage in business therein upon *the Federal nature* of

managing and renting an office building in the city of New York is liable to license and franchise tax as a corporation having its capital employed within the State. People *v.* Miller, 181 N. Y. 328, aff'g 98 N. Y. App. Div. 584. See also People *v.* Glynn, 194 N. Y. 387, aff'g 127 N. Y. App. Div. 933. *Goodwill* of the business of a foreign corporation which transacts business only in New York, and merely has a corporate charter from another State, is to be included in the capital of the corporation employed within the State. People *v.* Roberts, 159 N. Y. 70, rev'g 35 N. Y. App. Div. 624. *Book accounts of credits and bills receivable* for goods sold in New York in the course of the transaction of business there are to be included in computing the capital employed within the State. People *v.* Barker, 23 N. Y. App. Div. 524, aff'g 155 N. Y. 665. *Surplus earnings* of a foreign corporation carrying on a portion of its business in New York invested in real estate in New York, but not occupied by it or used by it in transacting its ordinary business, do not constitute capital employed within the State and are not taxable as such. People *v.* Wemple, 150 N. Y. 46. *Massachusetts* corporation manufacturing and licensing others to *use telephones does not do business in New York* by licensing the use of telephones within the State and furnishing telephones to the licensees. People *v.* American Bell Tel. Co., 117 N. Y. 241. A *foreign corporation* whose capital is invested in the stock and bonds of another foreign corporation doing business wholly out of New York and whose whole income is derived from such investment *does not employ its capital within the State* within the meaning of the statute, although it does business within the State, by maintaining in New York a leased office with furniture, officers, and clerks, where it receives and distributes the dividends or income derived from its investment, which constitutes its whole business. People *v.* Roberts, 154 N. Y. 1. Employment of an *agent to solicit orders* in New York is not doing business within the State within the meaning of the statute. People *v.* Roberts, 22 N. Y. App. Div. 282. Maintaining an office for soliciting and securing *advertising patronage for a foreign corporation* and collecting upon such contracts is not the employment of capital within the State within the meaning of the statute. People *v.* Roberts, 30 N. Y. App. Div. 150. Where the *only* business transacted is the soliciting of orders through agents and their orders are filled from the factory of the foreign corporation in another State, the fact that the corporation keeps samples of considerable value in an office in New York which it leased, and a bank account, does not make it liable to taxation here, since these are merely incidental to the soliciting of orders and making sales. People *v.* Roberts, 27 N. Y. App. Div. 455. A foreign corporation *does not employ its capital within New York* although it has an office therein in charge of a salaried agent when the office is maintained simply as a convenient meeting place for its patrons for the discussion of questions preliminary to the making of contracts, the contracts themselves being in every case executed at the home office and the rent of the office and salary of its agent being paid by checks drawn upon a bank of another State. People *v.* Campbell, 139 N. Y. 68. *A foreign manufacturing corporation does not do business* within the State although it rents part of a building in New York and maintains an office there kept by a selling agent from which are distributed samples of trifling value to customers and to travelling agents, the latter of whom were paid from that office. People *v.* Roberts, 8 N. Y. App. Div. 201. See also People *v.* Wells, 98 N. Y. App. Div. 82, aff'd 182 N. Y. 553. But a *corporation does business within the State* and employs its capital therein where it has a salaried manager and officer force in New York, keeps a bank account there, and maintains warerooms in New York in which the company keeps for sale an average of $50,000 worth of goods manufactured in another State and employs and discharges in New York travelling salesmen who sell goods throughout that State, a considerable percentage of such goods being delivered from the New York establishment. People *v.* Feitner, 49 N. Y. App. Div. 108. A foreign manufacturing company which

its business. As, for instance, where it has derived its being from an Act of Congress, or has become a lawful agency for the performance of governmental or *quasi*-governmental functions, or where it is necessarily an instrumentality of interstate commerce or its business constitutes such commerce, and is, therefore, fully within the paramount authority of Congress. In these cases the exceptional business is protected against interference by State authority.[1]

maintains a sales agency in New York with a depot or warehouse for its manufactures, sells a large portion thereof in the State and delivers them to officers there and keeps large sums of money on deposit in banks of the State for the purpose of its business, *does business* and employs its capital within the State and is taxable. People *v.* Wemple 131 N. Y. 64.

[1] Pembina Min. Co. *v.* Pennsylvania, 125 U. S. 181, 190; California *v.* Central Pac. R. Co., 127 U. S. 1; Hooper *v.* California, 155 U. S. 648, 652, 653, *per* Mr. Justice *White*; Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688, 696.

In Crutcher *v.* Kentucky, 141 U. S. 47, 59, where a *license tax* exacted by a State of the agent of a *foreign express company* was held to be a regulation of *interstate commerce*, Mr. Justice *Bradley*, who delivered the opinion of the court, said: "The case is entirely different from that of a foreign corporation seeking to do a business which does not belong to the regulating power of Congress. The *insurance business*, for example, cannot be carried on in a State by a foreign corporation without complying with all the conditions imposed by the legislature of that State. So with regard to *manufacturing corporations*, and all other corporations whose business is of a local and domestic nature, which would include express companies, whose business is confined to points and places wholly within the State." The limitations founded upon the fact that the foreign corporation is engaged in *interstate commerce* are discussed elsewhere in this treatise, see *ante*, §§ 1356–1362. In Western Un. Tel. Co. *v.* Kansas, 216 U. S. 1, rev'g 76 Kan. 609, and Pullman Co. *v.* Kansas, 216 U. S. 56, rev'g 75 Kan. 664, the Supreme Court of the United States had under consideration a statute of Kansas which provided among other things that corporations of other States, including those engaged in interstate commerce, must, as a condition precedent to the right to transact local business in Kansas, "pay to the State Treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of one-tenth of one per cent of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof; and upon the next four hundred thousand dollars, or any part thereof, one-twentieth of one per cent; and for each million or major part thereof over and above the sum of five hundred thousand dollars, two hundred dollars." The Western Union Telegraph Company, a New York corporation, having a capital of $100,000,000, and the Pullman Company, a corporation of Illinois, having a capital of $74,000,000, both engaged in Kansas in interstate commerce, resisted the payment of this tax. The Supreme Court refused to be bound by mere forms of expression in the statute and declined to confine the effect of the statute, as expressed therein, to the right to do local business. It held that the natural and reasonable effect of the statute, disregarding mere forms of expression, made the payment by the Telegraph Company and the Car Company, as a charter fee, of a given per cent of their authorized capital, representing, as that capital clearly did, all of the business and property both within and outside of the State, a condition of the right to do local business in Kansas, was, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the companies' interstate business and on their property located or used outside of the State. Mr. Justice *Harlan* said (216 U. S. 37): "The statutory requirement that the Telegraph Company shall, as a condition of its right to engage in local business in Kansas, first pay into the State school fund a given

§ 1365. **Due Process of Law; Right to Notice and Hearing.** — What is *due process of law* within the provisions of the Fourteenth Amendment to the Federal Constitution and similar provisions in the Constitutions of the respective States depends on circumstances, and varies with the subject matter and the necessities of the situation.[1] Although due process of law within the meaning of the Con-

per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the State, contribute to the support of the State's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance. It is easy to be seen that if every State should pass a statute similar to that enacted by Kansas not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified and the business of the country thrown into confusion, but each State would continue to meet its own local expenses not only by exactions that directly burden such commerce, but by taxation upon property situated beyond its limits. . . . It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the general government and not in hostility to rights secured by the supreme law of the land."

As to invalidity of stipulations imposed by a State as a condition of doing business within the State that a *foreign corporation shall not remove to a Federal Court actions against it*, see Home Ins. Co. *v.* Morse, 20 Wall. (U. S.) 445; Barron *v.* Burnside, 121 U. S. 186; Southern Pac. Co. *v.* Denton, 146 U. S. 202; Martin *v.* Baltimore & O. R. Co., 151 U. S. 673, 684; Goldey *v.* Morning News, 156 U. S. 518, 523; Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 111; Cable *v.* United States L. Ins. Co., 191 U. S. 288, 306, 307; Security Mut. L. Ins. Co. *v.* Prewitt, 202 U. S. 246; Texas Land Co. *v.* Worsham, 76 Tex. 556.

[1] "What is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation. Thus summary proceedings suffice for taxes, and executive decisions for exclusion from the country." *Per* Mr. Justice *Holmes* in Boyer *v.* Peabody, 212 U. S. 78, 84, citing Murray *v.* Hoboken Land & Imp. Co., 18 How. (U. S.) 272; United States *v.* Ju Toy, 198 U. S. 253, 263.

"That clause of the Fourteenth Amendment is found, in almost identical language, in the several State Constitutions, and is intended as additional security against the arbitrary deprivation of life and property and the arbitrary spoliation of property. Neither can be taken without due process of law. What constitutes that process it may be difficult to define with precision so as to cover all cases. It is, no doubt, wiser, as stated by Mr. Justice *Miller* in Davidson *v.* New Orleans, 96 U. S. 97, 104, to arrive at its meaning 'by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' It is sufficient to observe here, that by 'due process' is meant one which, following the terms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that

stitution implies in many cases notice and an opportunity to be heard, yet this right does not uniformly exist in *the imposition and collection of taxes*. Of the different kinds of taxes which the State may impose there are many of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of the business), and generally specific taxes on things or persons or occupations. In such cases the legislature in authorizing the tax fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he may thus be deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of a judicial nature, and nothing could be changed by a hearing of the taxpayer.[1] The decisions of

there must be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights." *Per* Mr. Justice *Field* in Hagar *v.* Reclamation Dist., No. 108; 111 U. S. 701, 707, 708.

[1] *Per* Mr. Justice *Field* in Hagar *v.* Reclamation Dist., 111 U. S. 701, 709. See also McMillen *v.* Anderson, 95 U. S. 37; Hodge *v.* Muscatine County, 196 U. S. 276, 280, aff'g 121 Iowa, 482; Lower Kings River Reclamation Dist. No. 531 *v.* Phillips, 108 Cal. 306, 314; Carney *v.* People, 210 Ill. 434, 440; *In re* Smith, 104 Iowa, 199; People *v.* Reardon, 184 N. Y. 431, 446; People *v.* Ronner, 185 N. Y. 285, 293, aff'g 110 N. Y. App. Div. 816; Commonwealth *v.* Lehigh Val. R. Co., 129 Pa. 429, 456.

A statute of *West Virginia* made it the duty of the owner of lands to place his lands on the tax books and provided that "when for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more shall not have been charged on such tax books, then *by operation hereof* the lands shall be forfeited and the right thereto vested in the State." It was held that the owner of the land was chargeable with notice of the provisions of the statute, and that he was not deprived of his property without due process of law, because of the fact that he did not receive any notice or a hearing before forfeiture was effected. State *v.* Sponaugle, 45 W. Va. 415. See also State *v.* Cheney, 45 W. Va. 478; State *v.* Swann, 46 W. Va. 128; Davis *v.* Living, 50 W. Va. 431; Stockton *v.* Craig, 56 W. Va. 464; State *v.* Harman, 57 W. Va. 447; Webb *v.* Ritter, 60 W. Va. 193; State *v.* West Branch Lumber Co., 64 W. Va. 673; State *v.* King, 64 W. Va. 546; State *v.* King, 64 W. Va. 610; s. c. *sub. nom.* King *v.* West Virginia, 216 U. S. 92; Baldwin *v.* Ely, 66 Wis. 171, 188, 192.

"Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occasion to hold that in proceedings for the condemnation of land under the laws of eminent domain or for imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential. But laws for the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary." *Per* Mr. Justice *Brown* in Turpin *v.* Lemon, 187 U. S. 51, 57. The legislature may impose *a tax on the privilege or right to carry on a business and no notice* of the assessment or levy of the tax is necessary. The legislature may also, without any notice to the owner of the premises where the business is carried on, other than such as implied in the

the Supreme Court of the United States do not disclose any limitation or qualification upon the power of the legislature to enact statutes imposing taxes and prescribing the amount which shall be levied upon property without notice and a hearing or an opportunity to be heard to the taxpayer. Where an Act of Congress in providing for a system of water works in the District of Columbia directed that assessments for laying water mains should be at the rate of $1.25 per linear front foot against all lots or lands abutting upon the street, road, or alley in which a water main should be laid, the Supreme Court of the United States held, against the contention of a property owner that he was entitled to notice, that the statute was valid and that the property owner was not entitled to notice either as to the creation of the system or as to the cost thereof to the property owners, — these questions being determined by legislative enactment, — or as to the propriety and necessity of laying water mains and pipes in the street, — that function being conferred upon the commissioners of the district and the *bona fide* exercise of their power being beyond review by the courts.[1] But the greater part of money which is raised

enactment of the statute, make such tax a lien on the property in which the business is carried on. The owner, besides being chargeable with knowledge of the law, is presumed to know the business there carried on, and to have let the property with knowledge that it might become encumbered by a tax imposed on such business. Hodge *v.* Muscatine County, 196 U. S. 276, 281, aff'g 121 Iowa, 482. See also Newton *v.* McKay, 130 Iowa, 596, 598.

[1] In Parsons *v.* District of Columbia, 170 U. S. 45, 51, 52, an Act of Congress of 1894 provided that "hereafter assessments levied for laying water mains in the District of Columbia, shall be at the rate of $1.25 per linear front foot against all lots or lands abutting upon the street, road, or alley in which a water main shall be laid." A property owner who was subjected to such an assessment contested the validity of the assessment on the grounds (1) that the statute was unconstitutional; (2) that his property was not sufficiently described, and (3) that no sufficient notice of the assessment was given to him. The Supreme Court of the United States decided all these contentions against the property owner. It will be observed that the creation of the system and the imposition of the cost thereof upon abutting property were effected by direct statutory enactment, and the Supreme Court distinguished between taxes or assessments levied by a legislative body having full authority over the subject and the acts of commissioners or official persons to be appointed under municipal ordinance or regulations, and held that the owners of abutting property could not be heard to complain that they were not notified of the improvement or given a hearing as to the probable cost thereof. Mr. Justice *Shiras*, who delivered the opinion of the court, said: "There is a wide difference between a tax or assessment prescribed by a legislative body having full authority over the subject and one imposed by a municipal corporation acting under a limited and delegated authority. And the difference is still wider between a legislative act making an assessment and the action of mere functionaries whose authority is derived from municipal ordinances. The legislation in question in the present case is that of the Congress of the United States and must be considered in the light of the conclusion so often announced by this court, that the United States possesses complete jurisdiction both of a political and municipal nature over the District of Columbia. By this legislation a comprehensive system regulating the supply of water and the erection and

by taxation for public purposes, whether State or municipal, is levied in the form of taxes upon property *ad valorem*, and it is not

maintenance of reservoirs and of water mains was established and of this legislation every property owner in the district must be presumed to have notice. And accordingly, when by the Act of August 11, 1894, Congress enacted that thereafter assessments levied for laying water mains in the District of Columbia should be at the rate of $1.25 per linear foot against all lots or lands abutting upon the street, road, or alley in which a water main shall be laid, such act must be deemed conclusive alike of the question of the necessity of the work, and of the benefits as against abutting property. To open such questions for review by the courts, on the petition of any or every property holder, would create endless confusion. Where the legislature has submitted these questions for inquiry to a commission, or to official persons, to be appointed under municipal ordinance or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing or to notice or an opportunity to be heard." As to the action of commissioners in directing the laying of mains, Mr. Justice *Shiras* said, "The power conferred upon the commissioners was not to make assessments upon abutting properties, nor to give notice to the property owners of such assessment, but to determine the question of the propriety and necessity of laying water mains and water pipes and of erecting fire plugs and hydrants and their *bona fide* exercise of such a power cannot be reviewed by the courts."

In People *v.* Pitt, 169 N. Y. 521, aff'g 64 N. Y. App. Div. 316, the charter of a village provided that the sewer commissioners should assess and levy "by direct tax or assessment on the property located or fronting on the street" through which any sewer might be laid or built or on property draining therein "for each linear foot of the sewers built within said street three dollars and forty cents per linear foot of sewers laid or built . . . the tax to be assessed one half on the property fronting on each side of such streets per linear foot of said frontage or on property draining therein; exempting from such tax or assessment property so situated that it cannot connect with or use the sewers for any of the purposes for which said sewers were built." Provision was made *for notice* of the completion of any assessment and a hearing of the persons aggrieved thereby. An assessment having been made, a property owner objected thereto that the legislature had no power to provide for the assessment upon his property of a fixed sum based upon each linear foot of sewer built in the street in front of his premises without any opportunity to be heard with respect to the benefits to his property arising from the construction of the sewer, or the justice and equity of the burden imposed. But the court held that the justice or propriety of the principle upon which the assessment should be apportioned is a *legislative question*, and that the property owner had no right to notice and a hearing in respect thereof. *O'Brien*, J., said: "The power of the legislature to impose the *entire cost* of the improvement, whatever it may be, whether regulating, grading, or paving a street itself, or the construction of a sewer therein, upon some rule or principle of apportionment prescribed in the statute, I assume cannot be doubted; and, hence, the power to impose some portion of the cost upon the local property owners must follow as a necessary conclusion, and unless the legislature is restricted in the choice of methods, it may adopt such rule or principle of apportionment as it determines to be just and equitable. It may select, as the basis of the rule or principle of apportionment, the assessed value of the several lots, the actual benefits to be derived from the improvement, a fixed percentage of the cost of the work, or a fixed sum per linear foot of the frontage of the parcels of property affected by the improvement. . . . The principle that the citizen cannot be deprived of his property without due process of law is applicable to all laws for imposing taxes; but only to this extent and in this sense, that before he is required to pay the tax or assessment, or before it shall be deemed to be conclusively established against him, he shall have notice of the proceeding and an opportunity to be heard before some board or official body competent to review the proceedings,

appropriate or expedient, if practicable, to determine by direct statutory enactment the value of property subject to a tax. The duty of ascertaining and listing the property subject to the tax, assessing its value, and determining the amount of the tax to be levied, is delegated to assessors or other local officers.[1]

or to redress any just grievance that he may have upon the facts. But the rule or principle of apportionment is a question that rests wholly with the legislature when enacting a law, and the citizen has no absolute right to a hearing upon that question any more than he is entitled to be heard upon the selection by the legislature of the subjects of taxation. . . . The provisions of the charter did not deny the relator the right to a judicial hearing before the assessment became conclusive upon him, and so far as that right is secured to the citizen by the Constitution or any principle of law in proceedings for imposing a tax or assessment, it was not disregarded or violated by the statute in question. . . . He had the right to a hearing upon every question relating to the validity or amount of the assessment, except the principle or rule of apportionment, and that was prescribed by the legislature in the exercise of its discretion, and he had no more right to a hearing upon that question after the statute was enacted than he had to a hearing upon the question whether his property should be assessed at all."

In Matter of Union College, 129 N. Y. 308, where an assessment had been held to be invalid for failure to give notice at a hearing on the apportionment, it was held that it was not within the power of the legislature by direct enactment to impose a similar assessment based upon the old apportionment *without notice* and a hearing. In Nehasane Park Assoc. *v.* Lloyd, 167 N. Y. 431, 439, aff'g 45 N. Y. App. Div. 631, where the statute created a special tax district out of parts of three different counties and directed commissioners for the construction of a highway *to levy a tax of fifteen cents* upon every one hundred acres of land in one county and *ten cents* on every one hundred acres of land in the other counties, the court referred to the fact that the legislature, in creating this district and in providing that all lands within the district should be taxed at a specified sum per acre without any regard to the value of the lands, or the benefits to be derived from the improvement, did not give to the landowner a hearing or an opportunity to be heard in regard to the apportionment of the tax, and although the case was decided on other grounds and the court did not hold that this method was unconstitutional, it expressed doubt on the subject, saying, *per O'Brien*, J.: "It was a uniform burden fixed by the legislature itself upon all lands within the district irrespective of their value, or their relation to the proposed improvement, or any special benefit to be derived from the construction of the road. We are not prepared to say that the statute was a valid exercise of power under the Constitution. It has been generally understood that a fixed and arbitrary sum assessed by statute upon property and imposed without reference to some system of just and equitable apportionment, and without any opportunity to the owner to be heard, cannot be upheld."

In English *v.* Wilmington, 2 Marv. (Del.) 63, it was held that the *legislature may, without notice* to the property owners to be assessed, fix the amount per foot of frontage or per square foot of area, which property adjoining a sewer shall be assessed for the cost of construction. See also Gillette *v.* Denver, 21 Fed. Rep. 822; Amery *v.* Keokuk, 72 Iowa, 701; Dittoe *v.* Davenport, 74 Iowa, 66. In Cleveland *v.* Tripp, 13 R. I. 50, the city charter provided that all sewer assessments should be made upon abutting property at a prescribed rate per front foot, and it was held that the fact that notice was not required to be given and that the assessment was made without notice, did not affect the validity of the assessment.

[1] In *Kentucky*, it has been held that the legislature has no power to fix the valuation of property for purposes of *ad valorem* taxation. The valuation or assessment of property for that purpose is a ministerial act, and no such power can be exercised by the legislature, even though it takes as a basis a

When, however, a special assessment is levied on property not specifically, but according to its value or the benefit derived from the improvement, *to be ascertained by assessors* appointed for that purpose upon such evidence as they may obtain, the officers, in estimating the value *act judicially*, and of such proceedings *a property owner must, before his property can be sold, have notice*, either actual or constructive.[1] But it is well established that if

void assessment which the assessor has attempted to make. Slaughter *v.* Louisville, 89 Ky. 112.

[1] Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701, 709, 710; Palmer *v.* McMahon, 133 U. S. 660, 669; Security Trust & Safety Vault Co. *v.* Lexington, 203 U. S. 323; Londoner *v.* Denver, 210 U. S. 373, 385; Scott *v.* Toledo, 36 Fed. Rep. 385, 397; Meyers *v.* Shields, 61 Fed. Rep. 713; Boorman *v.* Santa Barbara, 65 Cal. 313; Reclamation Dist. No. 551 *v.* Runyon, 117 Cal. 164, 165; Lower Kings River Reclamation Dist. No. 531 *v.* McCullah, 124 Cal. 175; People *v.* Carney, 210 Ill. 434, 440; Garvin *v.* Daussman, 114 Ind. 429; Kizer *v.* Winchester, 141 Ind. 694; Indianapolis *v.* Holt, 155 Ind. 222, 233; Gatch *v.* Des Moines, 63 Iowa, 718; Griswold College *v.* Davenport, 65 Iowa, 633; Auer *v.* Dubuque, 65 Iowa, 650; Ferry *v.* Campbell, 110 Iowa, 290, 297; Gilmore *v.* Hentig, 33 Kan. 156; Slaughter *v.* Louisville, 89 Ky. 112; Ulman *v.* Baltimore, 72 Md. 587; Sears *v.* Boston Street Com'rs, 173 Mass. 350, 355; State *v.* Weyerhauser, 68 Minn. 353, 362; St. Louis *v.* Ranken, 96 Mo. 497, 505; Weber *v.* Lockman, 66 Neb. 469; Stuart *v.* Palmer, 74 N. Y. 183; People *v.* Equitable Trust Co., 96 N. Y. 387, 395, 396; Matter of McPherson, 104 N. Y. 306, 321; Remsen *v.* Wheeler, 105 N. Y. 573; People *v.* Wemple, 117 N. Y. 77; McLaughlin *v.* Miller, 124 N. Y. 510; Matter of Union College, 129 N. Y. 308; People *v.* Selkirk, 180 N. Y. 401, 406; People *v.* O'Donnel, 183 N. Y. 9, 12; Power *v.* Larabee, 2 N. Dak. 141, 155; Rolph *v.* Fargo, 7 N. Dak. 640, 671; Philadelphia *v.* Miller, 49 Pa. 40; Godfrey *v.* Bennington Water Co., 75 Vt. 350, 356; Violett *v.* Alexandria, 92 Va. 561; Heth *v.* Radford, 96 Va. 272, 274; Norfolk *v.* Young, 97 Va. 728; Richmond *v.* Williams, 102 Va. 733, 739; Whitlock *v.* Hawkins, 105 Va. 242, 264; Dietz *v.* Neenah, 91 Wis. 422, 428.

But it is not to be inferred from the text that because assessing officers act judicially in a sense that "due process of law" requires *judicial* proceedings to collect and enforce taxes and assessments. Kelly *v.* Pittsburgh, 104 U. S. 78.

"In the assessment, apportionment, and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the States. In the enforcement of such restrictions as the Constitution does impose, this court has regarded substance and not form. But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing." *Per* Mr. Justice *Moody* in Londoner *v.* Denver, 210 U. S. 373, 385. The fact that a taxpayer has withheld property from the tax returns in the honest belief that it is not taxable, does not deprive him of the right to a hearing as to the validity of the tax and the amount of the assessment. His constitutional right to a hearing is not satisfied when he is allowed to attack the assessment *only* for fraud and corruption on the part of the assessors. Central of Georgia R. Co. *v.* Wright, 207 U. S. 127, rev'g 124 Ga. 596, 630, 125 Ga. 589, 617. A city ordinance prescribing an annual charge to be paid by property owners for the use of a common sewer permits the owner to use the sewer or not as he chooses, and involves a contractual relation and not the power of taxation. The property owner *is not entitled to notice* and a hearing as to the amount of the

provision be made for notice to and a hearing of each proprietor whose property is subjected to a public assessment at some stage of the proceedings upon the question what proportion of the tax shall be assessed upon his land or property, and such notice as is appropriate is in fact given, and an opportunity to be heard is in fact afforded before the assessment becomes irrevocably fixed, there is no taking of property without due process of law.[1] The

charge to be imposed for such use. Carson *v.* Brockton Sewerage Com'n, 182 U. S. 398.

In Stuart *v.* Palmer, 74 N. Y. 183, an act empowering three persons to open and pave an avenue, and for the purpose "to take such land as was requisite, estimate the value thereof, and assess the amount on the lands benefited by the opening of the avenue in proportion to the benefits," but which provided for no notice to the property owner, was held unconstitutional and the proceedings invalid. Notice in some form was essential, and here the legislature had not provided for notice in any form. After the decision in Stuart *v.* Palmer, *supra*, the legislature, in 1881, passed an act directing a sum equal to so much of the first assessment as had not been paid, with interest, and a proportionate part of the expenses of that assessment, to be assessed upon and equitably apportioned among the lots upon which the former assessment had not been paid, first giving notice to all parties interested to appear and be heard upon the question of apportionment of this sum among these lots. But no notice or hearing was provided as to any apportionment between them and those lots upon which the first assessment had been paid. The Court of Appeals sustained the Act of 1881. Spencer *v.* Merchant, 100 N. Y. 585. It held that the Act of 1881 did not unconstitutionally deprive the parties of their property "without due process of law," contrary to art. i., § 7, of the Constitution of the State. The Act of 1881 was regarded by the Court of Appeals as in effect a new assessment, fixing the amount of tax to be raised for the local improvement, the property to be assessed therefor, and the mode of apportionment, all of which the legislature in New York had the power to do, which power was not in that State subject to any special constitutional limitations or to judicial review; reaffirming Litchfield *v.* Vernon, 41 N. Y. 123, 141; People *v.* Brooklyn, 4 N. Y. 419; People *v.* Flagg, 46 N. Y. 401; Horn *v.* New Lots, 83 N. Y. 100. This judgment was taken to the Supreme Court of the United States, which decided that the Act of 1881 did not deprive the parties thereby affected of their property without due process of law, in violation of the Fourteenth Amendment. Spencer *v.* Merchant, 125 U. S. 345. *Matthews* and *Harlan*, JJ., dissented on the ground that the decision of the Court of Appeals in Stuart *v.* Palmer was right, and that it was impossible to reconcile its subsequent decision in Spencer *v.* Merchant, *supra*, with it; and that it was an evasion to say that the Act of 1881 was an original assessment upon a district created by law for that purpose, consisting of the lands adjudged by the legislature to be benefited by the improvement.

[1] McMillen *v.* Anderson, 95 U. S. 37; Davidson *v.* New Orleans, 96 U. S. 97; Kelly *v.* Pittsburgh, 104 U. S. 78; Hagar *v.* Reclamation District No. 108, 111 U. S. 701; Wurts *v.* Hoagland, 114 U. S. 606, 615; Spencer *v.* Merchant, 125 U. S. 345, 356, aff'g 100 N. Y. 585; Paulsen *v.* Portland, 149 U. S. 30, 41; Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112, 168; Bauman *v.* Ross, 167 U. S. 548, 590; Pittsburgh, C., C. & St. L. R. Co. *v.* West Virginia Board of Public Works, 172 U. S. 32, 45; King *v.* Portland, 184 U. S. 61, aff'g 38 Oreg. 402, 417; Hibben *v.* Smith, 191 U. S. 310, 322; Hodge *v.* Muscatine County, 196 U. S. 276, aff'g 121 Iowa, 482; Sanford *v.* Poe, 69 Fed. Rep. 546, 553; Brown *v.* Drain, 112 Fed. Rep. 582, aff'd 187 U. S. 635; Duncan *v.* Ramish, 142 Cal. 686, 691; Denver *v.* Dumars, 33 Colo. 94; Garvin *v.* Daussman, 114 Ind. 429; Gallup *v.* Schmidt, 154 Ind. 196, 202; Bowlin *v.* Cochran, 161 Ind. 486; Ross *v.* Wright County, 128 Iowa, 427, 440; Nevin *v.* Roach, 86 Ky. 492; Balti-

right to a hearing, when it exists, implies not merely the right to present objections to the validity or regularity of the tax, but includes the right of the taxpayer to support his allegations by argument, and, if need be, by proof.[1] It has been held that the law must require notice to the property owner, and give him the right to a hearing or an opportunity to be heard;[2] but the Supreme Court of the United States has sustained the validity of a special assessment, although the statute and ordinance by virtue of which it was levied did not contain any express provision for notice, when according to the decisions of the State courts such requirement was implied by law and notice was in fact given.[3]

more *v.* Ulman, 79 Md. 469, 480; Baltimore *v.* Stewart, 92 Md. 535, 545; McMillan *v.* Freeborn County, 93 Minn. 16, 21; Saxton Nat. Bank *v.* Carswell, 126 Mo. 436, 443; Alfalfa Irrig. Dist. *v.* Collins, 46 Neb. 411, 423; Terrel *v.* Wheeler, 123 N. Y. 76; People *v.* Pitt, 169 N. Y. 521, aff'g 64 N. Y. App. Div. 316; Wells County *v.* McHenry, 7 N. Dak. 246, 257; Erickson *v.* Cass County, 11 N. Dak. 494, 498; Wilson *v.* Salem, 24 Oreg. 504, 509; King *v.* Portland, 38 Oreg. 402; Nottage *v.* Portland, 35 Oreg. 539; Douglas County *v.* Commonwealth, 97 Va. 397, 401; Adams *v.* Roanoke, 102 Va. 53, 63; Whitlock *v.* Hawkins, 105 Va. 242, 265; Nathan *v.* Spokane County, 35 Wash. 26; Meggett *v.* Eau Claire, 81 Wis. 326; Schintgen *v.* La Crosse, 117 Wis. 158, 165.

[1] Londoner *v.* Denver, 210 U. S. 373, 386, rev'g 33 Colo. 104. See also Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112, 171, 172. A *statute directed* that upon the completion of the apportionment of special assessments the city clerk should by advertisement "*notify the owners* of real estate to be assessed that said improvements have been, or are about to be, completed and accepted, therein specifying the whole cost of the improvements, and the shares so apportioned to each lot or tract of land; and that any complaints or objections that may be made in writing, by the owners, to the city council and filed with the city clerk within thirty days from the first publication of such notice will be heard and determined by the city council before the passage of any ordinance affixing the cost of said improvements." Advertisement calling for objections was made as required by the terms of the statute, but it did not specify any time or place when the objections should be heard. A property owner made and filed objections in writing, but the city council proceeded to pass an ordinance fixing the cost of the improvement without fixing a time or place of hearing or giving an opportunity to be heard upon the objections filed. The Supreme Court of the United States held that the requirements of due process of law, even in proceedings for taxation, implied more than the right to file objections, and that the statutory right to a hearing, even in taxation, demanded that he who is entitled to it should have the right to support his allegations by argument, and, if need be, by proof; and that, as such a hearing expressly given by statute was by the proceedings in this case denied to the property owners, the assessment was invalid. Londoner *v.* Denver, 210 U. S. 373, 386, rev'g 33 Colo. 104.

[2] Stuart *v.* Palmer, 74 N. Y. 183; Violett *v.* Alexandria, 92 Va. 561.

[3] Paulsen *v.* Portland, 149 U. S. 30, 40. To the same effect, Londoner *v.* Denver, 210 U. S. 373, 379, 381; Sanford *v.* Poe, 69 Fed. Rep. 546; McCarty *v.* Southern Pac. Co., 148 Cal. 211, 214; Garvin *v.* Daussman, 114 Ind. 429; Gatch *v.* Des Moines, 63 Iowa, 718; Gilmore *v.* Hentig, 33 Kan. 156; Williams *v.* Detroit, 2 Mich. 560; Minard *v.* Douglas County, 9 Oreg. 206; Wilson *v.* Salem, 24 Oreg. 504; Shannon *v.* Portland, 38 Oreg. 382, 393; Tripp *v.* Yankton, 10 S. Dak. 516; Davis *v.* Lynchburg, 84 Va. 861; Baltimore & O. R. Co. *v.* Pittsburg, W. & K. R. Co., 17 W. Va. 812, 835.

Construction by State court of a

The phrase "due process of law" in matters of taxation and local assessments *does not necessarily mean a judicial proceeding*, with the notice and hearing appropriate thereto. The power to tax belongs exclusively to the legislative branch of the government, and when the law provides for a mode of confirming or contesting the charge imposed with such notice to the person as is appropriate to the case, the assessment cannot be said to deprive the owner of his property without due process of law.[1] Hence, in the case of property taxes imposed at regularly recurring periods for general State or municipal purposes, a statute fixing a definite body before whom and a time when complaints may be made and a hearing had thereon, gives all the notice that is required by due process of law.[2] And in the case of both general taxes and special

statute providing for the imposition of taxes as giving to taxpayers the *right to appear* before the assessing board and to be heard, held to be conclusive upon the Federal courts. Pittsburgh, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 421, 426.

[1] Spencer *v.* Merchant, 125 U. S. 345; Walston *v.* Nevin, 128 U. S. 578; Palmer *v.* McMahon, 133 U. S. 660, 669; Williams *v.* Eggleston, 170 U. S. 304; Parsons *v.* District of Columbia, 170 U. S. 45; King *v.* Portland, 184 U. S. 61; Hibben *v.* Smith, 191 U. S. 310, 321; Board of Equalization Cases, 49 Ark. 518, 530; Baird *v.* Williams, 49 Ark. 518, 530; Indianapolis *v.* Holt, 155 Ind. 222, 235; Griswold College *v.* Davenport, 65 Iowa, 633; Collins *v.* Keokuk, 118 Iowa, 30, 35; Ross *v.* Wright County, 128 Iowa, 427, 441; State *v.* Armstrong, 19 Utah, 117, 128.

"The nation from whom we inherit the phrase 'due process of law' has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation." *Per* Mr. Justice *Miller* in McMillen *v.* Anderson, 95 U. S. 37, 41. "Due process of law," as applied to the subject of proceedings to raise public revenue by levying and collecting taxes, "does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of the judicial tribunals." *Per* Mr. Justice *Matthews*, in Kentucky Railroad Cases, 115 U. S. 321, 331. See especially as to "due process of law," the leading case of Murray *v.* Hoboken &c. Land Co., 18 How. (U. S.) 272.

[2] State Railroad Tax Cases, 92 U. S. 575, 610; Kentucky Railroad Tax Cases, 115 U. S. 321, 331; Palmer *v.* McMahon, 133 U. S. 660; Pittsburgh, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 421, 426; Merchants' & M. Bank *v.* Pennsylvania, 167 U. S. 461, 467; Lander *v.* Mercantile Bank, 186 U. S. 458; Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. Rep. 385, 410; McLeod *v.* Receveur, 71 Fed. Rep. 455, 459; Nevada Nat. Bank *v.* Dodge, 119 Fed. Rep. 57, 63; Carney *v.* People, 210 Ill. 434, 440; Switzerland County *v.* Reeves, 148 Ind. 467, 472; Hubbard *v.* Goss, 157 Ind. 485; State *v.* Springer, 134 Mo. 212, 226; State *v.* Cummings, 151 Mo. 49, 58; State *v.* Baker, 170 Mo. 194, 200; Territory *v.* First National Bank, 10 N. Mex. 283; People *v.* Turner, 117 N. Y. 227, 238; People *v.* O'Donnel, 183 N. Y. 9, 12, rev'g 106 N. Y. App. Div. 526; Streight *v.* Durham, 10 Okla. 361; Carroll *v.* Alsup, 107 Tenn. 257, 278; Chicago & N. W. R. Co. *v.* State, 128 Wis. 553, 654. The kind of notice and the manner of giving it are a matter of legislative judgment and discretion. Lamb *v.* Connolly, 122 N. Y. 531, 536; People *v.* Turner, 117 N. Y. 227, 239; Godfrey *v.* Bennington Water Co., 75 Vt. 350, 356. A statute imposing a tax for general purposes on bonds and providing that the corporation, in paying interest on the bonds, shall deduct therefrom the amount of the tax gives sufficient notice to the owner of the bonds. Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 239. If the prop-

assessments *notice by publication*, reasonably and properly given, satisfies the constitutional requirement.[1] The hearing may be

erty owner is deprived of a hearing by the failure of the board to meet at the time and place prescribed by statute, the tax is void. Power *v.* Larabee, 2 N. Dak. 141. To constitute due process of law under the Fourteenth Amendment, *notice* of the assessment of ordinary annual taxes upon personal property need not be personal, but may be given by publication or by posting notices in public places. Glidden *v.* Harrington, 189 U. S. 255.

Where, as in the State of Washington, tax proceedings are *in rem*, owners are bound to take notice thereof and to pay taxes on their property even if assessed to unknown or other persons; and if an owner stands by and sees the property sold for delinquent taxes, he is not thereby deprived of his property without due process of law. Ontario Land Co. *v.* Yordy, 212 U. S. 152, aff'g 44 Wash. 239. If the *statute* gives the owner of property "full opportunity" to be heard as to the assessment on definite days, he is not denied due process of law, because notice of sale for default is by publication and not by personal service. He must be held to knowledge that failure to pay duly assessed taxes will be followed by sale. Longyear *v.* Toolan, 209 U. S. 414, aff'g 144 Mich. 55.

[1] Lent *v.* Tillson, 140 U. S. 316, 328; Paulsen *v.* Portland, 149 U. S. 30, 40; Winona & St. P. Land Co. *v.* Minnesota, 159 U. S. 526, 537; Bellingham Bay & B. C. R. Co. *v.* New Whatcom, 172 U. S. 314, 318; Glidden *v.* Harrington, 189 U. S. 255; Campbellsville Lumber Co. *v.* Hubbert, 112 Fed. Rep. 718, 721; Johnson *v.* Hunter, 127 Fed. Rep. 219; Cleneay *v.* Norwood, 137 Fed. Rep. 962, 965; Davies *v.* Los Angeles, 86 Cal. 37, 46; Gilmore *v.* Hentig, 33 Kan. 156, 170; Hoertz *v.* Jefferson Southern Pond Draining Co., 119 Ky. 824; Ball *v.* Ridge Copper Co., 118 Mich. 7, 10, 12; Meier *v.* St. Louis, 180 Mo. 391, 409; Matter of Lowden, 89 N. Y. 548, 554. See also Matter of Amsterdam, 126 N. Y. 158, 164; Citizens' Sav. Bank *v.* Greenburgh, 173 N. Y. 215, 230.

A statute which provided for the reassessment of the cost of local improvements in cases where the original assessment may have been set aside, directed the city clerk to give notice of the reassessment "by three successive publications in the official newspaper of such city," the notice to state a time at which the council would hear and consider objections, and further provided that the owner of the property assessed might "within ten days from the last publication" file objections in writing. An assessment for the cost of grading, planking, and sidewalking a street made on lots abutting thereon, having been held to be invalid, a reassessment was made, and notice thereof was given in three issues of a daily newspaper on three successive days of a hearing on the eleventh day after the last publication. The court held that as a reassessment implies, not merely the fact of the improvement, but also that one attempt had been made to collect the cost and failed, and as the facts were known, a period of ten days within which to present objections to the reassessment was not so unreasonably short as to justify the court in holding that due process of law was denied. The nature of the improvement and the fact that the complaining taxpayer, although a foreign corporation, was doing business in the State and had its principal office in the city was given great weight in holding the notice and the time for objections to be sufficient. Bellingham Bay & B. C. R. Co. *v.* New Whatcom, 172 U. S. 314, aff'g 16 Wash. 137. Mr. Justice *Brewer*, who delivered the opinion of the court, said: "It may be that the authority of the legislature to prescribe the length of notice is not absolute and beyond review, but it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time. The purpose of the notice is to secure to the owner the opportunity to protect his property from the lien of the proposed tax or some part thereof. In order to be effectual it should be so full and clear as to disclose to persons of ordinary intelligence in a general way what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed and when

before the board of assessors entrusted with the duty of assessing the property and levying the tax, before a final determination by the board,[1] and the legislature may, so far as the Federal Constitution is concerned, make the determination of the assessors *final and conclusive* both upon the owner of the property and upon the courts.[2]

But a tax or special assessment may be levied by the assessors or other local authority *without notice or a hearing* or opportunity to be heard, without violating the constitutional guarantee, if by law it can only be collected by suit in the courts, and the taxpayer is permitted in such suit to contest the validity of the tax, and his

and where he may be heard. And the time and place must be such that with reasonable effort he will be enabled to attend and present his objections. . . . How many days can the courts fix as a minimum? How much time can be adjudged necessary as matter of law for preparing and filing objections? How many and intricate and difficult are the questions involved? Regard must always be had to the probable necessities of ordinary cases. No hardship to a particular individual can invalidate a general rule. A reassessment implies not merely the fact of the improvement, but also that one attempt has been made to collect the cost and failed. Inquiry had been had in the courts and the other assessment set aside. The facts were known. Ten days' time, therefore, does not seem unreasonably short for presenting objections to a reassessment."

[1] Michigan Cent. R. Co. *v.* Powers, 201 U. S. 245, aff'g 138 Fed. Rep. 223; Griswold College *v.* Davenport, 65 Iowa, 633.

A *right of appeal* to a court or other tribunal, after the assessment is levied, is sufficient to comply with the requirements of due process of law, although the taxpayer has no right to a hearing before the assessment. Yeomans *v.* Riddle, 84 Iowa, 147; Butts *v.* Monona County, 100 Iowa, 74; Oliver *v.* Monona County, 117 Iowa, 43; Reed *v.* Cedar Rapids, 137 Iowa, 107, 113. A hearing before the assessing board prior to determination satisfies the requirements of the Constitution, if full opportunity be given to present all the evidence and the arguments which the party deems ample. A hearing of objections after the determination and before it becomes final is not a matter of right. "Re-hearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect." Pittsburgh, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 421, 426, *per Brewer*, J. See also Ross *v.* Wright County, 128 Iowa, 427, 440. If a full and ample hearing is afforded to taxpayers of a certain class, *e. g.* railroad companies, the fact that other taxpayers have the right not only to such a hearing, but also a right of appeal with a second hearing before a State board, *does not deny the equal protection of the laws* to the railroad companies. "If a single hearing is not due process, doubling it will not make it so; and the power of a State to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined and to parties belonging to a different class only a single hearing." Pittsburgh, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 421, 427, *per Brewer*, J.

[2] Hibben *v.* Smith, 191 U. S. 310, 322.

One hearing is sufficient to constitute due process; and a State statute giving a State assessing board power to correct valuations and naming time and place at which any person interested may be heard, does not deprive the persons assessed of their property without due process of law, because those parties do not have further opportunities to be heard by a court or the legislature. Michigan Cent. R. Co. *v.* Powers, 201 U. S. 245, aff'g 138 Fed. Rep. 223. See also Lake Shore & M. S. R. Co. *v.* Powers, 138 Fed. Rep. 257.

liability therefor, and to question the amount.[1] And there is authority to the effect that the requirement of due process of law is met, when, by statute, the owner of the property assessed is given the right to contest the validity and amount of the tax in an action to enjoin its collection.[2]

And it may be laid down generally that "due process of law" does not imply the right to notice and a hearing or an opportunity to be heard as to every step in a proceeding for an improvement or undertaking which results in the imposition of a tax or special assessment. The legislature, or the city council acting under delegated authority,

[1] Davidson *v.* New Orleans, 96 U. S. 97; Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701; Kentucky Railroad Tax Cases, 115 U. S. 321, 335; Winona & St. P. Land Co. *v.* Minnesota, 159 U. S. 526, 537; Gallup *v.* Schmidt, 183 U. S. 300, 307; Security Trust & Safety Vault Co. *v.* Lexington, 203 U. S. 323, 325; Scott *v.* Toledo, 36 Fed. Rep. 385, 397; Oskamp *v.* Lewis, 103 Fed. Rep. 906, 908; Reclamation Dist. *v.* Goldman, 65 Cal. 635, 637; Garvin *v.* Daussmann, 114 Ind. 429; Indianapolis *v.* Holt, 155 Ind. 222, 235; State *v.* Weyerhauser, 68 Minn. 353, 362; State *v.* Pillsbury, 82 Minn. 359, 369; St. Louis *v.* Richeson, 76 Mo. 470; Saxton Nat. Bank *v.* Carswell, 126 Mo. 436, 443; Springfield *v.* Weaver, 137 Mo. 650, 672; Kinston *v.* Loftin, 149 N. Car. 255; Kinston *v.* Wooten, 150 N. Car. 295; Adler *v.* Whitbeck, 44 Ohio St. 539, 571; Caldwell *v.* Carthage, 49 Ohio St. 334, 349; State *v.* Jones, 51 Ohio St. 492, 514.

A statute for the collection of taxes required the county auditor to file in the office of the clerk of the district court of the county a list of delinquent taxes upon real estate, and provided that the filing of such list verified as prescribed by the statute should be considered as the filing of a complaint by the county against each piece or parcel of land therein described to enforce payment of taxes and penalties appearing against it. Publication was then directed to be made, and upon the final publication of the notice the jurisdiction of the court over the property attached. Within twenty days after the last publication, any person interested in any parcel of land described in the list might file an answer in the office of the clerk of the court setting forth his defence or objections to the tax or penalty, and thereupon the court was directed to hear and determine the questions raised by this complaint and answer as it hears and determines any other action. There was a provision that it was a full defence that the taxes had been paid or that the property was not subject to taxation. It was held that this statute gave to the property owner such notice and such an opportunity to be heard in court as to the validity and regularity of the tax as constituted due process of law. Winona & St. P. Land Co. *v.* Minnesota, 159 U. S. 526, 535. A statute which requires the owner of land sold for non-payment of taxes to *deposit with the clerk of the court the amount of all taxes, interest and costs* accrued up to that time before being permitted to contest the validity of the tax or sale, held to be unconstitutional as depriving the owner of his property without due process of law by denying him free access to the courts. Bennett *v.* Davis, 90 Me. 102.

[2] McMillen *v.* Anderson, 95 U. S. 37; Oskamp *v.* Lewis, 103 Fed. Rep. 906, 908; Adler *v.* Whitbeck, 44 Ohio St. 539; Caldwell *v.* Carthage, 49 Ohio St. 334, 349; State *v.* Jones, 51 Ohio St. 492, 514; Musser *v.* Adair, 55 Ohio St. 466, 474; Taylor *v.* Crawford, 72 Ohio St. 560, 570. In *California*, it is provided by statute that reclamation districts may commence an action or proceeding in court to determine the validity of assessments levied by them, and it has been held that this form of procedure satisfies the requirements of due process of law and gives to the property owner all the notice and hearing guaranteed him by the Constitution. Lower Kings River Reclamation Dist. No. 531 *v.* McCullah, 124 Cal. 175.

may determine by statute or ordinance the necessity or expediency of a public improvement and of the taking of lands therefor,[1] the territorial district to be taxed therefor,[2] or the class of lands which shall bear the burden,[3] the rule or principle of apportionment[4] and the sum or amount necessary to be levied to defray the cost of the improvement;[5] and the property owner is not entitled to notice or a hearing upon any of these questions. Speaking generally, his right under the "due process of law" clause of the Constitution is *limited to a hearing* at some stage or in some form or proceeding before the tax or assessment becomes absolute or incontestible, upon the question whether his property is subject to the tax as fixed or declared by the legislature or council, and the amount or proportion of the tax which his property must bear in relation to other properties similarly assessed.[6]

[1] Paulsen *v.* Portland, 149 U. S. 30, 40; Goodrich *v.* Detroit, 184 U. S. 432; Londoner *v.* Denver, 210 U. S. 373, 378; Roberts *v.* Smith, 115 Mich. 5; Hinkley *v.* Bishopp, 152 Mich. 256, 260; State *v.* Several Parcels of Land, 83 Neb. 13; *In re* Madera Irrig. Dist., 92 Cal. 296, 324; Nevin *v.* Roach, 86 Ky. 492, 495; Barfield *v.* Gleason, 111 Ky. 491, 527; Meier *v.* St. Louis, 180 Mo. 391, 409; New York Cent. & H. R. R. Co. *v.* Rochester, 129 N. Y. App. Div. 805; Adams *v.* Roanoke, 102 Va. 53, 63; Schintgen *v.* La Crosse, 117 Wis. 158, 165.

[2] Paulsen *v.* Portland, 149 U. S. 30, 40; Williams *v.* Eggleston, 170 U. S. 304, 311; Voight *v.* Detroit, 184 U. S. 115; St. Louis S. W. R. Co. *v.* Grayson, 72 Ark. 119, 126; Prior *v.* Buehler & C. Const. Co., 170 Mo. 439; Meier *v.* St. Louis, 180 Mo. 391, 409; Genet *v.* Brooklyn, 99 N. Y. 296; McLaughlin *v.* Miller, 124 N. Y. 510; New York Cent. & H. R. R. Co. *v.* Rochester, 129 N. Y. App. Div. 805; Wilson *v.* Salem, 24 Oreg. 504, 508; King *v.* Portland, 38 Oreg. 402.

[3] Spencer *v.* Merchant, 125 U. S. 345; Nottage *v.* Portland, 35 Oreg. 539, 553.

[4] People *v.* Pitt, 169 N. Y. 521, aff'g 64 N. Y. App. Div. 316; Durkee *v.* Barre, 81 Vt. 530.

Under statutes of *Michigan* and *Wisconsin* which provide for the *assessment of railroad property within the State as a unit* by a State board which is directed to levy a tax thereon at the average rate imposed by all the counties and municipalities through which the railroad passes, it has been held that the determination of the average rate is a ministerial function, and that the company is not entitled to a hearing on the question of fixing of rate. Detroit Board of Education *v.* State Board, 133 Mich. 116; Michigan Railroad Tax Cases, 138 Fed. Rep. 223, aff'd *sub nom.* Michigan Cent. R. Co. *v.* Powers, 201 U. S. 245; Chicago & N. W. R. Co. *v.* State, 128 Wis. 553, 653.

[5] Spencer *v.* Merchant, 125 U. S. 345, 356; Voight *v.* Detroit, 184 U. S. 115; *In re* Madera Irrig. Dist., 92 Cal. 296, 324; Matter of Union College, 129 N. Y. 308; New York Cent. & H. R. R. Co. *v.* Rochester, 129 N. Y. App. Div. 805; Nottage *v.* Portland, 35 Oreg. 539, 553.

[6] Goodrich *v.* Detroit, 184 U. S. 432; Voight *v.* Detroit, 184 U. S. 115; Meier *v.* St. Louis, 180 Mo. 391, 409; People *v.* Pitt, 169 N. Y. 521, aff'g 64 N. Y. App. Div. 316; Adams *v.* Roanoke, 102 Va. 53, 64. Property owners subject to assessment for an improvement are *not entitled to notice and a hearing* on the question of the necessity or expediency of taking lands therefor. Property owners whose lands are taken or affected are the only persons entitled to notice on that question. Goodrich *v.* Detroit, 184 U. S. 432.

"If the State Constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what property shall belong to such district and what property shall be considered as benefited

§ 1366 (747). **Constitutional Restrictions on Taxation or Assessment; Arkansas.** — The Constitution of Arkansas contains a number of provisions affecting the *power of the legislature to delegate the power of taxation and assessment* to municipal corporations and forming an important limitation upon the legislative authority.[1]

by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited." *Per* Mr. Justice *Brewer*, in Williams *v.* Eggleston, 170 U. S. 304, 311.

Where the statute authorizing an assessment by commissioners of the expense of grading a street upon the property benefited thereby was held to be unconstitutional after some of the property owners had paid the tax, and the legislature thereupon enacted another statute directing a sum equal to so much of the first assessment as had not been paid, adding a proportional part of the expense of making that assessment, and interest since, to be assessed upon and equitably apportioned among the lots upon which the former assessment had not been paid, first giving notice to all parties interested to appear and to be heard upon the question of the apportionment of this sum among these lots, but not as to any apportionment between them and the lots upon which the former assessment had been paid, it was held that an assessment under the second statute did not violate the provisions of the Fourteenth Amendment prohibiting the taking of property without due process of law. Spencer *v.* Merchant, 125 U. S. 345, aff'g 100 N. Y. 585. The court held that it is within *the power of the legislature by direct enactment without notice* to the taxpayers to fix the sum necessary to be levied for the purpose of a public improvement, and the class of lands which will receive the benefit and should, therefore, bear the burden. On this subject Mr. Justice *Gray*, said: "The legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited."

[1] The *Constitution of Arkansas* of 1868 contained the following provisions: "Laws shall be passed taxing by a uniform rule all money, credit, investments in bonds, joint stock companies or otherwise; and also all real and personal property according to its true value in money." Ark. Const., 1868, art. x. § 2. "The general assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their powers of taxation, assessment, borrowing money, and loaning their credit, so as to prevent abuse of the power." Ark. Const., 1868, art. v. § 49.

The *Constitution of Arkansas* of 1874 has the following provisions: "The State's ancient right of eminent domain and of taxation is herein fully and expressly conceded; and the general assembly may delegate the taxing power, with the necessary restriction, to the State's subordinate political and municipal corporations, to the extent of providing for their existence, maintenance, and well being, but no further." Ark. Const. 1874, art. ii. § 23. "The general assembly shall provide by general laws for the organization of cities (which may be classified), and incorporated towns, and restrict their power of taxation, assessment, borrowing money, and contracting debts, so as to prevent the abuse of such power." Ark. Const., 1874, art. xii. § 3. "All property subject to taxation shall be taxed according to its value; that value to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the State." Ark. Const., 1874, art. xvi. § 5. "Nothing in this Con-

In this State, the general rule that the power of taxation is legislative in its nature and belongs to the legislative department is recognized,[1] and *municipal corporations have no inherent power to levy taxes* but can only do so under authority delegated to them by law.[2] The *rule of uniformity* in taxation prescribed by the Constitution requires uniformity in the rate of taxation, and in the mode of assessment. There must be an equality of burden. The uniformity must be coextensive with the territory to which it applies, whether it be the State, a county, township, city, town, or district.[3] For the purpose of *State* revenue all property in the State must be taxed.[4] And when the tax is laid upon the basis of the benefits received by a locality, a levy pursuant to statute upon a part of the lands benefited to the exclusion of others of the same class violates the constitutional requirement of equality and uniformity and avoids the levy upon the unexempted lands.[5]

Under the Constitution of this State as construed by the courts, no tax can be imposed upon *callings or occupations* for the purpose of raising a State revenue;[6] but the power of the legislature to delegate authority to tax callings and pursuits is not restricted by the Con-

stitution shall be so construed as to prohibit the general assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by laws; to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected. But such assessment shall be *ad valorem* and uniform." Ark. Const., 1874, art. xix. § 27.

[1] Pulaski County *v.* Irvin, 4 Ark. 473, 482. The manner in which property shall be valued and assessed rests in the discretion of the legislature. Clay County *v.* Brown Lumber Co., 90 Ark. 413; 119 S. W. Rep. 251.

[2] Vance *v.* Little Rock, 30 Ark. 435, 439; Ft. Smith Bridge Co. *v.* Hawkins, 54 Ark. 509.

[3] Fletcher *v.* Oliver, 25 Ark. 289. See also Patterson *v.* Temple, 27 Ark. 202, 210; Van de Griff *v.* Haynie, 28 Ark. 270, 278. The *expense of maintaining two judicial districts in a county is a county expense*, and a county tax to pay it must be levied at a uniform rate upon all the taxable property of the county. Hence a tax of five mills on property in one district when a tax of only three mills is levied on the property in the other district, is unconstitutional for want of uniformity in violation of art. xvi. § 5, of the Const. of 1874. Hutchinson *v.* Ozark Land Co., 57 Ark. 554. *Mansfield*, J., said: "It was not within the power of the legislature to create a district for the levy of the tax in question that did not embrace the whole county. The tax was for a county purpose, and its burden could not be imposed upon a part only of the county's territory."

[4] Pike *v.* State, 5 Ark. 204. A statute taxing the improvements on town lots for State purposes without taxing all improvements throughout the State is unconstitutional. Pike *v.* State, 5 Ark. 204.

[5] Davis *v.* Gaines, 48 Ark. 370. A statute relating to the levy of taxes for a local benefit provided that citizens who had previously contributed money for the same purpose should be reimbursed by giving them credit upon their future taxes. It was held that this enactment was in the nature of an exemption; that it created an obligation where none existed before; and decreed payment by sequestering the property of others; and that it was unconstitutional. Davis *v.* Gaines, 48 Ark. 370.

[6] Hynes *v.* Briggs, 41 Fed. Rep. 468.

stitution, and it may be conferred upon counties and towns,[1] and upon cities.[2]

The provision of the Constitution authorizing *the delegation of the taxing power* [3] was said, in a case which involved a local improvement, not to be an implied restriction on the power of the legislature confining the delegation of the power of taxation to subordinate political and municipal corporations, the bodies named in the Constitution.[4] Hence, it is within the power of the legislature to create a district for the purpose of effecting a local improvement, and the power of taxation within the district for the purposes of the improvement may be conferred by the legislature upon such agencies as it may designate.[5]

Assessments for local improvements in towns and cities are made the subjects of a special provision of the Constitution,[6] but neither that provision nor any other provision in the Constitution deprives the legislature of power to delegate authority to levy a tax for a local improvement to an agency other than the city council, such, for instance, as a board of local improvements for an improvement district of the city appointed by the council from residents of the district;[7] and the city council may, by statute, be authorized to constitute the entire area of the municipality into an improvement district.[8] But a statute providing for the formation of an improvement district must, as required by the express provision of the Constitution, make the consent of the majority of the property owners in the district to the improvement a condition precedent to its becoming effective.[9]

[1] Baker *v.* State, 44 Ark. 134, 137, citing Washington *v.* State, 13 Ark. 752; McGehee *v.* Mathis, 21 Ark. 40; Straub *v.* Gordon, 27 Ark. 625; Little Rock *v.* Barton, 33 Ark. 436; Little Rock *v.* Board of Improvements, 42 Ark. 152, 160.

[2] Little Rock *v.* Prather, 46 Ark. 471; Ft. Smith *v.* Scruggs, 70 Ark. 549.

The provision of the Arkansas Constitution of 1874, art. xvi. § 5, quoted *supra*, that all property shall be taxed according to value equally and uniformly throughout the State, is applicable only to taxes upon property and *does not apply* to taxes on occupations and privileges. Ft. Smith *v.* Scruggs, 70 Ark. 549.

[3] Ark. Const., 1874, art. ii. § 23, quoted *supra*.

[4] Carson *v.* St. Francis Levee Dist., 59 Ark. 513, 531.

[5] Carson *v.* St. Francis Levee Dist., 59 Ark. 513 (construction of levees); Cribbs *v.* Benedict, 64 Ark. 555 (construction of public ditch); Davis *v.* Gaines, 48 Ark. 370, 375, 385. Levee inspectors may determine the rate of taxation as well as the lands subject to tax. Davis *v.* Gaines, 48 Ark. 370, 375, 385.

[6] Ark. Const., 1874, art. xix. § 27, quoted *supra*.

[7] Little Rock *v.* Board of Improvements, 42 Ark. 152. But in so holding, the court was careful to say that its ruling must not be construed as applying to the delegation of the power of taxation for *general* city purposes.

[8] Crane *v.* Siloam Springs, 67 Ark. 30; Kansas City, P. & G. R. Co. *v.* Waterworks Imp. Dist., 68 Ark. 376, 380; Matthews *v.* Kimball, 70 Ark. 451.

[9] Craig *v.* Russellville Waterworks Imp. Dist., 84 Ark. 390.

It has been held that an improve-

The provision of the Constitution that local assessments in towns and cities shall "be based upon the *consent of a majority in value* of the property holders owning property adjoining the locality to be effected," is intended to operate upon any property adjoining or near to the improvement which is physically affected, or the value of which is commercially affected, directly by the improvement, to a degree in excess of the effect upon the property in the city generally.[1] This provision does not inhibit assessment for a local improvement upon property which does not actually touch upon the improvement.[2]

The provision of the Constitution that assessments on real property for local improvements in towns and cities "shall be *ad valorem* and uniform,"[3] permits the assessment to be made either according to the value of the property itself or according to the value of the benefit to the property.[4]

ment district, created pursuant to statute, and having a particular name, perpetual succession until the completion of the improvement, authority to contract, and capacity to sue and be sued, *is a corporation in effect*, although not so described in the State. Whipple *v.* Tuxworth, 81 Ark. 391. But an improvement district is not a "municipality" nor the agent of one within the meaning of the provision of the Constitution of 1874, art. xvi. § 1, which prohibits "any county, town, or other municipality" from issuing interest bearing evidences of indebtedness. Its powers are derived from the legislature; and in exercising them, it acts as the agent of the property owners, whose interests are affected by the duties it performs. Fitzgerald *v.* Walker, 55 Ark. 148. See also Morrilton Waterworks Imp. Dist. *v.* Earl, 71 Ark. 4. Similar rulings were made *as to the nature and capacity of levee districts* and the directors thereof; Memphis Trust Co. *v.* St. Francis Levee Dist., 69 Ark. 284; State *v.* Higginbotham, 84 Ark. 537, and *special school districts*; Schmutz *v.* Little Rock School Dist., 78 Ark. 118. Index, *Levee Districts*. By reason of the legislative origin and independent existence of improvement districts, the city council can neither abolish a district nor refuse to make an assessment, except as it is specially authorized so to do by statute. Morrilton Waterworks Imp. Dist. *v.* Earl, 71 Ark. 4.

[1] Improvement Dist. No. 5 *v.* Offenhauser, 84 Ark. 257.

[2] Matthews *v.* Kimball, 70 Ark. 451 (public park). Under the statute which authorizes the councils of cities of the first class *to form improvement districts* the action of the city council in including property within the improvement district is, except for fraud or clear mistake, conclusive upon the courts that the property is "adjoining the locality to be affected by" the improvement within the meaning of the constitutional provision requiring the consent of the majority of the property holders. Little Rock *v.* Katzenstein, 52 Ark. 107, 112; Watkins *v.* Griffith, 59 Ark. 344, 355; Lenon *v.* Brodie, 81 Ark. 208, 217; Improvement Dist. No. 5 *v.* Offenhauser, 84 Ark. 257. While the legislature in creating *a drainage district* may provide what lands shall be assessed for the improvement and the extent of such assessment, the courts will enjoin the assessment where the act of the legislature is such an arbitrary abuse of the taxing power as to amount to confiscation of the property without benefit. Coffman *v.* St. Francis Drainage Dist., 83 Ark. 54.

[3] Ark. Const., 1874, art. xix. § 27, quoted *supra*.

[4] Kirst *v.* Street Improvement Dist. No. 120, 86 Ark. 1. In this case, *Cockrill*, Special Judge, said: "Under the old plan the county assessor valued the property itself, and the council levied against the property a percentage of that value; under the present plan, the board of assessors values the benefits, and the council levies against the property a percentage of that

§ 1367 (748). **Constitutional Restrictions; Ohio; Taxation by Uniform Rule.** — The Constitution of Ohio, in substance, requires "the taxing" by the legislature of "all property by a uniform rule;" but, as construed, this provision does not necessarily exclude the right to tax that which is *not property*, nor does it cover the whole ground included within the scope of the taxing power.[1] An "assessment" is not "taxing," within the meaning of the Constitution;[2] nor is the exacting by a municipality of money for granting a *license for shows and exhibitions* a "taxing of property," and hence such exaction is not unconstitutional.[3] But although this constitutional provision does not apply to "assessments," it does apply to "all *taxes* either for State, county, township, or *corporation* purposes;" and it deprives the legislature of the plenary power it would otherwise have over the subject of taxation, and of the right (which it would otherwise possess) to make exceptions and exemptions. *All* property must be taxed.[4]

It has been held that this *constitutional provision furnishes the governing principle for all laws authorizing taxes* for general revenue, to be levied for any purpose, whether State, county, township, or municipal corporation. The object is to secure equality and uni-

value. Both plans conform to the *ad valorem* and uniform provision of the Constitution." Assessments for the improvement of streets *must be ad valorem* and not according to frontage; it must be upon both vacant and occupied lots similarly situated. The exception of one class violates the constitutional principle of uniformity in the imposition of the burden. Monticello *v.* Banks, 48 Ark. 251; following Peay *v.* Little Rock, 32 Ark. 31. It is discretionary with the legislature to require that assessments for levee purposes should be made according to the *whole value of the land in the levee district* or according to the *value of the benefit* added by the improvement. St. Louis S. W. R. Co. *v.* Red River Levee Dist., 81 Ark. 562. See also Ahern *v.* Board of Improvement, 69 Ark. 68.

[1] Constitution of *Ohio*, art. xii. § 2; Zanesville *v.* Richards, 5 Ohio St. 589, 593; Baker *v.* Cincinnati, 11 Ohio St. 534, 541, *per Gholson*, J.; Exchange Bank of Columbus *v.* Hines, 3 Ohio St. 1; Hill *v.* Higdon, 5 Ohio St. 243; *Ib.* 520. The provision of the Constitution of this State is that "laws shall be passed taxing by a uniform rule all moneys, credits, &c. . . . and also all real and personal property according to its true value in money." Ohio Const., 1851, art. xii. § 2.

[2] Reeves *v.* Wood County Treas., 8 Ohio St. 333; Northern Ind. R. Co. *v.* Connelly, 10 Ohio St. 159, and cases cited; People *v.* Brooklyn, 4 N. Y. 419, 440; Richmond & A. R. Co. *v.* Lynchburg, 81 Va. 473; Norfolk *v.* Ellis, 26 Gratt. 224; Roosevelt Hospital *v.* New York, 84 N. Y. 108.

[3] Baker *v.* Cincinnati, 11 Ohio St. 534, correcting and qualifying report in Mays *v.* Cincinnati, 1 Ohio St. 268, 273. See Peay *v.* Little Rock, 32 Ark. 31. See also *Ex parte* Montgomery, 64 Ala. 463; *infra*, § 1442, note. The provisions of the *Ohio* Constitution, 1851, art. xii. § 2, do not apply to taxes known as "excise taxes." State *v.* Guilbert, 70 Ohio St. 229.

[4] Zanesville *v.* Richards, 5 Ohio St. 589, 592, *per Ranney*, C. J.; Hill *v.* Higdon, *Ib.* 243, 246. A similar provision in the Constitution of *Indiana* was held not to prevent the legislature from making exemptions in respect to *municipal* taxation. Hamilton *v.* Fort Wayne, 40 Ind. 491; *post*, § 1369, note.

formity in the imposition of these public burdens, and the tax must be uniform upon all the taxable property within the limits of the taxing district. If the tax be a State tax, it must be uniform all over the State; if a county, township, or city tax, it must be uniform throughout the limited territory to which it is applicable.[1] Hence, a municipal corporation can be neither required nor authorized to levy within its limits a tax which is not a part of a general scheme of taxation throughout the State, for the furtherance or promotion of a public enterprise in which the people of the State are interested and which is not merely local to the municipality.[2]

§ 1368 (749). **Constitutional Restrictions; Delegated Authority; Uniform and Equal Rate; Kansas.** — In Kansas, it is held that the taxing power is a legislative power, which can only be exercised by the legislature, or by some body to which the Constitution authorizes the legislature to delegate legislative power. Under the Constitution the delegation of legislative power *is limited to tribunals* transacting county business and to cities, towns, and villages.[3] Therefore, the legislature cannot authorize any other person or body to levy taxes, even for local assessments.[4]

[1] *Per Spear*, C. J., in Wasson *v.* Wayne County, 49 Ohio St. 622, 635. See also Hubbard *v.* Fitzsimmons, 57 Ohio St. 436, 447.

[2] The *Ohio Agricultural Experiment Station*, an institution controlled by a board appointed by the governor, the purposes of which are to furnish information to the people of the State at large, is of a general and not of a local character, and must be supported by general taxation throughout the State under the provisions of the Ohio Constitution. Hence, a statute which attempts to authorize any county to raise money by tax within the county for a donation to secure the location of the institution within its limits is an attempt to tax the county for a general public purpose and is unconstitutional. Wasson *v.* Wayne County, 49 Ohio St. 622. Under the *Ohio* statute and polity the erection of *an armory for the use of the national guard* of the State is a general State purpose, and taxes therefor must be levied by uniform rule on all taxable property in the State, and cannot be limited to a county or municipality. Hubbard *v.* Fitzsimmons, 57 Ohio St. 436; State *v.* Brinkman, 7 Ohio Cir. Ct. R. 165; Daniel *v.* Columbus, 8 Ohio Cir. Ct. R. 642, aff'd 53 Ohio St. 658; State *v.* Krieghbaum, 9 Ohio Cir. Ct. R. 619, aff'd 54 Ohio St. 615. But compare New York L. Ins. Co. *v.* Cuyahoga County, 106 Fed. Rep. 123. But a *hospital* belonging to and controlled by a city is a local purpose and may be supported by taxation within the city. Cincinnati *v.* Trustees of Cincinnati Hospital, 66 Ohio St. 440, 444. A bureau for the inspection of public offices may be created and the expense charged upon the several counties to be paid out of the general county funds in proportion to population without violating the provisions of the Ohio Constitution. State *v.* Shumate, 72 Ohio St. 487.

[3] "The legislature may confer upon tribunals transacting the county business of the several counties such powers of local government as it shall deem expedient." Kan. Const., 1859, art. ii. § 21. "Provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit shall be so restricted as to prevent the abuse of such power." Kan. Const., 1859, art. xii. § 5.

[4] A statute for the *improvement of*

The Constitution of this State also declares that "the legislature shall provide for a *uniform and equal rate* of assessment and taxation."[1] It has been said that taxes cannot be levied by an equal and uniform rate, except by assessment upon the value.[2] There must be *equality and uniformity* throughout the State, or the county, township, city, or village which exercises the taxing power.[3] But

county roads provided that when a majority of the resident landowners within one-half mile on either side of any regularly laid out road within the territorial bounds mentioned in the petition, should petition the board of county commissioners of any county for the improvement of the road, it should be the duty of the county commissioners to appoint three road commissioners, resident landowners of the county, to take charge of the improvement. In payment for work done and materials furnished, the act authorized those road commissioners to issue certificates bearing interest. One-third of the expense of the improvement was to be paid out of the general county funds, and two-thirds to be *assessed by the road commissioners* against lands in the district according to the benefits. The court construed this statute as mandatory in its terms, and obliging the county commissioners to proceed to have the improvement made when a petition was presented. It was further held that the board of road commissioners appointed under the act was *not a county tribunal*, and therefore the legislature could not delegate to it any legislative authority or power to levy a tax. Wyandotte County *v.* Abbott, 52 Kan. 148. See also to the same effect, Hovey *v.* Wyandotte County, 56 Kan. 577; Parks *v.* Wyandotte County, 61 Fed. Rep. 436; First Nat. Bank *v.* Wyandotte County, 68 Fed. Rep. 878. Compare Hutchinson *v.* Leimbach, 68 Kan. 37, 44.

[1] Kan. Const., 1859, art. xi. § 1. As to the construction of this provision, see State *v.* Leavenworth County, 2 Kan. 61.

[2] Hines *v.* Leavenworth, 3 Kan. 186, 200.

[3] Hines *v.* Leavenworth, 3 Kan. 186; Midland Elevator Co. *v.* Stewart, 50 Kan. 378, 383. But see Ottawa County *v.* Nelson, 19 Kan. 234, 237, where it is remarked that the Constitution provides for an equal *rate*, and not for uniform or equal *rule* of assessment or taxation. A statute which assesses *cattle driven into a State* from outside thereof for grazing *between March 1st and December 1st*, is unconstitutional for lack of uniformity, in that it does not tax cattle coming into the State at other times. Graham *v.* Chautauqua County, 31 Kan. 473. Township, road, and other taxes levied, pursuant to statute, only on the property of the citizens of a township, and not on non-residents and persons and corporations who are not citizens, is *void for inequality*. Marion & M. R. Co. *v.* Champlin, 37 Kan. 682. *Unplatted lands* within the city limits must be taxed at the same rate as other lands for city purposes. Mendenhall *v.* Burton, 42 Kan. 570; Buffington *v.* Grosvenor, 46 Kan. 730, 745; Levitt *v.* Wilson, 72 Kan. 160, 162.

It was held to be unconstitutional under this provision to raise the fund for the payment of salaries and expenses of the board of railroad commissioners and the secretary thereof *by the taxation of railroad property only*. Atchison, T. & S. F. R. Co. *v.* Howe, 32 Kan. 737. The *assessment of railroad property* by the local assessors at full value, when the other property within the taxing authority is assessed at only twenty-five per cent of its value, violates this constitutional provision. Chicago, B. & Q. R. Co. *v.* Atchison County, 54 Kan. 781. But where railroads within the State were assessed as units, and the result was that railroad property within unorganized counties was assessed and taxed, although other property in such counties escaped taxation by reason of lack of provision for the assessment thereof, it was held that the constitutional provision was not violated. Francis *v.* Atchison, T. & S. F. R. Co., 19 Kan. 303, 314. This constitutional provision does not prevent the legislature from imposing a greater penalty for non-payment upon one class of property than on another. Hence, the constitutional provision *is not violated by classifying railroads as personal property* and imposing a penalty for

this constitutional provision does not prohibit the legislature from authorizing municipalities to require *a license tax upon occupations and privileges*,[1] and it has been held that such a *license tax may be graduated* according to the value of the stock of merchandise of the person taxed.[2] Nothwithstanding the fact that the language of the constitutional provision refers to assessments, it has been held that *special assessments on property benefited* by a local improvement according to the benefits therefrom are not within its operation.[3]

§ 1369 (750). **Constitutional Provisions in Louisiana; Equality and Uniformity.** — The Constitution of Louisiana provides that "taxation shall be equal and uniform throughout the territorial limits of the authority levying the tax, and all property shall be assessed in proportion to its value to be ascertained as directed by law."[4]

non-payment as in the case of non-payment of a tax on personal property, although a smaller penalty is exacted for the non-payment of the tax on other real property. Missouri, K. & T. R. Co. *v.* Miami County, 67 Kan. 434; Missouri, K. & T. R. Co. *v.* Labette County, 9 Kan. App. 545. The fact that the local taxing authorities have refused to accept the equalization of the State Board of Equalization in making a levy for any purpose except for State taxes, does not violate this constitutional provision. Geary County *v.* Missouri, K. & T. R. Co., 62 Kan. 168.

[1] Leavenworth *v.* Booth, 15 Kan. 627, 634; Fretwell *v.* Troy, 18 Kan. 271; Ottawa County *v.* Nelson, 19 Kan. 234, 241; Newton *v.* Atchison, 31 Kan. 151; State *v.* Topeka, 36 Kan. 76; Girard *v.* Bissell, 45 Kan. 66; Kansas City *v.* Overton, 68 Kan. 560; Topeka *v.* Jones, 74 Kan. 164, 168.

[2] *In re* Martin, 62 Kan. 638, 641. "The provisions of the Constitution with reference to taxation have no application whatever to this class of cases. And it would make no difference if these sums required of foreign insurance companies were required solely for the purpose of swelling the general revenue fund." *Per Valentine*, J., in Leavenworth *v.* Booth, 15 Kan. 627, 636. The exaction of a fee for the registration of dogs is not within this constitutional provision. State *v.* Topeka, 36 Kan. 76.

[3] Hines *v.* Leavenworth, 3 Kan. 186; Ottawa County *v*, Nelson, 19 Kan. 234, 240; Tull *v.* Royston, 30 Kan. 617, 619; Todd *v.* Atchison, 9 Kan. App. 251.

[4] La Const., 1898, art. 225.

The Constitution of 1845 contained the following provision: "Taxation shall be *equal and uniform throughout the State*. All property on which taxes may be levied in this State shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property shall be taxed higher than another species of equal value on which taxes shall be levied. The legislature shall have power to levy an income tax and to tax all persons pursuing any occupation, trade, or profession." La. Const., 1845, art. 127. Similar provisions are to be found in the Constitutions of 1852, art. 123; 1864, art. 124; 1868, art. 118; and 1879, art. 203. The Constitutions of 1879, art. 206, and 1898, art. 229, contain provisions in regard to the *levying of license taxes* to which reference will presently be made.

It is held, following the construction of the Constitutions of 1864 and 1868, that notwithstanding the declaration of the Constitution of 1879, that "*all property* shall be taxed," &c., there is no mandatory obligation on the legislature to include State or municipal bonds as subjects of taxation. State *v.* Board of Assessors, 35 La. An. 651; State *v.* Board of Assessors, 111 La. 982. But under the direction of the Constitution of 1879 referred to, and the further provisions of that Constitution that "the following property shall be exempt and no other," the *capital of a national bank invested in*

Under some of the earlier constitutional provisions of this State the courts appear to have recognized the power of the legislature to classify property and to select certain classes as the subjects of taxation,[1] but under later Constitutions, although the matter does not seem to have been made the subject of special discussion, the tendency of the courts appears to have been to hold that the constitutional mandate requires the inclusion of all property except such as the Constitution expressly declares may be exempted.[2]

But the constitutional requirement of equality and uniformity applies only to taxes strictly so called and *does not include special assessments upon property benefited* in proportion to the benefits received.[3] By the later constitutions of this State the legislature is

bonds of the United States is not exempt from taxation. The capital of the bank, in whatever form it may be invested, is subject to taxation. First Nat. Bank *v.* Board of Reviewers, 41 La. An. 181. A similar ruling was made as to *State bonds* in Parker *v.* Sun Ins. Co., 42 La. An. 1172. It is also held that shares of capital stock of a manufacturing corporation, when held and owned by an insurance company, are taxable as part of the assets and capital of the insurance company, although the capital, machinery, and other property of a manufacturing company are exempt from taxation by constitutional provision. State *v.* Board of Assessors, 47 La. An. 1498.

[1] "To be uniform, taxation need not be universal. Certain objects may be made its subject and others may be exempted from its operation; certain occupations may be taxed and others not; so some occupations may be taxed for a greater amount and others for a less; but as between the subjects of taxation in the same class there must be an equality." *Per Campbell*, J., in State *v.* Poydras, 9 La. An. 165, 167, 168. See to the same effect State *v.* Lathrop, 10 La. An. 398; New Orleans *v.* Dubarry, 33 La. An. 481. It was held that foreign corporations might be classified by themselves and taxed at a different rate from domestic corporations. State *v.* Lathrop, 10 La. An. 398. Under the Constitution of 1845, art. 127, the legislature might exempt any property it saw fit; but if it taxed, then the tax was required to operate equally, or in a uniform ratio according to an assessment legally made on all property of the same description upon which a tax was levied. New Orleans *v.* Commercial Bank, 10 La. An. 735; St. Anna's Asylum *v.* Parker, 109 La. 592.

[2] See First Nat. Bank *v.* Board of Reviewers, 41 La. An. 181; Parker *v.* Sun Ins. Co., 42 La. An. 1172, referred to above. In Parker *v.* North British & M. Ins. Co., 42 La. An. 428, the court said that the Constitution contemplates two kinds of taxes, viz., property and license taxes. It was held that a tax on the "gross receipts" of foreign insurance companies was not a license tax, but a property tax, or more properly, an "income tax"; and that whether or not the legislature might constitutionally authorize the levy of an income tax (a question which was not decided), the tax must embrace the income of all, and cannot single out a particular and limited class and require payment of the income tax from that class while exempting all others. The local authorities cannot tax the property of *non-residents at a higher rate* than the property of citizens and residents. Halloway *v.* Police Jury, 16 La. An. 203. The exaction by ordinance of twenty-five cents per load of supplies sold by growers at public markets, viewed as a tax, was held to be void under the Constitution of 1879. State *v.* Blaser, 36 La. An. 363.

[3] Municipality No. 2 *v.* Dunn, 10 La. An. 57; New Orleans *v.* Elliott, 10 La. An. 59; Yeatman *v.* Crandell, 11 La. An. 229; Matter of New Orleans Draining Co., 11 La. An. 338, 372; Wallace *v.* Shelton, 14 La. An. 498; State *v.* New Orleans, 15 La. An. 354; Matter of New Orleans, 20 La. An. 497, 499; Charnock *v.* Fordoche & G. T. Spec. Levee Dist. Co., 38 La. An. 323; Excelsior Planting & Mfg. Co.

expressly authorized to levy *license taxes*, but is directed to graduate the amount to be collected from the persons pursuing the several trades, professions, vocations, and callings.[1] Subject always to the requirement of graduation, it has been held that under the requirement of the Constitution that taxation shall be equal and uniform throughout the territorial limits of the authority levying the tax, *taxation by license must be equal and uniform* on all persons of the same class.[2] For the purposes of *license taxation*, the legislature may divide trades, professions, vocations, and callings into classes, and assess a license tax on the persons composing the several classes, provided it be equal and uniform on all persons of the same class.[3] It has been said that "graduating" the license tax under the constitutional requirement, means to regulate its amount according to the amount of the gross sales of the licensee or on some other basis of proportion.[4] But the application of this constitutional direction has apparently resulted in uncertainty in the decisions. The earlier cases appear to hold that the legislature is the sole judge of the necessity or possibility, and also of the method of the graduation.[5] But in a later case the court determined the question of the possibility of graduation for itself, and an uniform license tax imposed on all

v. Green, 39 La. An. 455, 460; Barber Asphalt Pav. Co. *v.* Gogreve, 41 La. An. 251; Hill *v.* Fontenot, 46 La. An. 1563, 1566; Fayssoux *v.* Denis, 48 La. An. 850, 851; Missouri, K. & T. Trust Co. *v.* Smart, 51 La. An. 416, 424; Rosetta Gravel Co. *v.* Jollisaint, 51 La. An. 804, 808; Shreveport *v.* Prescott, 51 La. An. 1895.

Special assessments on property benefited by a local improvement are not within the operation of the provisions of the Constitution placing a limit upon municipal taxation. Barber Asphalt Pav. Co. *v.* Gogreve, 41 La. An. 251, 263, 264; Munson *v.* Atchafalaya Basin Level Dist., 43 La. An. 15, 26. Taxes for *levee purposes* held to be governed by special provisions of the Constitution of 1879, art. 214, and not to be within the other provisions of that Constitution. Munson *v.* Atchafalaya Basin Levee Dist., 43 La. An. 15. Index, *Levee District.*

[1] La. Const., 1879, art. 206; La. Const., 1898, art. 229.

[2] Swords *v.* Baillio, 105 La. 328, 332. But compare New Orleans *v.* Pontchartrain R. Co., 41 La An. 519.

[3] State *v.* O'Hara, 36 La. An. 93; Browne *v.* Selser, 106 La. 691. A license tax imposed by the city of New Orleans *on the keepers of private markets* does not violate the constitutional rule of equality and uniformity in taxation, although no license tax at all is imposed on sellers of meats, &c., in the public markets. New Orleans *v.* Dubarry, 33 La. An. 481.

[4] *Per Provosty*, J., in State *v.* Rittenberg, 112 La. 224, 225. Licenses for keeping places for "variety performances" may be graduated on the basis of the population of the locality. State *v.* O'Hara, 36 La. An. 93; State *v.* Schonhausen, 37 La. An. 42.

[5] State *v.* Liverpool, L. & G. Ins. Co., 40 La. An. 463; State *v.* Traders Bank, 41 La. An. 329; New Orleans *v.* O'Neil, 43 La. An. 1182; Browne *v.* Selser, 106 La. 691. A *license tax on all peddlers* is sufficiently graduated when a specified sum is imposed on all peddlers. McClellan *v.* Pettigrew, 44 La. An. 356. A law which divides *insurance companies into classes* according to the amount of premiums received, and imposes on each class a different license tax complies with the constitutional requirement of graduation. State *v.* Liverpool, L. & G. Ins. Co., 40 La. An. 463. See also State *v.* New England Mut. Ins. Co., 43 La. An. 133.

dealers of a certain character was held to be unconstitutional because the license was not graduated.[1]

The legislature may, by general law, delegate to municipal corporations the power to exact license taxes.[2]

§ 1370. **Equal and Uniform Taxation; Mississippi.** — The Constitution of Mississippi contains provisions *requiring taxation to be uniform and equal* and property to be taxed *in proportion to its value.*[3] The constitutional provisions of this State do not apply to or control in the case of *special assessments for local improvements* based upon the benefit to the property taxed.[4] These constitu-

[1] State *v.* Rittenberg, 112 La. 224, 225. A small charge of twenty-five cents *imposed on laundries* to cover the cost of inspection as to cleanliness in the exercise of the police power was held to be neither a tax nor a license for revenue. New Orleans *v.* Hop Lee, 104 La. 601; New Orleans *v.* Sam Kee, 107 La. 762. A similar ruling was made as to a charge for the inspection of coal oil. Louisiana State Board of Health *v.* Standard Oil Co., 107 La. 713.

[2] Alexandria *v.* White, 46 La. An. 449; Mandeville *v.* Baudot, 49 La. An. 236; Chicago, St. L. & N. O. R. Co. *v.* Kentwood, 49 La. An. 931. The owner of a liquor saloon on board a steamer running on navigable streams between New Orleans and other points cannot be compelled by the local authorities other than those of the home port of the vessel to pay a license tax for selling spirituous liquors. State *v.* Dennie, 51 La. An. 608; *supra*, § 1363. Under the Constitution of 1897, it was held that the taxing power of a municipality was limited to obtaining revenue by *ad valorem* or property taxes and license taxes, and that any statute or ordinance authorizing any other levy was unconstitutional. Hence, it was held that an ordinance authorizing the exaction of certain rates or fees from each person selling within the corporate limits but without the market house or place was invalid. Mestayer *v.* Corrige, 38 La. An. 707. See also State *v.* Blaser, 36 La. An. 363. But compare New Orleans *v.* Dubarry, 33 La. An. 481.

[3] The provisions of the *present Constitution* of Mississippi are as follows: "Taxation shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value. The legislature may, however, impose a tax *per capita* upon such domestic animals as from their nature and habits are destructive of other property. Property shall be assessed for taxes under general laws and by uniform rules according to its value. But the legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county." Miss. Const., 1890, § 112. The *former Constitution* of Mississippi contained provisions as follows: "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals." Miss. Const., 1869, art. xii. § 13. "Taxation shall be equal and uniform throughout the State. All property shall be assessed in proportion to its value to be ascertained as directed by law." Miss. Const., 1869, art. xii. § 20.

[4] Williams *v.* Cammack, 27 Miss. 209; Alcorn *v.* Horner, 38 Miss. 652; Daily *v.* Swope, 47 Miss. 367; Vasser *v.* George, 47 Miss. 713; Nugent *v.* Jackson, 72 Miss. 1040; Edwards House Co. *v.* Jackson, 91 Miss. 429. Index, *Levee, Mississippi.* In Alcorn *v.* Horner, 38 Miss. 652, the court said: "It is perfectly well settled that, where any particular county or district is to be benefited by a public improvement, the inhabitants of such

tional provisions do not preclude the levying of a *privilege or occupation tax*, although the property of the taxpayer is also subject to assessment and taxation.[1] But although privilege or occupation taxes may be levied and occupations and businesses may be classified for that purpose, all the persons pursuing the same profession or occupation must be subjected to the same tax.[2] *Municipal taxes* as well as State taxes are within the operation of the provisions of the Constitution requiring taxation to be uniform and equal, and requiring that all property shall be taxed according to its value.[3] Under the Constitution the only manner in which a tax can be levied and assessed is by the agency of the assessors provided for by the Constitution, and an assessment by these assessors is a prerequisite to valid taxation.[4] Under the Constitution of 1869, it was held that

county or district may be taxed for the whole expense of the improvement, in proportion to the supposed benefit received by each, and that in this respect no limitation has been placed upon the taxing power vested in the legislature." In Edwards House Co. *v.* Jackson, 91 Miss. 429, it was held that as the constitutional provision is not applicable to special assessments, an assessment for the improvement of a street levied upon abutting property *according to frontage* does not violate the Constitution.

[1] Clarksdale Ins. Agency *v.* Cole, 87 Miss. 637; Attala County *v.* Kelly, 68 Miss. 40.

[2] Holberg *v.* Macon, 55 Miss. 112; Clarksdale Ins. Agency *v.* Cole, 87 Miss. 637; Coca Cola Co. *v.* Skillman, 91 Miss. 677. In Adams *v.* Mississippi Lumber Co., 84 Miss. 23, a privilege tax was levied by statute on lumber dealers, but saw-mill operators who did not ship lumber out of the State were excepted therefrom. It was held that the statute was unconstitutional, both as violating the principle of uniformity and equality, and as a regulation of interstate commerce in violation of the Federal Constitution. By statute an additional privilege tax of $10 per mile was imposed on all railroad companies which claimed exemption from State supervision under provisions of their charters fixing maximum and minimum rates of charge. The court held that this tax was discriminatory and violated the provisions of the Constitution of 1890, § 112, quoted above. Gulf & S. I. R. Co. *v.* Adams, 90 Miss. 559.

[3] Adams *v.* Mississippi State Bank, 75 Miss. 701. A statute which imposes a "docket fee" in all suits and proceedings in the courts of a certain county, which is to be applied to the payment of judicial salaries, violates the constitutional requirement of equality and uniformity, when the same courts exist in other counties and the fee is not exacted therein, but on the contrary judicial salaries in these counties are paid by the State. Murray *v.* Lehman, 61 Miss. 283. Although the Constitution requires the legislature to establish a public free school system as a State institution, the legislature may authorize a municipality to establish public schools outside of that system, and to levy a tax therefor without violating the constitutional requirement of equality and uniformity. Chrisman *v.* Brookhaven, 70 Miss. 477. The provisions of the Constitution of 1890, quoted *supra*, that property shall be assessed in proportion to its value, and that taxation shall be equal and uniform, are violated by a statute which provides that no city or town shall impose a greater tax on banks or solvent credits than the State tax of the same year. It is implied that all property in the municipality shall be assessed at its true value, and that the tax thereon shall be equal and uniform. Adams *v.* Mississippi State Bank, 75 Miss. 701.

[4] By the Constitution of 1869, art. xii. § 20, quoted *supra*, it was directed that all property should be "assessed in proportion to its value to be ascertained as directed by law."

the *subjects of taxation might be classified* at the discretion of the legislature, and if all property of the same class was taxed alike there was no violation of the equality and uniformity required by the Constitution. But this is no longer the rule under the Constitution of 1890, and property can now only be classified in the manner and to the extent permitted by that Constitution.[1]

In an action by the State revenue agent to recover taxes which had been omitted from the assessment rolls, it was held that there could be no recovery unless the taxes had first been entered on the rolls by the proper officer. State *v.* Adler, 68 Miss. 487. *Cooper*, J., said: "Aside from these [*i. e.* local assessments and levee taxes] we know of no instances in which a tax upon persons or property is due the State, counties, or municipalities, unless the property or person is first entered upon the rolls as provided and required by law." To the same effect, State *v.* Thebodeaux, 69 Miss. 92; State *v.* Vicksburg Bank, 69 Miss. 99; Thebodeaux *v.* State, 69 Miss. 683. The Constitution of 1890 provides for the election of assessors by the different counties "in the manner provided by law for each county"; and it was held that a statute which authorized the State revenue agent to assess for *ad valorem* taxes property within the State that has escaped taxation, and to collect taxes thereon, delegates the powers and duties of the assessor to the revenue agent and is unconstitutional, as departing from the constitutional scheme of securing equal and uniform taxation through assessment by local assessors in each county. State *v.* Tonella, 70 Miss. 701. A statute by which the legislature divides lands into classes, and assigns an arbitrary maximum and minimum value to each class, and confines the assessor to the limitation so fixed in making his assessment, violates the provisions of the Constitution of 1869, art. xii. § 20, *supra*. Hawkins *v.* Mangum, 78 Miss. 97. Where an additional percentage tax of $10 per mile was imposed on railroad companies claiming exemption from State supervision under charter provisions fixing maximum and minimum rates of charge, the court said that treating the charge as an *ad valorem* tax, it was unconstitutional because it was not imposed upon an assessment pursuant to law. Gulf & S. I. R. Co. *v.* Adams, 90 Miss. 559.

[1] Adams *v.* Bank of Oxford, 78 Miss. 532; Adams *v.* Kuykendall, 83 Miss. 571. It was at first held that the Constitution of 1869, art. xii. §§ 13, 20, did not oblige the legislature to tax all property, but left it to the discretion of the legislature to select the subjects of taxation. Having selected the property to be subjected to taxation then the Constitution required that the tax should be equal and uniform and according to value. But it was also held that the provisions of art. xii. § 12, which declared that "property of all corporations shall be subject to taxation" precluded the legislature from thereafter making a contract to exempt corporate property in the future. The Constitution gave the legislature the power to tax it or not as it saw fit, and it could not surrender that power. Hence, the legislature might repeal a statute which declared that certain corporate property should be exempt from taxation for a period of ten years. Mississippi Mills *v.* Cook, 56 Miss. 40. See also Attala County *v.* Kelly, 68 Miss. 40; Natchez, J. & C. R. Co. *v.* Lambert, 70 Miss. 779; Gulf & S. I. R. Co. *v.* Hewes, 183 U. S. 66. But the court *reconsidered its decisions* in these cases and held that the property of private corporations held for gain was required by the Constitution of 1869 to be taxed in the same manner as the property of individuals. It could not be exempted. Adams *v.* Yazoo & M. V. R. Co., 77 Miss. 194, 274. See, to the same effect under a similar provision of the *Alabama* Constitution, Mobile *v.* Stonewall, 53 Ala. 570, and of the *Iowa* Constitution, Davenport *v.* Chicago, R. I. & P. R. Co., 38 Iowa, 633. In Vicksburg Bank *v.* Worrell, 67 Miss. 47, it was held that the legislature might exempt property from taxation, and that therefore it might impose a tax upon a business and might provide that such tax should be a substitute for all other taxes on the means and property employed in the busi-

§ 1371. **Constitutional Provisions as to Taxation; Uniformity; Proportion to Value; Missouri.** — In Missouri, it is provided by the Constitution that taxes "*shall be uniform* upon the same class of subjects within the territorial limits of the authority levying the tax," and also that "all property subject to taxation shall be *taxed in proportion to its value.*" [1] It will be observed that these provisions merely require uniformity upon the "class of subjects" upon which the tax is levied. Hence, a *proper and legitimate classification* for purposes of taxation and the application of special rules and provisions to each class is not prohibited by the Constitution.[2] But the

ness. But a bank *failing to pay* a privilege tax under this statute was not exempt from other taxation, whether State, municipal, or county. Bank of Oxford *v.* Oxford, 70 Miss. 504.

[1] The following are the more important provisions of the *Missouri* Constitution affecting the power of taxation: "The taxing power may be exercised by the general assembly for State purposes, and by counties and other municipal corporations, under authority granted to them by the general assembly, for county and other corporate purposes." Mo. Const., 1875, art. x. § 1. "Taxes may be collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws." Const., 1875, art. x. § 3. "All property subject to taxation shall be taxed in proportion to its value." Const., 1875, art. x. § 4. "All railroad corporations in this State, or doing business therein, shall be subject to taxation for State, county, school, municipal, and other purposes, on the real and personal property owned or used by them, and on their gross earnings, their net earnings, their franchises and their capital stock." Const., 1875, art. x. § 5. "The general assembly shall not impose taxes upon counties, cities, towns, or other municipal corporations or upon the inhabitants thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." Const., 1875, art. x. § 10.

In 1900, an amendment to the Constitution of *Missouri* was adopted which provided that in addition to the taxes authorized by the Constitution to be levied for county purposes, the county authorities might "*in their discretion* levy and collect a special tax not exceeding fifteen cents on each $100 valuation to be used for road and bridge purposes, but for no other purpose whatever; and the power hereby given said county courts and township boards is declared to be a discretionary power. This constitutional amendment shall not apply to the cities of St. Louis, Kansas City, and St. Joseph." It was held that this constitutional amendment was void as denying the equal protection of the laws *in violation of the Fourteenth Amendment* to the United States Constitution, because Kansas City and St. Joseph were exempt from its provisions, these cities forming a part only of the counties in which they were located. The court expressed the opinion that the exemption of St. Louis did not affect the validity of the amendment, as that city was organized for purposes of county government as well as for municipal purposes. State *v.* Chicago, B. & Q. R. Co., 195 Mo. 228. Of this decision it may be observed that the power of taxation conferred was discretionary with the local authorities, and no decision of the Supreme Court of the United States has held that it is a denial of the equal protection of the laws under the Federal Constitution for the people of a State, by constitutional provision, to confer discretionary power of taxation upon such local taxing authorities as they may deem expedient, and over such territory as they may see fit.

[2] For the purposes of taxation and under the *Missouri* Constitution *insurance companies may be classified* as doing business for a profit, or as mutual benefit, fraternal, or assessment.

constitutional requirement of uniformity is violated *if the classification is arbitrary and unreasonable*, and a fair consideration shows that the tax in fact is not laid upon all of the same class of subjects within the jurisdiction of the taxing authority. The lack of uniformity may be emphasized by the fact that the tax is levied upon property at an arbitrary rate and not in proportion to its value as required by the Constitution.[1] But fees and charges exacted and imposed

Hence, a tax of two per cent on the premiums of old line companies is valid although it is not applicable to assessment companies. Northwestern Masonic Aid Assoc. *v.* Waddill, 138 Mo. 628. The legislature may provide by statute for the valuation of *railroad property* by a State board of equalization, *as a unit* throughout the State, and then authorize that board to ascertain the value of such property in each local taxing district. Such method of taxation does not violate the constitutional requirement of uniformity. State *v.* Severance, 55 Mo. 378. A statute imposing a *collateral inheritance tax* of five per cent on the estates of all persons who at the time of their death have no father, mother, wife, legally adopted child, or direct lineal descendant, is upon a proper and legitimate classification, and *is not void for lack of uniformity* under the Constitution, although the tax is laid on *collaterals* only, and not upon ascendants or descendants. State *v.* Henderson, 160 Mo. 190, 217.

[1] A statute which imposes a *succession tax* of five per cent on the whole estate of decedents, and seven and one-half per cent additional on all of such estates in excess of $10,000, violates the constitutional requirement of uniformity. The classification and regulation of the rate by amount is arbitrary and unreasonable. State *v.* Switzler, 143 Mo. 287. See to the same effect under the *Ohio* Constitution, State *v.* Ferris, 53 Ohio St. 314. A city ordinance which imposes a "license tax of one per cent per annum upon the goods, wares, and merchandise of any resident of said city" imposes an *ad valorem* property tax, which can only be levied on all personal property in the city, and *is void for lack of uniformity*. Brookfield *v.* Tooey, 141 Mo. 619. See also Troy *v.* Harris, 102 Mo. App. 51. A statute which imposes a *poll tax* of $2.50 in years when a general election is had upon each male resident of legal age, but provides for the *exemption* thereform *of all persons voting* at the election, is *void for lack of uniformity*. Kansas City *v.* Whipple, 136 Mo. 475.

Prior to the Constitution of 1875, it was held that in *extending the city limits*, the legislature might provide that no subdivision of land in the annexed territory containing over five acres should be subject to taxation for city purposes. This provision was held not to violate the requirement of the Constitution of 1865 that property should be *assessed in proportion to value*. Kansas City *v.* Cook, 69 Mo. 127. But under the provision of the Constitution of 1875 that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, no such provision can now be made. Hence, an exemption from taxation in cities of *agricultural lands exceeding five acres* is unconstitutional. Copeland *v.* St. Joseph, 126 Mo. 417, 428; Westport *v.* McGee, 128 Mo. 152; State *v.* Wardell, 153 Mo. 319; Birch *v.* Plattsburg, 180 Mo. 413, 417. In assessing *railroad property* for taxation, the same rate must be applied as is applied to the general property of individuals. State *v.* Missouri Pac. R. Co., 92 Mo. 137.

A statute which provided that persons should be licensed, and that stamps for the payment of a so-called special license tax should be issued to these licensees only, and by them affixed to liquors at the rate of ten cents per gallon, but which by its terms was only applicable to persons manufacturing liquors within the State for sale in the State and persons importing liquors for sale within the State, was held to be, *not a mere police regulation, but a statute levying a tax for revenue purposes on property*, and therefore void both for lack of uniformity under the Constitution, and also because the property was not

by the State *in the exercise of the police power* for the cost of inspection, when reasonable in amount and fairly proportioned to the cost of inspection, are not taxes within the constitutional requirements of uniformity and assessment in proportion to value.[1]

The constitutional requirements of uniformity and taxation in proportion to value have *no application to special assessments for local improvements* levied in proportion to the benefits received.[2]

The constitutional provisions of this State do not preclude the State from imposing and collecting an *ad valorem tax on property* used in a calling, and at the same time imposing and collecting a *license tax on the pursuit of the calling* as a condition of the right to carry it on, and this power may be delegated to municipal corporations.[3] For purposes of *license taxes, pursuits and occupations may*

taxed in proportion to its value. State *v.* Bengsch, 170 Mo. 81.

A law which purported to provide for *the inspection of beer* provided that a certain fee should be paid into the State treasury by the manufacturers of beer for the inspection thereof. Such fees in the aggregate amounted to $500,000 per annum more than the expense of inspection. It was held that the fee was a tax and as such was unconstitutional, being neither levied on the property in proportion to its value nor upon an equal and uniform basis. State *v.* Eby, 170 Mo. 497, 526.

[1] State *v.* Vickens, 186 Mo. 103, 107 (factory inspection); St. Louis *v.* Liessing, 190 Mo. 464, 487 (milk inspection); St. Louis *v.* Grafeman Dairy Co., 190 Mo. 492, 506 (milk inspection).

A *per capita* charge imposed upon the *registration and licensing of dogs* is an exercise of the police power, and does not come within the requirement of the Constitution that property shall be taxed in proportion to value. Carthage *v.* Rhodes, 101 Mo. 175. Although the Constitution prohibits the *legislature* from levying taxes for "municipal purposes" (Mo. Const., 1875, art. x. § 10), the legislature may, without violating any constitutional provision, require the expense of all elections held within a municipality to be paid by it. State *v.* Owsley, 122 Mo. 68; State *v.* St. Louis Board of Education, 141 Mo. 45, 49. *Police expenses* are incurred in the exercise of a *State* function and not in the exercise of a *municipal* power, and the legislature may, notwithstanding the constitutional prohibition against levying taxes for municipal purposes, impose the cost of the police on the city and direct the city to levy a tax. State *v.* Mason, 153 Mo. 23. *Water rates* for water supplied by a municipality to a consumer are in the nature of a toll for services rendered and are not a tax, and a higher charge to one person than to another is not prohibited by the constitutional requirement that taxes shall be uniform upon the same class of subjects. St. Louis Brewing Assoc. *v.* St. Louis, 140 Mo. 419.

[2] Garrett *v.* St. Louis, 25 Mo. 505; Egyptian Levee Co. *v.* Hardin, 27 Mo. 495; Farrar *v.* St. Louis, 80 Mo. 379, 390; St. Joseph *v.* Owen, 110 Mo. 445, 455; Morrison *v.* Morey, 146 Mo. 543, 564; Kansas City *v.* Bacon, 147 Mo. 259, 282; Thornton *v.* Clinton, 148 Mo. 648, 663; Meier *v.* St. Louis, 180 Mo. 391, 408; Heman Const. Co. *v.* Wabash R. Co., 206 Mo. 172, 179; Fruin-Bambrick Const. Co. *v.* St. Louis Shovel Co., 211 Mo. 524, 532.

[3] American Un. Exp. Co. *v.* St. Joseph, 66 Mo. 675; St. Louis *v.* Green, 70 Mo. 562; St. Joseph *v.* Ernst, 95 Mo. 360, 367; Aurora *v.* McGannon, 138 Mo. 38, 45; Springfield *v.* Smith, 138 Mo. 645, 654.

Under the Constitution of 1865 it was held that the direction that property subject to taxation shall be taxed in proportion to its value, did not preclude the levy of *capitation or income taxes*. Glasgow *v.* Rowse, 43 Mo. 479. Notwithstanding the provisions of the Constitution of 1875, a city may be authorized by statute to levy and collect from the same person (1) a tax on

be classified, but license taxes are otherwise within the provisions of the Constitution, and must be uniform on the same class of subjects within the limits of the authority levying the tax.[1]

§ 1372 (746). **Constitutional Restrictions; Taxation for "Corporate Purposes" by "Corporate Authorities"; Illinois.** — The present and former Constitutions of Illinois contain a provision to the effect that the "corporate authorities" of cities may be vested by the legislature with power to assess and collect taxes for "corporate purposes."[2] According to the uniform course of decision in Illinois,

his property; (2) a vehicle tax for the privilege of using the streets; (3) a tax on the business or occupation. St. Louis *v.* Weitzel, 130 Mo. 600, 619.

[1] St. Louis *v.* Steinberg, 69 Mo. 289; St. Louis *v.* Spiegel, 90 Mo. 587; St. Louis *v.* Bowler, 94 Mo. 630; St. Louis *v.* Consolidated Coal Co., 113 Mo. 83, 88. Compare Kansas City *v.* Richardson, 90 Mo. App. 450. A *license tax* levied on *all sewing machine* agents is on a legitimate classification and is uniform within the meaning of the Constitution. St. Louis *v.* Bowler, 94 Mo. 630. An *ad valorem* tax on the *gross annual receipts of express companies* upon business done within the city is not void for lack of uniformity, although the license tax on merchants is levied upon a different basis. American Un. Exp. Co. *v.* St. Joseph, 66 Mo. 675. A license tax on *vehicles for trade and traffic* using the streets is not void for lack of uniformity. St. Louis *v.* Green, 70 Mo. 562. A city ordinance which imposes a license of $2 on merchants with a stock of less than $1,000 and of $3 on merchants with a greater stock does not violate the constitutional requirement of uniformity. The license tax may be proportioned to the value of the privilege without destroying its uniformity. Aurora *v.* McGannon, 138 Mo. 38. A statute which authorizes the levy of a *poll tax* of $2.50 for road purposes in road districts organized under it on all inhabitants between twenty-one and sixty years of age is not unconstitutional for lack of uniformity, although the poll tax for road purposes in the remainder of the county is $2 on persons between twenty-one and fifty years of age. Elting *v.* Hickman, 172 Mo. 237, 258. A license tax of $100 upon *meat dealers* in one part of the city, and of $25 on those in the remainder of the city is void for lack of uniformity. St. Louis *v.* Spiegel, 75 Mo. 145.

A city had authority to license "merchants" and enacted an ordinance imposing a license tax on produce dealers. It was held that the statutory authority justified the levy of the license tax upon produce dealers as they were merchants, but that the license tax was void for lack of uniformity because all merchants were not subjected to it. Kansas City *v.* Grush, 151 Mo. 128. In *Missouri* it is the settled rule that the *liquor business* may be prohibited absolutely, and that, notwithstanding the constitutional requirements as to taxation, the State may exact, or provide for the exaction of, a charge for the privilege in its discretion. Such a charge is not a tax, but is a condition of carrying on a business which otherwise might be prohibited. State *v.* Hudson, 78 Mo. 302; State *v.* Bixman, 162 Mo. 1; State *v.* Seebold, 192 Mo. 720, 727.

[2] The full text of these constitutional provisions is as follows: "The corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the general assembly shall require that all the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law." Illinois Const., 1848, art. ix. § 5.

In the Constitution of 1870, a considerable change in the language of this provision was made and it now is as follows: "The general assembly

this constitutional provision is to be construed as a *limitation upon the power of the legislature to delegate* the right of corporate or local taxation to any other than the corporate or local authorities; and by the phrase "*corporate authorities*" must be understood those municipal officers who are either *directly elected by the people* to be taxed, or appointed in some mode to which they have given their consent.[1] The *consent* of the people to the exercise of corporate

may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations shall be invested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property, within the jurisdiction of the body imposing the same." Illinois Const., 1870, art. ix. § 9. There is a further provision in the Constitution of this State prohibiting the *legislature* from itself imposing taxes upon municipal corporations or the inhabitants or property thereof for corporate purposes. Illinois Const., 1870, art. ix. § 10.

These provisions of the two constitutions are substantially identical so far as concerns the question now under consideration. O'Brien *v.* Wheelock, 184 U. S. 450, 486. It has been said that the provision of the Constitution of 1870, quoted *supra*, does not relate to *counties*, but solely to taxes for cities, towns, and villages. Wetherell *v.* Devine, 116 Ill. 631.

[1] Weightman *v.* Clark, 103 U. S. 256; Harter *v.* Kernochan, 103 U. S. 562, 570; O'Brien *v.* Wheelock, 184 U. S. 450, 487, aff'g 95 Fed. Rep. 883; People *v.* Chicago, 51 Ill. 17, 30; Harward *v.* St. Clair & M. Levee & Dr. Co., 51 Ill. 130; Gage *v.* Graham, 57 Ill. 144; Hessler *v.* Drainage Com'rs, 53 Ill. 105; Lovington *v.* Wider, 53 Ill. 302; Wider *v.* East St. Louis, 55 Ill. 133; Madison County Court *v.* People, 58 Ill. 456, 463; School Trustees *v.* People, 63 Ill. 299; Decker *v.* Hughes, 68 Ill. 33, 44; People *v.* Dupuyt, 71 Ill. 651, 653; Updike *v.* Wright, 81 Ill. 49, 53; People *v.* McAdams, 82 Ill. 356, 360; Gaddis *v.* Richland County, 92 Ill. 119; Cornell *v.* People, 107 Ill. 372; Mather *v.* Ottawa, 114 Ill. 659, 664; Wetherell *v.* Devine, 116 Ill. 631; Snell *v.* Chicago, 133 Ill. 413; People *v.* Knopf, 171 Ill. 191, 199; Givens *v.* Chicago, 188 Ill. 348; Morgan *v.* Schusselle, 228 Ill. 106, 112. See also Chicago, D. & V. R. Co. *v.* Smith, 62 Ill. 268.

The constitutional provision, as construed by the courts, does not prohibit the creation by statute of a *board of local improvements in cities* which is charged with the duty of initiating public improvements and preparing an ordinance therefor for submission to the council, since the adoption of the ordinance by the council lies at the foundation of the improvement proceeding and that is a municipal act. Givens *v.* Chicago, 188 Ill. 348. See also White *v.* Chicago, 188 Ill. 392, 395.

Under this provision of the Constitution, it was held that a city could not be *compelled to incur debts and issue its bonds* without the consent of the corporate authorities. In the case of Lincoln Park the commissioners were created by the legislature, were not under the control of the corporation, and had the power to make purchases of lands for the park; and to pay for such purchases, the city was to issue to them its bonds. The court held that they were not the *corporate authorities* of the city, and refused a *mandamus* to the city authorities to issue the bonds. People *v.* Chicago, 51 Ill. 17. A statute attempting *mandatorily to validate a void issue of bonds* and to provide for their collection from a town construed as an attempt by the legislature to impose a tax without the consent of the local authorities and held unconstitutional. Marshall *v.* Silliman, 61 Ill. 218. Index, *Curative Act.*

A statute which provided for the *appointment of police commissioners for the city of East St. Louis* named the commissioners, gave them charge of the police, authorized them to certify to the city authorities the amount of the expense, and prohibited the city

powers *may be given by a vote* upon the question of the adoption of a statute; after a favorable vote as prescribed by law, the persons

authorities from appointing or interfering with the police force, held to be unconstitutional under the provisions of the Constitution of 1848, quoted *supra*. Lovington *v.* Wider, 53 Ill. 302; People *v.* Canty, 55 Ill. 33; Wider *v.* East St. Louis, 55 Ill. 133; Hinze *v.* People, 92 Ill. 406. Under a statute which named the first directors and provided that the freeholders in certain townships should elect their successors, the *Wabash River Levee Directors* were held to be a *private corporation* and incapable of receiving a delegation of power to levy a tax. Wabash River Levee Directors *v.* Houston, 71 Ill. 318. Where a building was erected under the will of a testator as a *private school house and place of worship*, the legislature cannot, by statute, create a school district for the support of such school, provide for the election of trustees therein, and invest them with the taxing power. People *v.* McAdams, 82 Ill. 356.

Statutes naming *drainage commissioners* with authority to make improvements and to certify the cost of the same to the county treasurer for collection by taxation held to be unconstitutional. O'Brien *v.* Wheelock, 184 U. S. 450, 487, aff'g 95 Fed. Rep. 883; Hessler *v.* Drainage Com'rs, 53 Ill. 105; Gage *v.* Graham, 57 Ill. 144. As to the formation of *drainage districts* under the amendment to the Constitution of 1870, art. iv. § 31, authorizing the legislature to "provide for the organization of drainage districts," see Blake *v.* People, 109 Ill. 504; Owners of Lands *v.* People, 113 Ill. 296; Wilson *v.* Chicago Sanitary Dist., 133 Ill. 443; People *v.* Nelson, 133 Ill. 565. *Drainage commissioners* elected in a drainage district which embraces several towns, are not the corporate authorities of such towns, and cannot be authorized by statute to impose on any town without its consent a burden which requires resort to taxation to remove it; and this is true although the drainage commissioners are not vested with the power to levy taxes to discharge the burden. The expense, in this case, was for constructing a bridge across a ditch by the side of a highway for the purpose of giving access to farm lands immediately adjoining. Morgan *v.* Schusselle, 228 Ill. 106.

The *library board of Chicago*, consisting of nine members appointed by the mayor, with the approval of the city council, and removable by him, with the consent of the council, are not the corporate authorities of Chicago, and cannot levy a library tax. Chicago *v.* Cook County, 136 Ill. App. 120, 123.

Under the clause of the constitutional provision of 1848, art. ix. § 5, quoted above, that the legislature "shall require that all the property within the limits of municipal corporations belonging to individuals shall be taxed for the payment of debts contracted under authority of law," the legislature might provide by statute that the State auditor should ascertain the interest on town and other bonds and certify the amount to the county clerk who should thereupon extend the tax upon his books. This is a mere provision for the *collection of the debt* pursuant to the express provision of the Constitution. Dunnovan *v.* Green, 57 Ill. 63. A similar authority may be exercised by the legislature under the Constitution of 1870. Decker *v.* Hughes, 68 Ill. 33. Where a debt has been voluntarily incurred by the municipality, the legislature may select the agent to raise the means of paying the same by taxation. Neither the Constitution of 1848 nor that of 1870 imposes any restriction upon this power. Decker *v.* Hughes, 68 Ill. 33.

Cities under the General Incorporation Act, prior to the Act of 1871, were not restricted as to the amount of taxes to be raised for sewerage in any fiscal year. Hale *v.* People, 87 Ill. 72. The constitutional provisions relating to *the uniformity of taxes* has respect to the laws which may be passed for the imposition of taxes, and not to the particular working of the laws. Spencer *v.* People, 68 Ill. 510; Murphy *v.* People, 120 Ill. 234. A *license fee* imposed upon a certain business or occupation is not unconstitutional if the fees are uniform as to all persons of the same class, as here, brokers, in a city. Braun *v.* Chicago, 110 Ill. 186.

named in the statute become corporate authorities who may exercise the power of taxation.[1] As construed by the courts, the effect of this constitutional provision is to limit taxation by municipalities *to local or corporate purposes;* and a "corporate purpose," as defined by the courts, is one that is germane to the objects for which the municipality was created, or having a legitimate connection with those objects and a manifest relation thereto.[2] But this constitutional provision does not confine the legislature to any particular corporate authorities or to any then known instrumentalities of that character. It may create every conceivable kind of corporate authority, and may endow them with the powers of pre-existing corporate authorities, except in so far as it may be restrained by other provisions of the Constitution. Hence, several towns may be united in one district for the specific purpose of establishing and maintaining *a public park* and the corporate authority of the district so created

[1] People *v.* Salomon, 51 Ill. 37, 51; Lee *v.* Ruggles, 62 Ill. 427, 430; Cornell *v.* People, 107 Ill. 372; Wetherell *v.* Devine, 116 Ill. 631; People *v.* Knopf, 171 Ill. 191. After the people of a municipality have adopted a statute providing for the appointment of taxing authorities in a prescribed manner, the *legislature cannot change* the manner of appointment. Cornell *v.* People, 107 Ill. 372.

[2] Taylor *v.* Thompson, 42 Ill. 9; Livingston County *v.* Weider, 64 Ill. 427; People *v.* Dupuyt, 71 Ill. 651, 655; Hackett *v.* Ottawa, 99 Ill. 86. A tax for a *corporate purpose* has been defined to be a tax to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it. Wetherell *v.* Devine, 116 Ill. 631, 637. *Election expenses* in the municipality are a corporate purpose for which the power of taxation may be exercised. Wetherell *v.* Devine, 116 Ill. 631.

In Livingston County *v.* Weider, 64 Ill. 427, it was held that the *State Reform School* was a *State institution,* and not a county or corporate institution; that the expense of establishing it should be borne by all parts of the State equally; that an act of the legislature authorizing the creation of municipal or corporate debt in order to secure its location or erection was unconstitutional, because such a debt (involving the necessity of a resort to taxation to pay it) is not created for a "corporate purpose" within the meaning of the constitutional provision referred to in the text. See also People *v.* Dupuyt, 71 Ill. 651. But compare Livingston County *v.* Darlington, 101 U. S. 407, 414, where the Supreme Court of the United States appears to have been of the contrary opinion.

The *development of water power for manufacturing purposes* is not a corporate purpose of a city for which bonds can be issued and the power of taxation exercised. Mather *v.* Ottawa, 114 Ill. 659. See also Ottawa *v.* Carey, 108 U. S. 110. But compare Hackett *v.* Ottawa, 99 U. S. 86. The *payment of a debt* which was not incurred by the municipality and for which it is not responsible is not a corporate purpose for which it may be taxed. Hence, it was held that a statute which provided that all *taxes* collected for county and township purposes from any railroad *should be set apart* by the county treasurer as a sinking fund *to redeem the bonds* of any town issued in aid of the railroad was unconstitutional. Sleight *v.* People, 74 Ill. 47. *School trustees* cannot be authorized by statute to issue *railroad aid bonds* and to collect taxes for the payment of principal and interest. These functions are foreign to the objects for which the school trustees are appointed or elected, and they are not corporate authorities for that purpose. School Trustees *v.* People, 63 Ill. 299. See also Weightman *v.* Clark, 103 U. S. 256.

may be vested in agents designated by the statute who may also be vested with power to assess and levy taxes for the corporate purposes.[1] A tax for a corporate purpose — provided, of course, it be not of such nature that it may be collected by special taxation or special assessment under other provisions of the Constitution — must be collected from the entire territory of the municipality, and not only from a part thereof. The *corporate purpose must extend to the entire city;* and, in the apportionment, the principle of equality and uniformity must be observed.[2] But, apparently, these constitutional provisions do not apply to taxes levied within the limits of the municipality for a general public purpose in which the people of the State are directly interested, although the area upon which the tax is imposed is limited.[3]

§ 1373. **Exercise of the Delegated Authority by Popular Representatives.** — It will be seen from the foregoing examination of the decisions of the Illinois courts that the general effect of the construction of the constitutional provisions of that State is to confine the exercise of delegated power to tax to the representatives of the people elected by and immediately responsible to them. Without under-

[1] People *v.* Salomon, 51 Ill. 37. *Statutes creating park commissioners* for certain districts, vesting them with certain governmental powers of a political character, held to create the commissioners into public municipal corporations capable of exercising the power of taxation. People *v.* Salomon, 51 Ill. 37; People *v.* Williams, 51 Ill. 63; South Park Com'rs *v.* Dunlevy, 91 Ill. 49; People *v.* Walsh, 96 Ill. 232, 247; Dunham *v.* People, 96 Ill. 331; West Chicago Park Com'rs *v.* Western Un. Tel. Co., 103 Ill. 33; Cornell *v.* People, 107 Ill. 372; West Chicago Park Com'rs *v.* McMullen, 134 Ill. 170; McCormick *v.* South Park Com'rs, 150 Ill. 516; Jones *v.* Lake View, 151 Ill. 663, 676; West Chicago Park Com'rs *v.* Chicago, 152 Ill. 392, 404; West Chicago Park Com'rs *v.* Sweet, 167 Ill. 326; West Chicago Park Com'rs *v.* Farber, 171 Ill. 146; South Park Com'rs *v.* First Nat. Bank, 177 Ill. 234; Chicago Title & Trust Co. *v.* Lake View, 187 Ill. 622. In *the Park Cases*, cited *supra*, the statute provided for the appointment of commissioners otherwise than by an election by the voters, but it was held that inasmuch as the park statutes did not become operative until they were adopted by a vote of the people, the consent of the people to the exercise of the taxing power by the commissioners was sufficiently established. People *v.* Salomon, 51 Ill. 37.

[2] Primm *v.* Belleville, 59 Ill. 142.

[3] In Will County *v.* People, 110 Ill. 512, it was held that a statute which makes *counties liable* to contribute one-half of the expense of the *town bridges* upon certain contingencies, enacted in pursuance of a general law of the State for the purpose of building bridges and maintaining public highways, &c., in which the people of the State at large are directly interested, is not the levying of a tax for a corporate purpose, and hence is not within the operation of the provision of the Constitution of 1870, art. ix. § 9. See also Heffner *v.* Cass & M. Counties, 193 Ill. 439, 452. A statute which subjects municipalities to responsibility for *damages caused by mob violence* does not create a debt or impose a tax in violation of the Constitution. Chicago *v.* Manhattan Cement Co., 178 Ill. 372.

taking to say how far this rule is of general application as a right inherent in local self-government in the different States, it would appear that the same general result has been reached in several of the States under the Constitutions, polity, and legal principles adopted in such States.[1]

[1] *Alabama.* In this State it is held that the legislature can only delegate the power to tax to municipal corporations and other like bodies. Hence, where a school district was created by statute, the first trustees being named in the act and their successors being appointed by the State superintendent of education, it was held that although the school district was a public corporation, it was not a municipal corporation, and a statutory provision giving the trustees power to levy taxes for school purposes was unconstitutional. Schultes *v.* Eberly, 82 Ala. 242, 244. See also Mitchell *v.* State, 134 Ala. 392, 409, 412; Harlan *v.* State, 136 Ala. 150.

Iowa. An action for *mandamus* was begun to compel the city council of Des Moines to levy a tax to create a sinking fund *to build and maintain a library.* The statute, as originally enacted, placed the library under the direct control and management of the city council who were elected by the people, and authorized the council to levy a tax. The people of the city by vote accepted the provisions of this law. By subsequent acts of the legislature, a board of trustees was established and the control and management of the library were vested in the board with the power of absolutely determining the amount of the taxes to be levied. It was held that under the rule that the legislature cannot, without the consent of the people, delegate the power of taxation for municipal purposes to a body or persons not elected by, or immediately responsible to, the people, the delegation to the board of trustees of the authority to tax was unconstitutional, and that the fact that the mayor appointed the library board with the consent of the council did not make such library board an elective body responsible to the people within this principle. State *v.* Des Moines, 103 Iowa, 76, 88, 90, 94. *Kinne,* J., who delivered the opinion of the court, said: "Under our Constitution, the power of taxation has been vested by the people in the legislature. There is no express constitutional restriction or limitation upon the power of the legislature in this State, and that body may, for proper and legitimate purposes, confer the taxing power upon municipalities. Nevertheless, in the absence of such constitutional restrictions, the power of the legislature to confer the right of taxation is limited by implication. . . . There is *an implied limitation* upon the power of the legislature to delegate the power of taxation. This of necessity must be so, otherwise the legislature might clothe any person with the power to levy taxes, regardless of the will of those upon whom such burdens would be cast, and such person might be directly responsible to no one. . . . The uses to which this tax is to be put are local, and the benefits to be derived from such library must necessarily inure mostly to the benefit of the people of the city of Des Moines. Such being the case, we think that the legislature had no power to vest the levying of this tax in a body not directly responsible to the people of the city. The levy and collection of a tax is a taking of the property of the taxpayer against his will, and such a necessary, arbitrary, and far-reaching power ought not to be conferred upon a body of persons who are not the direct representatives of the people, who are not elected by them, and who, therefore, are not directly responsible to them, unless the people assent thereto. . . . We hold that no officer and no board not elected by, and immediately responsible to, the people can be made the repository of such power. If this power was given to the city council, and it was abused, the people could, at least, prevent a recurrence of the wrong at the polls; but if it be reposed in a body not elected by the people, a remedy is uncertain, indirect, and likely to be long delayed. The absolutely unlimited power of taxation as to duration, attempted to be conferred by the act under consideration,

§ 1374. **Constitutional Prohibition of Delegation to Special Commissions, &c.** — A *limitation upon the power of taxation* in the constitutions of certain States is to be found in a prohibition against delegating to any special commission, private corporation or association, any power to make, supervise, or interfere with any municipal improvement, money, property, or effects, or to levy taxes, or to perform any municipal function whatever.[1] It has been held that

is, of itself, a forcible reminder that the power to fix, determine, and levy a tax for local purposes should be conferred upon some body which stands as the direct representative of the people, to the end that an abuse of such power may be speedily and directly corrected by those whose property must bear such burdens. The act in question is unconstitutional in so far as it undertakes to confer the arbitrary power upon the board of library trustees to fix and determine the amount of tax to be levied for the purpose therein mentioned, and the city council cannot be compelled to levy (regardless of any discretion) the amounts fixed by the library board and certified to said council." See also State *v.* Barker, 116 Iowa, 96, 105, 106.

Kansas. See, as to this State, *supra*, § 1368.

Michigan. In this State the court has declared that "the whole theory of the Constitution and of our State polity, before and since its adoption, looks to the imposition of local taxes for local purposes by local officers." Wilcox *v.* Paddock, 65 Mich. 23, 29. Hence, in this case it was held that the legislature could not authorize the judge of probate of a court to appoint a commissioner to superintend the improvement of a river, determine the necessity of the work, and assess taxes for benefits upon lands without the limits of his county, such action being an encroachment upon the right of local self-government.

New Jersey. As to the rule in this State, see *post*, §§ 1434, 1435.

Tennessee. It has been held that the provisions of the Constitution of 1870, art. ii. § 29, that the legislature may authorize the several counties and incorporated towns to impose taxes for county and corporation purposes respectively, by inference, is exclusive of any other delegation, and the power to tax cannot be delegated to any other body. Keesee *v.* Civil Dist. Board of Education, 6 Cold. (Tenn.) 127. The power conferred upon counties to tax cannot, by special or local law, be taken from the county court, and conferred on local tribunals of particular counties composed even temporarily of commissioners appointed by the governor. Taxation by a county court complies with the principle of taxation by the representatives of the taxpayers which the other system infringes. Pope *v.* Phifer, 3 Heisk. (Tenn.) 682. Generally, see Index, *Charters, Local Self-government* also, *ante*, §§ 98-101.

[1] The earliest of these constitutional prohibitions seems to be that of *Pennsylvania*, which is as follows: "The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise, or interfere with any municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever." Pa. Const., 1874, art. iii. § 20. This provision appears in exactly similar terms in the Constitutions of *Colorado* (Const., 1876, art. v. § 35), *Montana* (Const., 1889, art. v. § 36), and *Wyoming* (Const., 1889, art. iii. § 37). In *South Dakota* (Const., 1889, art. iii. § 26) and in *Utah* (Const., 1895, art. vi. § 29) a similar prohibition is to be found which includes the selection of a capitol site among the prohibited functions.

In *California*, the prohibition is framed in slightly different language, and includes within its operation the *levying of assessments* as well as the levying of taxes. The provision of the Constitution of that State is as follows: "The legislature shall not delegate to any special commission, private corporation, company, association, or individual any power to make, control, appropriate, supervise, or in any way interfere with any

these constitutional provisions are prospective in their operation, and do not affect delegations of authority previously made.[1] These constitutional prohibitions do not affect *ordinary proceedings* in connection with the administration of municipal affairs.[2] Nor do they apply to those functions which are *not properly municipal* in their nature.[3] When the board or body created or provided for by statute *is subjected to the direction and control of the municipal authorities*, it is to be regarded as a department or agency of the municipality and not within the prohibition of the Constitution.[4] But

county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or *assessments*, or perform any municipal functions whatever." Cal. Const., 1879, art. xi. § 13.

[1] Sacramento Sinking Fund Com'rs *v.* Sacramento, 71 Cal. 310; Perkins *v.* Slack, 86 Pa. 283. See also Mellon *v.* Pittsburgh, 31 Leg. Int. (Pa.) 212; Struthers *v.* Philadelphia, 12 Phila. (Pa.) 268.

[2] The *initiative and referendum* are not *within* the prohibition of the *California* Constitution, quoted *supra*. The aggregate body of qualified electors cannot, under that provision, be regarded as a "special commission." *In re* Pfahler, 150 Cal. 71, 87, 88.

The prohibition of the *Utah* Constitution does not apply to a statute which authorizes a *proceeding in court to disconnect certain territory* from a municipality. Young *v.* Salt Lake City, 24 Utah, 321.

[3] The enactment of a statute which authorizes the *commitment of juvenile offenders to a reformatory institution* maintained by a *private* corporation, and the payment to such corporation by the municipality of the sum necessary for the maintenance of the offenders so committed is not within the prohibition of the *California* Constitution. The statute does not relate to a "municipal function." Boys' & Girls' Aid Society *v.* Reis, 71 Cal. 627. See also Cochran *v.* Los Angeles County, 117 Cal. 534, 538.

[4] A statute which creates the mayor, auditor, and treasurer of a municipality a *pension board* and gives them the management of the pension fund does not create a "special commission" in violation of the *California Constitution*, quoted *supra*. Pennie *v.* Reis, 80 Cal. 266. *Commissioners* appointed by a municipality pursuant to statute for the purpose of *assessing benefits and damages*, and to whom the *general supervision of the work of an improvement* is committed until its completion, are simply agents of the municipality to assist it in making the improvement, and when they act under the direction of the city authorities and have no power to bind the city until their acts are approved and confirmed by the city council, they are *not a special commission* within the prohibition of the *California* Constitution, quoted *supra*. Davies *v.* Los Angeles, 86 Cal. 37, 49. Under the statute of *California* known as the *Vrooman Act*, which provides for the payment of contractors for public improvements by the issuance of assessment certificates to them which may be collected by them, the contractor is only the agent or servant of the city in collecting the assessment, and delegation of authority to him for that purpose does not violate the prohibition of the *California* Constitution, quoted *supra*. Banaz *v.* Smith, 133 Cal. 102. The prohibition of the *California* Constitution does not prevent the legislature from conferring statutory authority upon *county supervisors to license an individual to collect tolls* on condition of keeping the highway in repair. Blood *v.* McCarty, 112 Cal. 561. The prohibition of the *California* Constitution does not prevent statutory authority being conferred upon county officers to *appoint a specified number of deputies* whose salaries are fixed by the statute and payable from the county treasury. Tulare County *v.* May, 118 Cal. 303, 308; San Francisco *v.* Broderick, 125 Cal. 188, 193. See also Farnum *v.* Warner, 104 Cal. 677. But the statute would be unconstitutional if it gave to the county officers unrestrained authority to ap-

the appointment of any *independent commission by statute* having authority over municipal affairs and authorized *to subject the municipality to taxation* is within the prohibition of the Constitution, and enactments for that purpose are invalid.[1]

§ 1375. (739). **Municipal Authority to levy Taxes.** — In the general power of the legislature, as well as in its power to create municipal corporations,[2] may be found the right to authorize them, when created, *to impose or levy local rates, taxes, and assessments* upon

point deputies at will and to fix the salaries. San Francisco *v.* Broderick, 125 Cal. 188, 193. In *California*, it has been held that the constitutional prohibition of that State does not prevent the enactment of a statute authorizing the organization of a *sanitary district* for the construction of sewers among other purposes, at least when the district is in rural territory and is not in any city or town, and there is no evidence that the power to construct sewers, &c., and to assess and levy taxes in any way interferes with or affects any municipality. Woodward *v.* Fruitvale Sanitary Dist., 99 Cal. 554. But compare *In re* Werner, 129 Cal. 567, 574. It has been said in a case which involved the construction of a *Freeholders' Charter*, that the provision of the *California* Constitution forbids the municipality to do what the legislature is forbidden to do. Yarnell *v.* Los Angeles, 87 Cal. 603. Index, *Freeholders' Charters*.

A statute which authorizes *borough councils to establish boards of health*, which shall have power to adopt rules and regulations, subject always to the approval thereof by the borough councils, provides for an agency of the municipality and is constitutional. Smith *v.* Baker, 14 Pa. County Ct. R. 65.

It has been held that the *manner of appointment* of the municipal agents is not material so long as they are subject to municipal control. Thus, notwithstanding the prohibition of the *Colorado* Constitution, referred to *supra*, the *legislature* may create a *board of public works* for a city, the members of which are to be *appointed by the governor* with the advice and consent of the senate, and may charge such board with duties and endow it with powers relating to the expenditure of city funds, the payment and cancellation of outstanding city warrants, and the making of public improvements. Such a board is *not a "special commission,"* but is *a department of the city government. In re* Denver Board of Public Works, 12 Colo. 188. See also Denver *v.* Londoner, 33 Colo. 104, 114; Denver *v.* Iliff, 38 Colo. 357, 363. But it would seem that a statute may violate this constitutional prohibition if it simply confers upon a municipal officer the power of a *special commission without subjecting him to municipal control.* Thus, a *Pennsylvania* statute of 1870, enacted prior to the adoption of the constitutional provision of that State, created a certain commission, naming the commissioners, for the erection of public buildings in the city of Philadelphia. In 1893, a statute was passed applicable to all cities of the first class, but operating only upon Philadelphia, which abolished these commissioners and vested their powers in the department of public works. It was held that the Act of 1893 simply abolished the commissioners, thereby vacating the offices, but did not extinguish the commission; that it transferred the powers of the commission to the head of the department of public works, another commissioner, and therefore violated the prohibition of the Pennsylvania Constitution. Perkins *v.* Philadelphia, 156 Pa. 554.

[1] The *Pennsylvania* statute which provides for the *appointment of side-path commissioners* to construct and maintain side-paths along highways in towns for the use of bicycles and pedestrians held to be unconstitutional. Porter *v.* Shields, 200 Pa. 241; Commonwealth *v.* Smith, 9 Pa. Dist. R. 350; Keeler *v.* Westgate, 10 Pa. Dist. R. 240.

[2] *Ante*, §§ 33, 55.

their inhabitants, and upon all property within the limits of the designated taxing district, which is ordinarily coextensive with the territorial limits of the municipality.[1] Indeed, it is one of the distinguishing features of our municipal institutions, borrowed from the mother country, that local rates shall be locally imposed by those who have to pay them or bear their burden; and this power, from very early periods, has, in the different States, been constantly delegated to, and exercised by, the local authorities.[2]

§ 1376 (740). **Same Subject.** — In the absence of special constitutional restriction, the legislature may *confer the taxing power upon*

[1] Hope *v.* Deaderick, 8 Humph. (Tenn.) 1; Smith *v.* Aberdeen, 25 Miss. 458; Washington *v.* State, 13 Ark. 752; Goddin *v.* Crump, 8 Leigh (Va.), 120; Bull *v.* Read, 13 Gratt. 78, 98; Thompson *v.* Floyd, 2 Jones L. (N. C.) 313, 316; Wilmington *v.* Roby, 8 Ired. L. (N. C.) 250; Caldwell *v.* Burke Co. Jus., 4 Jones Eq. (N. C.) 323; Taylor *v.* Newberne Com'rs, 2 Jones Eq. 141; Alexander *v.* Baltimore, 5 Gill (Md.), 383, 393, *per Martin*, J.; Burgess *v.* Pue, 2 Gill, 11; s. c. *Ib.* 254 (1844); State *v.* Noyes, 30 N. H. 292; Cheaney *v.* Hooser, 9 B. Mon. (Ky.) 330; Slack *v.* Maysville & Lex. R. Co., 13 B. Mon. (Ky.) 1; Bradley *v.* McAtee, 7 Bush (Ky.), 667; *Ib.* 599; Marion Council & Int. *v.* Chandler, 6 Ala. 899; State *v.* Estabrook, 6 Ala. 653; Battle *v.* Mobile, 9 Ala. 234; Osborne *v.* Mobile, 44 Ala. 493; Hurford *v.* Omaha, 4 Neb. 336; People *v.* Kelsey, 34 Cal. 470; Harrison *v.* Vicksburg, 11 Miss. 581; Shreveport *v.* Jones, 26 La. An. 708; Butler's Appeal, 73 Pa. St. 448; Kinney *v.* Zimpleman, 36 Tex. 554; St. Louis *v.* Laughlin, 49 Mo. 559; People *v.* Hurlbut, 24 Mich. 44; Steward *v.* Jefferson, 3 Harr. (Del.) 335; Stein *v.* Mobile, 24 Ala. 591; Desty, Taxation, § 98, pp. 472–479, cites other cases. Taxes on the same species of property should be equal, and assessed according to the value of the property taxed. When a tax is levied by a municipal corporation, it must be levied on all the taxable property within its limits, according to its value, and not upon the property of a few only. Mobile *v.* Dargan, 45 Ala. 310; Mobile *v.* Royal St. R. Co., 45 Ala. 322; Lebanon *v.* Ohio & Miss. R. Co., 77 Ill. 539; Turner *v.* Omaha, 6 Neb. 54; *supra*, § 1352, note. As to the right of a city council to change the appraisement adopted under the power of equalization, see Jones *v.* Columbus, 62 Ind. 422; Delphi *v.* Bowen, 61 Ind. 29.

"The State has an undoubted power to tax persons and property within its limits, and it may delegate such power to a civil corporation, so far as it may be necessary for the good government of the corporation." Harrison *v.* Vicksburg, 3 Sm. & Marsh. (11 Miss.), 581, *per Sharkey*, C. J.; Smith *v.* Aberdeen, 25 Miss. 458; *supra*, § 1350, note. Improvements made by a lessee upon land owned and leased by the municipality are, for the purposes of taxation, his property. San Francisco *v.* McGinn, 67 Cal. 110. A building erected by a lessee upon land owned by a church, whose property is exempt from taxation, is taxable as real estate. Russell *v.* New Haven, 51 Conn. 259.

[2] Caldwell *v.* Burke Co. Jus., 4 Jones Eq. (N. C.) 323, *per Ruffin*, J., quoted *ante*, § 15, note; Burgess *v.* Pue, 2 Gill (Md.), 254, above cited; Perry *v.* Rockdale, 62 Tex. 457, quoting text. As to the right of municipalities to local self-government, free from legislative direction or constraint, see *ante*, §§ 98–101.

The subject of Local Government and Taxation in England by County Governments and the numerous smaller administrative areas and their authorities, and the necessity for their consolidation and reform of their administration are clearly presented by Messrs. Rathbone, Pell, and Montague in their work on Local Government and Taxation, London, 1885. And see also Lord Avebury's work on Municipal and National Trading, *passim*.

municipalities in such measure as it deems expedient, — in other words, with such limitations as it sees fit, as to the rate of taxation, the public purposes for which it is authorized, and the objects (the persons, business and property) which shall be subjected to taxation; but it cannot, of course, confer any greater power than the State itself possesses, and it must observe the restrictions and limitations of the organic law.[1]

[1] *Ex parte* Montgomery, 64 Ala. 463; Primm *v.* Belleville, 59 Ill. 142; State *v.* Des Moines, 103 Iowa, 76, 88, citing text; Hines *v.* Leavenworth, 3 Kan. 186; Atchison, T. & S. F. R. Co. *v.* Peterson, 5 Kan. App. 103, quoting text; Alexander *v.* Baltimore, 5 Gill (Md.), 383, 393, *per Martin*, J.; Adams *v.* Kuykendall, 83 Miss. 571, 583; North Missouri R. Co. *v.* Maguire, 49 Mo. 482, 490, 500; Reineman *v.* Covington, C. & B. H. R. Co., 7 Neb. 310; Erie *v.* Reed's Ex., 113 Pa. St. 468; and see Weightman *v.* Clark, 103 U. S. 256; *post*, § 1396.

In many of the more recent Constitutions these limitations and restrictions upon the amount and rate of taxation that may be levied, as well as upon the amount of debt that may be created, are numerous. See *ante*, chap. vi.

Taxes levied by municipal corporations, which are for this purpose instruments of the State, are in legal effect levied by the State. The lien for such taxes is, unless otherwise expressly provided, of equal rank with that for taxes levied by the State. Justice *v.* Logansport, 101 Ind. 326; *post*, § 1420.

"The State cannot authorize a municipal corporation to impose a tax which she herself would have no right to levy." O'Donnell *v.* Bailey, 24 Miss. 386; Nashville *v.* Thomas, 5 Coldw. (Tenn.) 600; Union Bank of Tenn. *v.* State, 9 Yerg. (Tenn.) 490; Memphis *v.* Hernando Ins. Co., 6 Baxter, 527. The *Alabama* Constitution provides that no city, &c., "shall levy or collect a larger rate of taxation in any one year on the property other than one half of one per cent of the value." A statute was enacted by which the State attempted to levy directly a tax within the city for school purposes; the money when collected was directed to be turned over to the city. It was held that the statute was an obvious attempt to evade the constitutional limitation, and that it was invalid. State *v.* Southern R. Co., 115 Ala. 250, 257.

Where the *Constitution makes the State assessment for the preceding year* the basis of value on which the rate of taxation by a municipal corporation shall be levied and collected, and limits the rate, a provision in a city charter making it the duty of the clerk to add to the value of property so assessed for State taxes the value of other property for purposes of local taxation, violates this constitutional restriction. Elyton Land Co. *v.* Birmingham, 89 Ala. 477. The legislature, in providing for a local improvement, cannot charge the property holders affected by the improvement by a course of proceedings unknown to the common law, and differing from that provided by the city charter for cases of like nature. Granger *v.* Buffalo, 6 Abb. (N. Y.) N. Cas. 238.

Construction of special constitutional provision requiring the legislature to *restrict the power of taxation* of incorporated towns and cities. *Ante*, § 74. If not specially restricted in the Constitution, the legislature may authorize municipalities to levy and collect taxes in a mode different from that provided for State and county taxes. State *v.* Blundell, 24 N. J. L. 402. When rights of creditors are not infringed, the legislature may change the power of taxation delegated to municipal corporations. Richmond *v.* Richmond & D. R. Co., 21 Gratt. (Va.) 604. A *constitutional restriction* that all taxes *shall be levied by general laws* does not repeal the provisions of municipal charters authorizing taxation. Kansas City *v.* Johnson, 78 Mo. 661; *ante*, §§ 234, 235; *infra*, §§ 1396, 1404–1406. The Constitution of *Virginia* does not authorize the *county* authorities to assess property for taxation and levy taxes upon it independent of the action of

§ 1377 (763). **Power to tax must be plainly conferred.** — It is a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the *power be plainly and unmistakably conferred.*[1] It has, indeed, often been said that it must be specifically granted *in terms;* but all courts agree that the authority must be given either in express words or by necessary or unmistakable implication, and that it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor can it be deduced from any consideration of convenience or advantage.[2] It has, however, been held by the Supreme Court of the United States that the power to levy a tax may be implied from an express

the legislature, and under the legislation of the State the county authorities can only levy a tax upon such property as by law is assessed with State taxes in the county; they cannot levy a tax on the real estate of railroads in the county, either for county, township, school, or road purposes. Va. & Tenn. R. Co. *v.* Washington County, 30 Gratt. (Va.) 471. A statute requiring a city council to pass within the first quarter of each year an ordinance in which they *may* appropriate money to defray necessary expenses and liabilities, is mandatory; it is the duty of such council to make the needful appropriations. Cairo *v.* Campbell, 116 Ill. 305. Under the General Incorporation Act of *Illinois* there must first be passed an act making appropriations, and after it has been published and has become final, there must be passed an ordinance levying the amount of the appropriations upon the taxable property; the appropriation and levy of taxes cannot be made by the same ordinance. People *v.* Peoria, D. & E. R. R. Co., 116 Ill. 410.

[1] Heine *v.* Levee Com'rs, 19 Wall. (U. S.) 655, 660; Scottish Union & Nat. Ins. Co. *v.* Bowland. 196 U. S. 611, 629; Hare *v.* Kennerly, 83 Ala. 608, 611; Boyd *v.* Selma, 96 Ala. 144; Vance *v.* Little Rock, 30 Ark. 435, 439; Fort Smith Bridge Co. *v.* Hawkins, 54 Ark. 509, 513, citing text; Swamp Land Dist. *v.* Haggin, 64 Cal. 204; English *v.* People, 91 Ill. 566; Kniper *v.* Louisville, 7 Bush (Ky.), 599; Caldwell *v.* Rupert, 10 Bush (Ky.), 179, 182, quoting text; Button *v.* Kremer, 114 Ky. 463, 469, quoting text; Shreveport *v.* Prescott, 51 La. An. 1895, 1922, quoting text; New Iberia *v.* Weeks, 104 La. 489, 942, citing text; Sewall *v.* St. Paul, 20 Minn. 511, citing text; State *v.* Van Every, 75 Mo. 530; Trephagen *v.* South Omaha, 69 Neb. 577; Methodist Church, *In re*, 66 N. Y. 395; Landon *v.* Syracuse, 19 N. Y. App. Div. 41, aff'd 163 N. Y. 562; State *v.* Bean, 91 N. Car. 554; Winston *v.* Taylor, 99 N. Car. 210; Zanesville *v.* Richards, 5 Ohio St. 589; State *v.* Maysville, 12 S. Car. 76; Charleston *v.* Oliver, 16 S. Car. 49; Milster *v.* Spartanburg, 68 S. Car. 26, 33, citing text; Lee *v.* Mellette, 15 S. Dak. 586, 587, quoting text; El Paso *v.* Mundy, 85 Tex. 316, 319; Peters *v.* Lynchburg, 76 Va. 927; Schoolfield *v.* Lynchburg, 78 Va. 366; Green *v.* Ward, 82 Va. 324; Wytheville *v.* Johnson, 108 Va. 589.

A municipal corporation cannot levy a tax in the absence of delegated authority from the State (*ante*, § 1380; Meriwether *v.* Garrett, 102 U. S. 472), and the power to contract indebtedness does not by implication confer authority to levy taxes for the payment of the debt. Jeffries *v.* Lawrence, 42 Iowa, 498. But see limitation on this last proposition, *post*, § 1380, and the judgment of the Supreme Court of the United States, in United States *v.* New Orleans, 98 U. S. 381; Ralls County Ct. *v.* United States, 105 U. S. 733; Scotland County Court *v.* United States, 140 U. S. 41. "The power to contract a debt does not imply the power to levy a tax to pay it." Grand County *v.* King, 32 U. S. App. 1.

[2] Lee *v.* Mellette, 15 S. Dak. 586, 587, quoting text.

power to incur an obligation, where the authority to tax must have been intended by the legislature as the means of payment, and there is nothing in the legislation applicable to the case to rebut the implication.[1] It is important to bear in mind that the authority to municipalities to impose burdens of any character upon persons or property is wholly statutory, and, as its exercise may result in a divestiture and transfer of property, it must be clearly given and strictly pursued.[2] This rule applies, as we have already seen, to proceedings[3] by municipal corporations under the delegated right of eminent domain, and it extends equally to proceedings under the taxing power, including special assessments for local improvements.[4]

[1] *Post*, § 1380; United States *v.* New Orleans, 98 U. S. 381; Ralls County Ct. *v.* United States, 105 U. S. 733; Scotland County Court *v.* United States, 140 U. S. 41; *infra*, §§ 1402, 1403. Index — *Municipal Bonds*.

[2] Text approved in St. Mary's Industrial School *v.* Brown, 45 Md. 310; Vansant *v.* Harlem Stage Co., 59 Md. 330; and New Iberia *v.* Weeks, 104 La. 489, 492, citing text.

[3] *Ante*, chap. xx. § 1041 *et seq.*

[4] Beatty *v.* Knowles, 4 Pet. (U. S.) 152; Mobile *v.* Baldwin, 57 Ala. 61; Stone *v.* Mobile, 57 Ala. 61; Emery *v.* San Francisco Gas Co., 28 Cal. 345; Taylor *v.* Douner, 31 Cal. 480; Pueblo *v.* Robinson, 12 Colo. 593, 597, citing text; Wright *v.* Chicago, 20 Ill. 252; Chicago *v.* Wright, 32 Ill. 192; Chicago *v.* Law, 144 Ill. 569, 576; West Chicago Park Com'rs *v.* Baldwin, 162 Ill. 87, 89; Harmony Tp. *v.* Osborne, 9 Ind. 558; Niklaus *v.* Conkling, 118 Ind. 289, 291; Indianapolis & V. R. Co. *v.* Capitol Pav. & Const. Co., 24 Ind. App. 114; Fairfield *v.* Ratcliff, 20 Iowa, 396; Chicago, R. I. & P. R. Co. *v.* Ottumwa, 112 Iowa, 300, 305; Leavenworth *v.* Norton, 1 Kan. 432; Burnes *v.* Atchison, 2 Kan. 454; Murray *v.* Tucker, 10 Bush (Ky.), 240, approving text; Henderson *v.* Lambert, 14 Bush (Ky.), 24; Louisville *v.* Tyler, 111 Ky. 558, 593; Button *v.* Kremer, 114 Ky. 463, 469, quoting text; Henderson *v.* Baltimore, 8 Md. 352; St. Louis *v.* Laughlin, 49 Mo. 559; Hanscom *v.* Omaha, 11 Neb. 37, 44; State *v.* Irey, 42 Neb. 186, 189, 190, quoting text; State *v.* Jersey City, 26 N. J. L. 444; State *v.* Guttenberg, 39 N. J. L. 660; Sharp *v.* Spier, 4 Hill (N. Y.), 76; Sharp *v.* Johnson, 4 Hill (N. Y.), 92; Rathbun *v.* Acker, 18 Barb. (N. Y.) 393; Dyckman *v.* New York, 5 N. Y. 434; Manice *v.* New York, 8 N. Y. 120; Howell *v.* Buffalo, 15 N. Y. 512; Burnett *v.* Buffalo, 17 N. Y. 383; Stebbins *v.* Kay, 123 N. Y. 31; Nehasane Park Assoc. *v.* Lloyd, 167 N. Y. 431, 436; Matter of New York City, 114 N. Y. App. Div. 519, 523; Asheville *v.* Means, 7 Ired. L. (N. Car.) 406; Mays *v.* Cincinnati, 1 Ohio St. 268; Zanesville *v.* Richards, 5 Ohio St. 589; Jonas *v.* Cincinnati, 18 Ohio, 318; Oregon S. Nav. Co. *v.* Portland, 2 Oreg. 81; Columbia *v.* Hunt, 5 Rich. L. (S. Car.) 550; Lee *v.* Mellette, 15 S. Dak. 586; Connor *v.* Paris, 87 Tex. 32, 36; Henry *v.* Chester, 15 Vt. 460 (nature of authority discussed by *Redfield*, J.); Richmond *v.* Daniel, 14 Gratt. (Va.) 385; Virginia & T. R. Co. *v.* Washington Co., 30 Gratt. (Va.) 471; Violett *v.* Alexandria, 92 Va. 561, 577.

Where a *general tax* is authorized by statute and a rate prescribed, the tax cannot be levied by *special taxation*, nor can the rate be exceeded; power to impose a special tax or a special assessment cannot be exercised by imposing a general tax. Webster *v.* People, 98 Ill. 343; Dubuque *v.* Chicago, D. & M. R. Co., 47 Iowa, 196, 201. Power to levy taxes for general purposes does not authorize the imposition of a special assessment. Chicago, R. I. & P. R. Co. *v.* Ottumwa, 112 Iowa, 300, 305.

A statute delegating power to charge the property of individuals with the expense of local improvements must be strictly pursued; what-

§ 1378 (764). **Same Subject.** — Therefore, the *power to tax* (using the word in its strict and proper sense, as a means of raising municipal revenue) *cannot be inferred* from the general welfare clause in a charter;[1] nor is it usually to be implied from authority to license and regulate specified avocations;[2] nor from legislative authority permitting certain improvements to be made, or liabilities to be created, unless such appears on the whole to have been the clear legislative intent;[3] nor is it included in the police power.[4]

ever step the legislature has prescribed to be taken therein cannot be declared by the courts to be merely directory or immaterial. Merritt *v.* Portchester, 71 N. Y. 309.

"The burden is upon the corporation to show the grant [to lay taxes] by express words or necessary implication. For otherwise it cannot be justified in the exercise of this high prerogative of sovereignty." *Per Lumpkin*, J., in Savannah *v.* Hartridge, 8 Ga. 23–26. Statutes authorizing the levying of taxes are strictly construed, and if there is much doubt, that doubt exempts the citizen from the burden. *Ib.*; Lot *v.* Ross, 38 Ala. 156, 161. "The law [authorizing local assessments] must be strictly followed as to all its substantial requirements." *Per Lawrence*, J., Scammon *v.* Chicago, 40 Ill. 146. "Possessing, as these municipal corporations do, the power of assessment and sale of private property, often wielded by the indiscreet and selfish, the grossest abuses would inevitably follow, if they were not held strictly within the powers granted and the means prescribed for the execution of these powers." *Per Stuart*, J., Kyle *v.* Malin (relating to power to tax for local improvement), 8 Ind. 34, 37. "It is undoubtedly true, as held by this court in Richmond *v.* Daniel, 14 Gratt. (Va.) 387, that laws conferring the power of taxation upon a municipal corporation are to be construed strictly; and so, too, are exemptions from taxation to be construed strictly, and when the power of taxation has been once conferred, it is not to be crippled or destroyed by strained interpretation of subsequent laws." *Per Joynes*, J., Orange & A. R. Co. *v.* Alexandria, 17 Gratt. (Va.) 176. Statutes granting *exemption from taxation* should be construed strictly. Citizens' Savings Bank *v.* Owensboro, 173 U. S. 636; Henderson Bridge Co. *v.* Henderson, 173 U. S. 592. Tax levied by *de facto* aldermen valid. Dean *v.* Gleason, 16 Wis. 1–17; *ante*, chap. xiii. § 518. A city council cannot bind the city by an unauthorized exemption from taxation. Milster *v.* Spartanburg, 68 S. Car. 26.

[1] *Ante*, § 661–671; Mays *v.* Cincinnati, 1 Ohio St. 268. If the objects or subjects of taxation are expressly designated, the right to tax for other objects or subjects cannot be derived from the general power, though expressly conferred, to enact by-laws for the good government of the town. Asheville *v.* Means, 7 Ired. L. (N. Car.) 406.

[2] *Ante*, chapter xvi. on Ordinances, §§ 661–676, 720. And see Mays *v.* Cincinnati, *supra;* Cincinnati *v.* Bryson, 15 Ohio, 625, approving Boston *v.* Schaffer, 9 Pick. (Mass.) 415, 419. Compare Cincinnati *v.* Buckingham, 10 Ohio, 257, as to correctness of which *quære;* Mobile *v.* Yuille, 3 Ala. 137; Collins *v.* Louisville, 2 B. Mon. (Ky.) 134; State *v.* Roberts, 11 Gill & J. (Md.) 506, *per Archer*, J.; Columbia *v.* Beasly, 1 Humph. (Tenn.) 232; *infra*, § 768.

[3] Leavenworth *v.* Norton, 1 Kan. 432; Burnes *v.* Atchison, 2 Kan. 454; *ante*, § 322, and cases cited. The power to make an improvement does not imply or carry with it the power to levy a special assessment upon property benefited to pay for the improvement. Such assessments can only be made where the power to do so is plainly conferred and strictly followed. Wright *v.* Chicago (assessments for deepening river), 20 Ill. 252; Columbia *v.* Hunt (curbing assessment), 5

[4] Jackson *v.* Newman, 59 Miss. 385. But see Fair Haven & W. R. Co. *v.* New Haven, 75 Conn. 442.

§ 1379 (765). **Same Subject. Special Powers construed.** — So, conformably to the *principles adopted for the construction* of this class of powers, it is held that where a statute specifies certain purposes for which taxes may be levied by the municipal authorities, and adds "or for any other purpose they may deem necessary," these general words will authorize taxation only for purposes of the same general character with those already enumerated.[1] So, power "to levy and collect a special tax" for lighting a city does not authorize the council to add to the tax a percentage for collectors' fees, nor the cost of proceedings before the mayor; these services must be paid for from the general revenue, unless otherwise specifically provided for by the charter.[2] So, power to make such by-laws as shall be necessary "to promote the peace, good order, benefit, and advantage" of the corporation, and to assess such taxes as shall be necessary for carrying the same into effect, does not authorize a tax for the payment of part of the expense to be incurred by a railroad company in bringing the line of their road nearer to the town than originally located.[3] So, where the power is granted with a proviso annexed, no greater authority is given than is contained within the limits of the proviso.[4]

§ 1380 (741). **Same Subject. Authority may be implied.** — The *legislative branch of the government* has the exclusive power of taxation, but may delegate it, as above stated, to municipal corporations.[5] When such corporations are created, the power of taxation,

Rich. (S. Car.) 550; Chicago *v.* Wright, 32 Ill. 192; Annapolis *v.* Harwood, 32 Md. 471. Power "to regulate and improve sidewalks" does not authorize special assessments upon adjoining owner; but such improvements may be paid for out of the corporation treasury. Fairfield *v.* Ratcliff, 20 Iowa, 396.

[1] Drake *v.* Phillips, 40 Ill. 388. As to when assessments may be made, see Hyde Park *v.* Borden, 94 Ill. 26. Special assessments for local improvement cannot be enforced by fines or penalties imposed by ordinance. Augusta *v.* Dunbar, 50 Ga. 387; Gridley *v.* Bloomington, 88 Ill. 554; s. p. Ottawa *v.* Spencer, 40 Ill. 211. See Index, tit. *Fines and Penalties.*

[2] Jonas *v.* Cincinnati, 18 Ohio, 318–323; Nelson *v.* La Porte, 33 Ind. 258. Same principle as to local assessments. Bucknall *v.* Story, 36 Cal. 67; Williams *v.* Detroit, 2 Mich. 560; Minn. Linseed Oil Co. *v.* Palmer, 20 Minn. 468, 475, citing text. An enactment that *no costs* shall be recovered against a city in suits properly commenced against it was held unconstitutional. Durkee *v.* Janesville, 28 Wis. 464.

[3] McDermond *v.* Kennedy, Bright. (Pa.) 332; *ante*, chap. viii. §§ 321–323; Minn. Linseed Oil Co. *v.* Palmer, 20 Minn. 468.

[4] Methodist Church, *In re*, 66 N. Y. 395.

[5] A municipal corporation has no power to levy taxes except under express authority or necessary or unmistakable implication. Meriwether *v.* Garrett, 102 U. S. 472; *In re* Chicago, 64 Fed. Rep. 897, 899; Felton *v.* Hamilton County, 97 Fed. Rep. 823; Jeffries *v.* Lawrence, 42 Iowa, 498; McLean County Precinct *v.* Deposit Bank, 81 Ky. 254; Adams *v.* Kuykendall, 83 Miss. 571; Adams *v.* Ducate, 86 Miss. 276; Crafts *v.* Ray, 22 R. I. 179, 186;

though generally conferred in express terms, may be held to exist by necessary or unmistakable intendment. When, for example, such corporations have, in order to execute a public work, been expressly vested with authority to borrow money or incur an obligation, they have, unless the contrary appears in the constitution or legislation of the State, the power to levy a tax to raise revenue wherewith to pay the money or discharge the obligation, without any special mention that such power is granted.[1] A limitation *imposed by statute* upon municipal corporations, restraining them from creating any indebtedness without providing at the same time for the payment of principal and interest, was held not to control a subsequent statute, which, without prescribing such limitation, authorizes them to incur a special obligation.[2]

§ 1381 (766). **Legislature may change Revenue and Taxing Powers at Will within Constitutional Limits.** — The power to levy taxes and to make local assessments conferred upon municipal corporations may, in the absence of constitutional restriction, and when the rights of creditors are not impaired, as we have heretofore shown, *be changed at the pleasure of the legislature*,[3] or resumed and be exercised by commissioners directly appointed by the legislature.[4]

State *v.* Maysville, 12 S. Car. 76; Blanchard *v.* Barre, 77 Vt. 420; *ante*, chap. viii.; *ante*, § 1377; *post*, §§ 1402, 1403, 1408.

[1] Citizens' Loan Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 660; United States *v.* New Orleans, 98 U. S. 381; Quincy *v.* Jackson, 113 U. S. 332; Breckinridge County *v.* McCracken, 22 U. S. App. 115, 124; United States *v.* Lincoln County, 5 Dillon C. C. 184, 195; United States *v.* Elizabeth, Fed. Cas. No. 15,041 a; United States *v.* Capdevielle, 118 Fed. Rep. 809; Taylor *v.* McFadden, 84 Iowa, 262, 271; Lowell *v.* Boston, 111 Mass. 454, 460; Boody *v.* Watson, 64 N. H. 162, 177, citing text; Charlotte *v.* Shepard, 122 N. Car. 602; State *v.* Bristol, 109 Tenn. 315, 324; Austin *v.* Nalle, 85 Tex. 520, 542; Oconto City Water Supply Co. *v.* Oconto, 105 Wis. 76, 86, citing text. In *Illinois*, it is held that the act of conferring power upon a municipal corporation to incur a liability, by implication also confers the power to levy taxes to discharge it. Peoria, D. & E. Ry. Co. *v.* Scott, 116 Ill. 401. The Supreme Court of the United States has, in a still more recent case than the one in that court above cited, decided that a power to borrow money and to issue bonds therefor, implies the power to levy a tax for the payment of the obligations unless the contrary clearly appears. Ralls County Ct. *v.* United States, 105 U. S. 733. On this general subject see Index — *Borrowing Money; Municipal Bonds; Taxation.* And especially where power is given to the county court "to protect the interest *and credit* of the county," in connection with power to subscribe for stock of a railroad company and issue bonds. Scotland County Court *v.* United States, 140 U. S. 41. *Ante*, chaps. xviii. and xx.; *ante*, § 1377; *post*, §§ 1402, 1403.

[2] United States *v.* New Orleans, 98 U. S. 381. Compare Knox *v.* Baton Rouge, 36 La. An. 427; *ante*, chapters xviii. and xx. on Contracts and Municipal Bonds.

[3] *Ante*, chap. iv. § 96, note; §§ 103, iv. *ante;* Philadelphia *v.* Field, 58 Pa. 320; *ante*, §§ 114–123.

[4] Baltimore *v.* State Board of Police, 15 Md. 376. See on this subject, chap.

§ 1382 (767). **Same Subject.** — Suppose, however, a tax has been levied by a municipal corporation, under and in pursuance of legislative authority, and not collected, is it within the competency of the legislature, as against the municipality and against its consent, *to release a specific class of taxpayers from the payment of such tax?* The general subject is discussed in a previous chapter, in which is considered the extent of legislative power over municipal corporations and their rights. As a general proposition the legislature has complete power over public revenues and their disposition, except where restrained by express constitutional limitations. In the Iowa case, cited in the note, it was held by a majority of the judges, but on different grounds, that an act of the legislature releasing railway companies from the payment of taxes, already levied by the municipality, but not collected, was unconstitutional and void.[1]

§ 1383 (779). **Municipality cannot delegate its Power to tax.** — We have already had occasion to refer to the principle that *public powers* conferred upon a municipality, to be exercised by its council, when and in such manner as it shall judge best, are, without legislative authority to that end, *incapable of delegation* by the municipality.[2] The principle extends to the authority conferred upon a municipal corporation to levy and collect taxes, or to determine upon the necessity and character of local improvements. Such authority cannot be delegated unless such delegation is legislatively permitted.[3]

105, 106, 109, 111, 123; *ante*, chap. xviii.; Blanding *v.* Burr, 13 Cal. 343; Aspinwall *v.* Daviess County Com'rs, 22 How. (U. S.) 364; Gilman *v.* Sheboygan, 2 Black (U. S.), 510; Lansing *v.* County Treasurer, 1 Dillon C. C. 522; Muscatine *v.* Miss. & Mo. R. Co., 1 Dillon C. C. 536; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535; Butz *v.* Muscatine, 8 Wall. (U. S.) 575; Louisiana *v.* Pilsbury, 105 U. S. 278; Wolff *v.* New Orleans, 103 U. S. 358; State *v.* Cassidy, 22 Minn. 312; State *v.* Brewer, 64 Ala. 287; Gasaway *v.* Seattle, 52 Wash. 444. If bonds are issued by a municipality upon the faith and credit of powers of taxation then existing, the power of taxation enters into and forms part of the contract with the bondholder and cannot be destroyed or substantially impaired by subsequent legislation. Ralls County Ct. *v.* United States, 105 U. S. 733, 735; Scotland County Court *v.* United States, 140 U. S. 41; Hubert *v.* New Orleans, 215 U. S. 170; McKie *v.* Rose, 140 Fed. Rep. 145, 148; Grand County *v.* King, 32 U. S. App. 1. See also Mobile *v.* Watson, 116 U. S. 289; East St. Louis *v.* Amy, 120 U. S. 600, 604. Index — *Municipal Bonds.*

[1] Dubuque *v.* Illinois Cent. R. Co., 39 Iowa, 56; Const. Iowa, Art. 8, § 2.

[2] *Ante*, § 244 and cases cited; Foss *v.* Chicago, 56 Ill. 354; Thompson *v.* Booneville, 61 Mo. 282; Indianapolis *v.* Lawyer, 38 Ind. 348; Johnston *v.* Macon, 62 Ga. 645; Macon *v.* First Nat. Bank, 59 Ga. 648; Macon *v.* Macon Sav. Bank, 60 Ga. 133; Hunt *v.* Booneville, 65 Mo. 620.

[3] *Ib.*; McInerney *v.* Reed, 23 Iowa, 410; Meuser *v.* Risdon, 36 Cal. 239; Banaz *v.* Smith, 133 Cal. 102; Davies *v.* Los Angeles, 86 Cal. 37; Bolton *v.* Gilleran, 105 Cal. 244; State *v.* Parker, 26 Vt. 362; State *v.* Swisher, 17 Tex. 441; Foss *v.* Chicago, 56 Ill. 354;

§ 1384 (781). **Powers cannot be varied by Ordinance.** — It is plain that the powers of taxation conferred upon the municipal au-

Jenks *v.* Chicago, 56 Ill. 397; State *v.* Copeland, 3 R. I. 33; Murray *v.* Tucker, 10 Bush (Ky.), 240; Davis *v.* Reed, 65 N. Y. 566; Bellinger *v.* Gray, 51 N. Y. 610; Hitchcock *v.* Galveston, 96 U. S. 341; Sheehan *v.* Gleason, 46 Mo. 100; Lord *v.* Oconto, 47 Wis. 386. Approving text, also, Mathews *v.* Alexandria, 68 Mo. 115; Richardson *v.* Heydenfeldt, 46 Cal. 68; Thompson *v.* Schermerhorn, 6 N. Y. 92, approved in Phelps *v.* New York, 112 N. Y. 216; where it was held, under a charter making it the duty of the city to award a contract to the lowest bidder unless otherwise ordered by a vote of three-fourths of the council, that the power must be exercised by the council in *each case*, and could not be delegated to a public officer; St. Louis *v.* Clemens, 52 Mo. 133; People *v.* Clark, 47 Cal. 456; Randolph *v.* Gawley, 47 Cal. 458; Richardson *v.* Heydenfeldt, 46 Cal. 68; Ould *v.* Richmond, 23 Gratt. (Va.) 471; Robinson *v.* Dodge, 18 Johns. (N. Y.) 351; Trumbull *v.* White, 5 Hill (N. Y.), 46; Davis *v.* Reed, 65 N. Y. 566; Schofield *v.* Lansing, 17 Mich. 437; East St. Louis *v.* Wehrung, 46 Ill. 392; Lake Shore & M. S. R. R. Co. *v.* Chicago, 56 Ill. 454; Walker *v.* Chicago, 62 Ill. 286; Moore *v.* Chicago, 60 Ill. 243; Bryan *v.* Chicago, *Ib.* 507. Bluffton *v.* Miller, 33 Ind. App. 521. The above cases distinguished. Page *v.* Chicago, 60 Ill. 441. In Schwartz *v.* Flatboats, 14 La. An. 243, it was held (but *quære* as to its correctness) that the power to "alien, *lease, farm*, and dispose of all and every kind of property," and "to lay and collect taxes in *such a manner* as may be deemed expedient, on all steamboats, &c., landing at the levee of the corporation," gave the corporation power to lease, for a period of years, to a private person, the revenues of the port, with the privilege of collecting them in his own name and for his own benefit.

The principle stated in the text is thus enforced by the Court of Appeals in *Kentucky*, in a case arising in the city of Louisville. In substance, the court says, the general council of the city of Louisville, by ordinance as prescribed in the city charter, may direct or authorize the sidewalks in the city to be graded, paved, curbed, &c., at the cost of the owners of the property fronting thereon. The *council alone can determine the necessity* of such improvement, as well as its kind and character, and has no authority to refer the determination of these matters to any other body or person. The power to pass ordinances to improve streets is legislative, and cannot be delegated. It is in effect a power of taxation, which is the exercise of sovereign authority. To ordain generally that a street or square shall be graded and paved, or "*so much thereof as the engineer may direct, and according to specifications to be furnished by him*," is simply to delegate to him the power to fix the grade, determine what materials should be used for the pavement, and how much of the street or square should be thus improved, and is not the determination of the council as to any of these things. To allow such an ordinance to bind the property-holder is, in the opinion of a majority of the court, to destroy all the safeguards thrown around him by law. Subsequent acts of affirmance by the city council cannot validate an invalid ordinance. Hydes *v.* Joyes, 4 Bush (Ky.), 464. City council cannot ratify so as to impose obligation on lot-owner to pay. Murray *v.* Tucker, 10 Bush (Ky.), 240; but see on this point Davis *v.* Reed, 65 N. Y. 566; Hitchcock *v.* Galveston, 96 U. S. 341.

But where the act of the legislature charged the burden of certain local improvements upon the adjoining lots, and directed the street commissioners to make out the assessment, it is not necessary that the city assess the tax by an ordinance, and an ordinance to that effect, if passed, is not a delegation by the corporation of its power of taxation. Schenley *v.* Commonwealth, 36 Pa. St. 29. In *South Carolina*, under a general power to the *city council* to make local assessments and to appoint officers to execute the corporate powers and duties, it is held not to be a valid objection to an assessment that it was made, pursuant to ordinances or regulations, by the officers of the corporation and not by the corporation itself; for the city council is to be regarded as a local legislative body for the purpose of making by-laws, with power to cause them to be carried out; and particularly is such an objection without force when the assessments

thorities by the charter or organic act, and the mode of exercising such powers when prescribed therein, *cannot be varied by ordinances* or by-laws.[1] Therefore a city corporation cannot impose terms or conditions which can affect the validity of a tax-sale made within the authority conferred by the legislature.[2] So, under a charter constituting the city-marshal the collector of taxes, and making it his duty to receive and collect the taxes due the corporation, it is not competent for the council by ordinance to dispense with the duties which the charter imposes upon this officer, and devolve them upon another.[3] So, under a charter authorizing a town corporation "to collect taxes upon all real estate within the town, not

have first to be submitted to and approved by the council. Cruikshanks v. Charleston, 1 McCord (S. Car.), 360. Compare Charleston v. Pinckney, 1 Tr. Const. (S. Car.) 42. Where such a course is expressly authorized by the charter, a grade for a street need not be previously fixed by the council, but it may require the adjoining owners to make certain improvements according to the direction of the city pa er, who may thus determine the grade. State v. New Brunswick, 30 N. J. L. 395. See further, *ante*, § 244; *infra*, § 1466.

In Coit v. Grand Rapids, 115 Mich. 493, the court held (distinguishing Weeks v. Milwaukee, 10 Wis. 242), that while a city could not release a property owner from general taxation for the maintenance of sewers in consideration of his permission to construct a sewer through his land, it might release him from special assessment for the construction of the sewer in consideration of such permission. This arrangement did not amount to an exemption from taxation so as to throw an additional burden on other taxpayers. The council agreed what the property owner's fair share of taxation was, and he paid it by deeding his lands with right of ingress and egress, and agreeing to perpetually charge his adjoining land with the damage resulting from the construction of the sewer. But in Leggett v. Detroit, 137 Mich. 247, it was held, distinguishing the case last cited, that a condition subsequent in a deed to a city, that the grantor should be released from all future assessments for opening streets, was an *ultra vires* abrogation of the power of future assessment and void. Where the ordinance granting a franchise to a street railway company to occupy the street provided that it should pave and keep in good repair the portion of the street which it occupied, a subsequent ordinance assessing the abutting owners for the paving of the rest of the street properly excepted from assessment the portion occupied by the railway, the burden imposed upon the street railway company to pave the portion of the street occupied by it being regarded as an equivalent for the assessment. Billings v. Chicago, 167 Ill. 337.

[1] *Ante*, chapter on Ordinances, § 587; Weeks v. Milwaukee, 10 Wis. 242; and State v. Hannibal & St. J. R. Co., 75 Mo. 208, which hold that the city cannot exempt from taxation property which the laws make taxable. City has no inherent power to grant exemption from taxation. Mack v. Jones, 21 N. H. 393; 1 Desty, Taxation, 466, 467, and cases; *post*, § 1392, note.

In Moale v. Baltimore, 61 Md. 224, the city of Baltimore, being empowered to assess the cost of paving, grading, etc., *pro rata* upon the *property* abutting upon streets, passed an ordinance directing the cost to be collected, when assessed, from "*property owners* as other city taxes are collected," and the court held that by the statute it was only intended to indicate the proportion in which the property owners should be assessed, and that the tax *was a personal debt* of the owners. Citing Dashiell v. Baltimore, 45 Md. 615; Gould v. Baltimore, 58 Md. 46, and 59 Md. 378, and Handy v. Collins, 60 Md. 229.

[2] Thompson v. Carroll, 22 How. (U. S.) 422.

[3] Placerville v. Wilcox, 35 Cal. 21.

exceeding one half per cent upon the assessed value thereof," it cannot pass an ordinance directing lots to be taxed, without considering the value of the improvements upon them; for since buildings are part of the land which the legislature had designated as the property to be taxed, such an ordinance makes a discrimination which the charter does not authorize.[1]

§ 1385 (782). **The Objects of Taxation.** — The authority of municipal corporations to levy and collect taxes is usually limited, not only as respects the *rate* of taxation, but the *objects* of it.[2] Under grants of this character, the question has arisen, not only as to what property the municipality *may*, but also as to what it *must*, subject to taxation for the purpose of obtaining revenue or discharging liabilities. Thus, the city of New Orleans was authorized by charter "to raise money by taxation, in such manner as to the council shall seem proper, upon *real and personal estate*," &c. It was claimed that the city was bound to tax both species of property at the same time, and that a tax could not legally be imposed upon either alone. This view, however, was not sustained by the court, which said: "It does not appear to us that the power given to tax real and personal estate renders it imperative on the corporation to tax both. By the same section of the law, the city council are empowered to exercise their authority as to them may seem proper."[3]

§ 1386 (783). **Same Subject. Uniformity of Rule of Taxation.** — But there may be a *constitutional limitation* upon both the legislative and the municipal power to select one class of property for taxation and omit another. In an important case relating to this subject, there was a constitutional provision "that the rule of taxa-

[1] Fitch *v.* Pinckard, 5 Ill. 76; approved, Primm *v.* Belleville, 59 Ill. 142.

[2] Power to levy taxes confined to kinds of property mentioned in the charter. Rabassa *v.* New Orleans, 3 Martin (La.), o. s. 218; Blanc *v.* New Orleans, 1 Martin (La.), o. s. 65; Harper *v.* Elberton, 23 Ga. 566; Municipality No. 3 *v.* Johnson, 6 La. An. 20; Barret *v.* Henderson, 4 Bush (Ky.), 255; Dubuque *v.* Northwestern L. Ins. Co. (premiums received by local agent of foreign insurance company), 29 Iowa, 9.

[3] Oakey *v.* New Orleans, 1 La. 1; s. p. Municipality No. 2 *v.* Duncan, 2 La. An. 182; Winter *v.* Montgomery, 65 Ala. 403; approved in Winter *v.* Montgomery, 79 Ala. 481. The power of a city corporation to levy a general tax upon one species of property — for example, real estate — and to omit personal property, was, under the construction of special charter provisions, sustained in the case of Frederick *v.* Augusta, 5 Ga. 561; Primm *v.* Belleville, 59 Ill. 142. Power of counties to release lien and reduce amount of taxes must be conferred by statute, or it does not exist. State *v.* Central Pac. R. Co., 9 Nev. 79; State *v.* Central Pac. R. Co., 10 Nev. 47; Lowell *v.* Middlesex County, 3 Allen (Mass.), 550; Finch *v.* Temaha County, 29 Cal. 455.

tion shall be uniform," &c., which was considered to mean that all kinds of property not absolutely exempt must be taxed alike, by the same standard of valuation, equally with other taxable property, and coextensively with the territory to which it applies; and therefore a tax to pay a city debt, ordered to be levied *exclusively upon the real property* within the city, is a discrimination in favor of personal property, and violates the uniformity required by the Constitution, and is void.[1]

§ 1387 (784). **Extent of Power to Tax.** — Power to tax real and personal estate within the city corporation does not confer the right to tax *capital employed in merchandise*, distinct from the articles of property in which such capital is invested.[2]

§ 1388 (786). **What Property is within the Municipality.** — Among the most usual of the express limitations upon the power of municipal taxation is the one confining it to property within the corporation. What property is to be considered *within* the municipality, so as to give the right to tax it, is, in some instances, hard to determine.[3]

[1] Gilman *v.* Sheboygan, 2 Black (U. S.), 510; approving, on the constitutional point, Knowlton *v.* Rock County, 9 Wis. 410; Weeks *v.* Milwaukee, 10 Wis. 242; Lumsden *v.* Cross, *Ib.* 282; Attorney-Gen. *v.* Winnebago, L. & F. R. Pl. R. Co., 11 Wis. 42; Zanesville *v.* Richards, 5 Ohio St. 589; Exchange Bank of Columbus *v.* Hines, 3 Ohio St. 1. See Muscatine *v.* Miss. & Mo. R. Co., 1 Dillon C. C. 536; *ante*, § 114; *supra*, § 1367, *et seq.*, 1384; *post*, §§ 1433, 1445; Hale *v.* Kenosha, 29 Wis. 599; Cape Girardeau County Ct. *v.* Hill, 118 U. S. 68. Uniformity, what is? Livingston *v.* Albany, 41 Ga. 21; Mobile *v.* Dargan, 45 Ala. 310; State *v.* Severance, 55 Mo. 378.

[2] Municipality No. 3 *v.* Johnson, 6 La. An. 20.

[3] St. Louis *v.* Wiggins Ferry Co., 11 Wall. 423. "It is obvious," said Mr. Justice *Swayne*, in this case, "that the purpose of the legislature in conferring authority of this nature was not to tax property through the proprietor, but to tax things themselves, by reason of their being 'within the city.'" *Ib.* 431; Trigg *v.* Glasgow, 2 Bush (Ky.), 594; Loud *v.* Charlestown, 103 Mass. 278.

A power to tax all property within the corporate limits of a city does not authorize the taxation of its own bonds. Macon *v.* Jones, 67 Ga. 489. See § 1399. The taxing power does not extend beyond the geographical limits of a municipal corporation, and where the boundary was the low-water mark in a river, it was held that the city had no power to tax coal under the river beyond that mark. Gilchrist's Appeal, 109 Pa. St. 600. To the effect that the power of taxation is confined to the territorial limits of the municipality, see Toby *v.* Haggerty, 23 Ark. 370; Taylor *v.* Youngs, 48 Mich. 268; Hubbard *v.* Newton, 52 Vt. 346. A contract or agreement between two municipalities that each should not tax the lands within its limits owned by residents of the other, is contrary to the policy of the law and void. Dillingham *v.* Snow, 5 Mass. 547.

Bridges: The question of what property is within the city has been passed upon, with opposite conclusions, in discussing the right of *cities to tax bridges over navigable rivers* between two States. In Louisville Bridge Co. *v.* Louisville, 81 Ky. 189, the Court of Appeals of *Kentucky*, held that the mere fact that a part of a bridge was within the corporate limits of a city, was not sufficient to authorize such a tax, because the corporate limits may be larger than the taxable boundary,

With respect to the *situs* of real estate, there can ordinarily be no doubt; but as respects *personal property*, its *situs* is often difficult to settle. If the property is tangible and is actually and not merely temporarily or in transit, within the municipality, it is plain that it may be taxed by it, under the authority we are considering, irrespective of the residence or domicil of its owner.[1]

§ 1389. **Power of Taxation; Situs of Property.** — While the mode, form, and extent of taxation are, generally speaking, limited only by

and as, at the time the bridge was built, the bed of the river was not subject to taxation by the city, and so remains, they were larger in this case. It also held that a city has no power to tax property which is not benefited by its government; and for these two reasons, it refused to sustain a municipal tax upon a railroad bridge across the Ohio River. In St. Louis Br. Co. *v.* East St. Louis, 121 Ill. 238, the Supreme Court of *Illinois* decided that the city had the right to tax such part of a similar bridge as was situated within its corporate limits, which limits in this case extended to the middle of the Mississippi River, on the ground that the mere fact that the structure was built upon ground covered by a navigable stream, and therefore was not capable of improvement for streets, &c., furnished no reason for exempting it from city taxes, although it appeared that the bridge company had derived no protection for its property from the city, and had, at its own expense, provided for its lighting, police, fire apparatus, waterworks, cleaning, hospital, &c. A similar result was reached in State *v.* Columbia, 27 S. Car. 137, where the boundary of a city upon a river which was not navigable was held to be in the middle of the stream. Only that part of a bridge which is within the State can be taxed by its authority. Keokuk & H. Bridge Co. *v.* People, 145 Ill. 596; Keobuk & H. Bridge Co. *v.* People, 161 Ill. 132. A *railroad bridge* across a navigable river forming the boundary of two States is not, by reason of being an instrument of Congress, exempt from taxation by either State upon the part within it. Pittsburgh, C., C. & St. L. R. Co. *v.* West Virginia Board of Public Works, 172 U. S. 32. See also Henderson Bridge Co. *v.* Henderson, 173 U. S. 592. Following the rule of the *Iowa* decisions (see *post*, § 1395) that property within the municipality which cannot possibly be benefited by the municipal government cannot be taxed therefor, it was held that a railroad bridge partly within the city across a navigable river, which was so situ ted as to derive no benefit or protection from the municipality, could not be taxed by the city. Arnd *v.* Union Pac. R. Co., 120 Fed. Rep. 912. *Quære?* Property which is annexed to the city *subsequent* to the time for the return of taxable property to be made by the assessor cannot be taxed for that year. Latonia *v.* Meyer (Ky.), 86 S. W. Rep. 686.

[1] St. Louis *v.* Wiggins Ferry Co., 11 Wall. 423, 430, *per Swayne*, J.; Augusta *v.* Dunbar, 50 Ga. 387; Finley *v.* Philadelphia, 32 Pa. 381; Mills *v.* Thornton, 26 Ill. 300; Sangamon & M. R. Co. *v.* Morgan County, 14 Ill. 163; Pomeroy Salt Co. *v.* Davis, Treas., 21 Ohio St. 555; Dunleith *v.* Reynolds, 53 Ill. 45; People *v.* Ogdensburgh, 48 N. Y. 390; St. Louis *v.* Wiggins Ferry Co., 40 Mo. 580; Hoyt *v.* N. Y. Tax Com'rs, 23 N. Y. 228; New Albany *v.* Meekin, 3 Ind. 481, cited *infra;* People *v.* Niles, 35 Cal. 282. See Bell *v.* Pierce, 51 N. Y. 12; People *v.* N. Y. Tax Com'rs, 64 N. Y. 541. A non-resident creditor of a city, whose debt is evidenced by the certificates of the city, is not a holder of property within its limits. Murray *v.* Charleston, 96 U. S. 432, cited § 1399. As to *situs* of personal property for taxation, see § 1389.

As to taxation of personal property where the owner is a corporation, or has his domicil in one town and does business in another, see Gardiner Cotton & W. F. Co. *v.* Gardiner, 5 Me. 133, and cases there cited. Taxation of foreign capital. People *v.* N. Y. Tax Com'rs, 59 N. Y. 40; Bates *v.* Mobile, 46 Ala. 158; Kirtland *v.* Hotchkiss, 100 U. S. 491; s. c. 42 Conn. 426.

the wisdom of the legislature, *that power is limited* by the principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the *jurisdiction* of the taxing government.[1] If the property, which is the subject of taxation, be not within the taxing power of the State, because it has no *situs* therein for that purpose, the taxation of such property, under those conditions, partakes rather of the nature of an extortion than a tax and is not only beyond the power of the legislature, but is a taking of property for public use without compensation, and a denial of due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution.[2] Hence, *situs* of the property for purposes of taxation within the State essential to the exercise of the taxing power of the State. *Real property* is universally conceded to be taxable only by the State in which it is situated.[3]

But difficult and intricate questions arise with reference to *personal property*. The old rule was that the *situs* of personal property is governed by the maxim *mobilia sequuntur personam*, by which personal property was supposed to follow the person of its owner,

[1] Louisville & J. Ferry Co. *v.* Kentucky, 188 U. S. 385, 396, rev'g 108 Ky. 717; In McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 429, Mr. Chief Justice *Marshall* said that, while all subjects over which the taxing power of the State extends are objects of taxation, "those over which it does not extend are upon the soundest principles, exempt from taxation." That proposition, he said, could almost be pronounced self-evident.

[2] Northern Cent. R. Co. *v.* Jackson, 7 Wall. (U. S.) 262; State Tax on Foreign-held Bonds, *Re*, 15 Wall. (U. S.) 300; Tappan *v.* Merchants' Nat. Bank, 19 Wall. (U. S.) 490, 499; Louisville & J. Ferry Co. *v.* Kentucky, 188 U. S. 385, 398, *per* Mr. Justice *Harlan;* Delaware, L. & W. R. Co. *v.* Pennsylvania, 198 U. S. 341, 358; Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 202.

[3] "We know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any court." *Per* Mr. Justice *Brown* in Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 204. Although a *railroad extending through two or more States* may be valued *as a unit* for purposes of taxation, and the proportion of the gross value which the mileage within the State bears to the total mileage may be assessed by the State, the decisions of the Supreme Court recognize that if, for instance, a railroad company has terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the railroad to equalize the value of every mile without first deducting the value of the terminals. That would be taxing property outside the State under a pretence. Pittsburgh, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 421, 431; Western Un. Tel. Co. *v.* Taggart, 163 U. S. 1, 23; Fargo *v.* Hart, 193 U. S. 490, 500. Jurisdiction of *New Jersey* to assess taxes on *lands under the waters* of the Hudson River to the west of the boundary line between the States of New York and New Jersey sustained, although by compact between these States exclusive jurisdiction for certain purposes is given to New York over the waters to the west of such boundary line to low water mark on the New Jersey Shore. Central R. Co. *v.* Jersey City, 209 U. S. 473, aff'g 72 N. J. L. 311.

and to be subject to the law of the owner's domicil.[1] The application of this rule to *tangible personal property*, which is physically capable of having a definite and fixed *situs*, has as to such property been greatly modified, if, indeed, it is not now denied entirely. For purposes of taxation, it has been long held that tangible personal property may be separated from its owner, and he may be taxed on its account at the place where the property is, although it is not the place of the owner's domicil, and even if he is not a citizen or resident of the State which imposes the tax.[2] And in recent years the Supreme Court of the United States has gone further, and has held that *the domicil of the owner* does not confer jurisdiction upon the State of his domicil to tax tangible personal property, belonging to him, which is permanently located and has an actual *situs* in an-

[1] Buck *v.* Beach, 206 U. S. 392, 400, 401, *per* Mr. Justice *Peckham*.

[2] Eidman *v.* Martinez, 184 U. S. 578, 582; Blackstone *v.* Miller, 188 U. S. 189, 204; Tappan *v.* Merchants' Nat. Bank, 19 Wall. (U. S.) 490; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 22; Fargo *v.* Hart, 193 U. S. 490; Old Dominion SS. Co. *v.* Virginia, 198 U. S. 299; Metropolitan L. Ins. Co. *v.* New Orleans, 205 U. S. 395, aff'g 115 La. 698; Buck *v.* Beach, 206 U. S. 392, 401; People *v.* Com'rs of Taxes, 23 N. Y. 224, 240; Hall *v.* Miller, 102 Tex. 289.

In Union Refrigerator Transit Co. *v.* Kentucky, 199 U.S. 194, 202, 204, Mr. Justice *Brown* treated the right of taxation of personal property as the counterpart or correlative of the protection afforded to the property or its owner by the laws of the taxing power, saying: "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. . . . It is essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives the most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State."

A State may tax private property having a *situs* within its territorial limits, and may require the party in possession thereof to pay the taxes thereon. Carstairs *v.* Cochran, 193 U. S. 10, 16, aff'g 95 Md. 488. *Vessels* owned by a foreign corporation, although engaged in interstate commerce, when employed in such commerce wholly within the limits of a State, are subject to taxation in that State as their actual *situs*, although they may have been registered and enrolled under the Federal laws at a port outside its limits. Old Dominion SS. Co. *v.* Virginia, 198 U. S. 299. See also Ayer & L. T. Co. *v.* Kentucky, 202 U. S. 409.

other State.[1] Within this rule, a tax on the value of *the capital stock* of a corporation is a tax on the property in which that capital

[1] Louisville & J. Ferry Co. *v.* Kentucky, 188 U. S. 385; Old Dominion Steamship Co. *v.* Virginia, 198 U. S. 299; Delaware, L. & W. R. Co. *v.* Pennsylvania, 198 U. S. 341; Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 205; New York Cent. & H. R. R. Co. *v.* Miller, 202 U. S. 584, 596, 597; Commonwealth *v.* American Dredging Co., 122 Pa. 386.

The Supreme Court of the United States has assimilated the rules as to the taxation of *tangible personal property having an actual and permanent situs* elsewhere than at the owner's domicil to the rules applicable to the taxation of real property. Thus, in Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 204, where it was held that refrigerator cars permanently located and employed in a State other than the domicil of the owner could not be taxed by the State of the owner's domicil, Mr. Justice *Brown* said: "The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever may be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived." In this same case (pp. 194, 210, 211) Mr. Justice *Brown* referred to the evils resulting from any rule taxing tangible personal property at the domicil of the owner, and not where it has its actual *situs*, in the following language: "The adoption of a general rule that tangible personal property in other States may be taxed at the domicil of the owner involves possibilities of an extremely serious character. Not only would it authorize the taxation of furniture and other property kept at country houses in other States or even in foreign countries, of stocks of goods and merchandise kept at branch establishments when already taxed at the State of their *situs*, but of that enormous mass of personal property belonging to railways and other corporations which might be taxed in the State where they are incorporated, though their charters contemplated the construction and operation of roads wholly outside the State, and sometimes across the continent, and when in no other particular they are subject to its laws and entitled to its protection. The propriety of such incorporations, where no business is done within the State, is open to grave doubt, but it is possible that legislation alone can furnish a remedy."

But property which has its natural *situs* at the domicil of the owner, *e. g., rolling stock of a domestic railroad corporation*, may be taxed by the State of the domicil although it is used in interstate commerce and is so constantly being sent into other States that some of the property is always absent therefrom, when it appears that none of the cars were so constantly and continuously employed beyond the State as to be absent from it during the entire taxing year, but that they were sent therefrom and returned thereto as demanded by the exigencies of the business and the requirements of shippers. New York Cent. & H. R. R. Co. *v.* Miller, 202 U. S. 584, aff'g 177 N. Y., 584, 89 N. Y. App. Div. 127; s. c. 173 N. Y. 255; 75 N. Y. App. Div. 169. In this case some considerable portion of the company's cars were always absent from the State, and it was urged on behalf of the company that the car mileage within the State and that upon lines without the State afforded a basis of apportionment of the average total of its cars continuously employed by other corporations without the State, and that that mileage offered a basis of apportionment of its equipment for purposes of taxation. It was argued on its behalf that to assess a tax on the total value within and without the State was beyond the jurisdiction of the State, a taking of property without due process of law, and an unconstitutional interference with commerce among the States. But the court overruled this contention, Mr. Justice *Holmes* saying: "It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of

is invested, and no tax can be levied on such capital stock which includes therein property that is otherwise exempt.[1] Hence, the

the State. But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the State of origin remains the permanent *situs* of the property, notwithstanding its occasional excursions to foreign parts. . . . In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other State as to be taxable there. The absences relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home." A *herd of cattle* within the State of Missouri belonging to a resident of Iowa, was held not to be subject under the statute of *Iowa* to inheritance tax upon the decease of the owner, because it was not within the State. Weaver's Estate *v.* State, 110 Iowa, 328.

[1] Bank of Commerce *v.* New York City, 2 Black (U. S.), 620; Bank Tax Case, 2 Wall. (U. S.) 200; Pullman's Pal. Car Co. *v.* Pennsylvania, 114 U. S. 18, 25; Fargo *v.* Hart, 193 U. S. 490, 498, 499; Delaware, L. & W. R. Co. *v.* Pennsylvania, 198 U. S. 341, 353, 354.

Shares of Stock and their Situs: What are shares of stock, what their *situs*, and what are the rights of the owner therein? These questions have been frequently decided by the highest court in the State of New York. Thus in Plimpton *v.* Bigelow, 93 N. Y. 592, 596, 600, the court said: "We do not doubt that shares for the purpose of attachment proceedings may be deemed to be *in the possession of the corporation which issued them, but only at the place* where the corporation by intendment of law always remains, to wit, in the State or country of its creation" (p. 600). Again, in the same case, Judge *Andrews*, for the court, said: "The right which a shareholder in a corporation has by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts" (p. 599). In Enston's Case (113 N. Y. 174, 181), it was said, "The *situs* of the property owned by a shareholder in a corporation is either where the corporation exists, or at the domicil of the shareholder." The same doctrine was declared in the James Case (*In re* James, 114 N. Y. 6, 12). These cases are not overruled by Simpson *v.* Jersey City Contracting Co., 165 N. Y. 193, which does not profess to overrule them, and turned on its special facts.

And such seems also to be the doctrine of Supreme Court of the United States as to the nature of shares and their *situs*. State Tax on Foreign Held Bonds, *Re*, 15 Wall. (U. S.) 300; Delaware Railroad Tax, *Re*, 18 Wall. (U. S.) 206; Jellenik *v.* Huron Copper Mining Co., 177 U. S. 1, approves the New York doctrine as to nature and *situs* of shares of stock. Thus, Mr. Justice *Harlan* in the Jellenik case (p. 12), delivering the opinion of this court, said: "The Court of Appeals of New York, speaking by Judge *Comstock*, held certificates of stock to be simply muniments and evidence of the holder's title to a certain number of shares in the property and franchises of the corporation of which he is a member. Mechanics' Bank *v.* New York & New Haven R. R. Co., 13 N. Y. 599."

Stamp Tax on transfers of stock: The State of *New York* (chap. 201, Laws, 1905), imposed a tax of two cents on each hundred dollars' face value "on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company or corporation, made after the first day of June, nineteen hundred and five." The validity of this Act was assailed on four grounds: I. To tax sales of shares of corporate stock *exclusively*

value of the *tangible physical property* of a corporation, which has an actual and permanent *situs* beyond the limits of the State, must be deducted from the value of the capital stock; a failure to do so is a denial of due process of law entitling the corporation to relief.[1] And in assessing a corporation engaged in transportation, or any other similar business in respect of its property *within the State, by treating the whole business as a unit* on the basis of the value of the entire capital stock of the company, and assessing it on the proportion of the value of its property within the State, determined by the ratio of the mileage within the State to the total mileage of the company, tangible personal property which has its *situs* at the domicil of the corporation in a State other than that which exercises the taxing power, and which is not used in the general transaction of the company's business, must be deducted from the total value of the stock before an apportionment is made upon the basis of the mileage. If this is not done, the result cannot be regarded as a mere case of over-valuation, but is an assessment made upon unconstitutional principles upon property which has no *situs* within the State.[2]

is an arbitrary discrimination in violation of the provision of the Fourteenth Amendment securing the equal protection of the laws. II. The act imposes a tax on sales in New York of the *shares of a foreign corporation owned by non-residents*, and is a taxing of their property without due process of law, in violation of the Fourteenth Amendment. III. The act, in adopting the *face value of the shares as the basis of the tax*, regardless of their real value, deprives the owners of stock of their property without due process of law, and denies to them the equal protection of the laws, in violation of the Fourteenth Amendment. IV. This tax law is void under the *commerce clause* of the Constitution. But the act was sustained both by the Court of Appeals of the State of New York (People *v.* Reardon, 184 N. Y. 431, aff'g 110 N. Y. App. Div. 821), and by the Supreme Court of the United States. Hatch *v.* Reardon, 204 U. S. 152.

[1] Delaware, L. & W. R. Co. *v.* Pennsylvania, 198 U. S. 341, 354, 358 (coal shipped beyond the State for sale).

[2] Fargo *v.* Hart, 193 U. S. 490, 502. *The unit business basis of taxation:* The American Express Company was engaged in commerce among the States, including *Indiana*. It had real estate of a market value of nearly $2,000,000, which was outside of Indiana, and which, it said, was not used in its business. It had $15,500,000 of business property in New York, which, according to the evidence before the court, was not used in its business. It had over $3,000,000 worth of real estate used in connection with the business, and about $1,500,000 of personal property used in the business, of which there was less than $8000 worth in Indiana. It had paid local taxes on the Indiana personal property. The total value of the company's property of all kinds for the year in which the assessment was made was $22,059,055. The market value of its stock was $21,600,000. The State Board of Tax Commissioners of *Indiana* undertook to assess the property of the company by treating the *whole business as the unit* on the basis of the value of the capital stock, and assessing the company on a proportion of the total value of its property determined by the ratio of the mileage in Indiana to the total mileage of the company. On this basis the property in Indiana was assessed at $809,253, as against less than $8000 worth of tangible property

There is, however, an obvious *distinction between tangible and strictly intangible property*, in the fact that the latter is often held secretly, and that there is no method by which its existence or ownership can be ascertained in the State of its *situs*, except perhaps in certain cases such as mortgages or shares of stock. So, too, if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicil, or the collection of the tax effectively enforced. In this class of cases, the tendency of the modern authorities is to apply the maxim *mobilia sequuntur personam* and to hold that purely intangible property, especially if not elsewhere taxed, may be taxed at the domicil of the owner as its real *situs*.[1] But even intangible property may have, under some circumstances, a *situs* elsewhere than in the State of the domicil of the owner. Thus, franchises and privileges, such as a franchise to maintain a ferry, conferred on a corporation of another State have a *situs* for taxation in the State by which they are granted and within which they are to be exercised, and are taxable in that State alone.[2] Even in the case of such species of intangible property as

within the State. Although the evidence showed that the personal property in New York amounting to $15,500,000 was not used in the company's business, the *Indiana* State authorities did not make any deduction from the capital stock in respect thereof. It was held that because of the failure to deduct the value of such personal property, the assessment was unconstitutional and invalid as including personal property which was not within the limits of the State. Fargo *v.* Hart, 193 U. S. 490.

[1] Tappan *v.* Merchants' Nat. Bank, 19 Wall. (U. S.) 490; Kirtland *v.* Hotchkiss, 100 U. S. 491; Bonaparte *v.* Tax Court, 104 U. S. 592; Sturges *v.* Carter, 114 U. S. 511; Kidd *v.* Alabama, 188 U. S. 730; Blackstone *v.* Miller, 188 U. S. 189; Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 205.

[2] Louisville & J. Ferry Co. *v.* Kentucky, 188 U. S. 385, rev'g 108 Ky. 717.

A franchise, granted by *Indiana* and vested by transfer in a Kentucky corporation, *to maintain a ferry across the Ohio River* between Indiana and Kentucky, has its *situs* for taxation in Indiana, and cannot be taxed in Kentucky although that is the State of the company's domicile. So held in a case where the only right of the company to maintain the ferry had was granted by Indiana. All tangible property of the company, real and personal, was taxed in the States where located. The company had no intangible property except the ferry franchise granted by Indiana. The Kentucky taxing authorities proceeded to levy a tax on the corporate franchise of the company. They capitalized the net earnings of the company for the preceding year at six per cent, making the capital value thereof $121,050. From this sum they deducted $54,164, being the assessed value of the company's tangible property in Kentucky and Indiana, leaving the sum of $66,886, as the value of the company's franchise. In describing the method of assessment the Kentucky Court of Appeals said that "the board of valuation and assessment fixed the value of the franchise for the corporation as if it conducted all of its business in the territorial limits of the State of Kentucky, not deducting anything from that value on account of the fact that it exercised the privilege of conveying passengers from Jeffersonville to Louisville by reason of its acquisition of privileges which were originally granted under the laws of Indiana." The Supreme Court of the United States held that as the assessment included

debts and choses in action the transaction may take such a form, by relation to a business carried on within the State, or by advantage taken by the creditor of the laws of the State for his protection, or when the credits are in the nature of a permanent investment within the State, as to subject them to the taxing power of a State which is not the domicil of the owner, and this is more particularly the case when such debts and choses in action have a concrete existence within the State in the form of bonds, notes, or bills.[1] In the case

the value of the Indiana ferry franchise it was invalid, that franchise not having a *situs* in Indiana for purposes of taxation. Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, rev'g 108 Ky. 717; Mr. Justice *Harlan* said: "The learned counsel for Kentucky says that it is the value of the company's franchise contained 'in its charter' which is the subject of taxation. But the franchise obtained from Indiana is not in the company's charter granted by Kentucky. It is contained only in the act of the legislature of Indiana. The Indiana franchise was not carried into the charter of the Kentucky corporation by reason of that corporation having the authority to purchase it. Its existence and validity depend entirely upon the laws of Indiana. Counsel further say that Kentucky does not impose a tax upon the company's privilege, *as such*, granted by the State of Indiana. If it had done so the tax so imposed would not have been defended as valid. Yet by her statute, under which the board of valuation and assessment proceeded, Kentucky has accomplished that result by including for purposes of taxation, in the valuation of the franchise granted by it, the value of the franchise granted by Indiana, and then taxing the franchise of the Kentucky corporation upon the basis of the aggregate value of both franchises. Although now owned by one corporation these are separate franchises. There is, in our judgment, no escape from the conclusion that Kentucky thus asserts its authority to tax a property right, an incorporeal hereditament, which has its *situs* in Indiana."

[1] New Orleans *v.* Stempel, 175 U. S. 309; Bristol *v.* Washington County, 177 U. S. 133; Blackstone *v.* Miller, 188 U. S. 189; State Board of Assessors *v.* Comptoir National d'Escompte, 191 U. S. 388; Scottish Union & Nat. Ins. Co. *v.* Bowland, 196 U. S. 611, 620; Metropolitan L. Ins. Co. *v.* New Orleans, 205 U. S. 395, aff'g 115 La. 698; People *v.* Home Ins. Co., 29 Cal. 533; Armour Packing Co. *v.* Augusta, 118 Ga. 552; Goldgart *v.* People, 106 Ill. 25, 28; German Trust Co. *v.* Davenport Board of Equalization, 121 Iowa, 325; Commonwealth *v.* Dun, 126 Ky. 108; Commonwealth *v.* Peebles (Ky.) 119 S. W. Rep. 774; Bluefields Banana Co. *v.* Board of Assessors, 49 La. An. 43; Parker *v.* Strauss, 49 La. An. 1173; Comptoir National d'Escompte *v.* Board of Assessors, 52 La. An. 1319; *In re* Jefferson, 35 Minn. 215; State *v.* St. Louis County Ct., 47 Mo. 594, 600; Finch *v.* York County, 19 Neb. 50; People *v.* Ogdensburgh, 48 N. Y. 390, 397; People *v.* Smith, 88 N. Y. 576; Redmond *v.* Rutherford, 87 N. Car. 122; Poppleton *v.* Yamhill County, 18 Oreg. 377; Billinghurst *v.* Spink County, 5 S. Dak. 84, 98; Catlin *v.* Hull, 21 Vt. 152, 159, 161.

Credits and choses in action evidenced by notes largely secured by mortgages on real estate, which notes and mortgages are in the possession of an agent of the owner for collection of principal and interest, sums received being deposited in bank within the State to the credit of the owner at the place of investment, have a *situs* for taxation at the place of investment, although the owner may be domiciled elsewhere. New Orleans *v.* Stempel, 175 U. S. 309. Property of a *non-resident of Minnesota*, in the shape of notes payable at the office of his agent in Minnesota, where the mortgages securing the notes were retained by the agent, and the notes were returned from time to time when required for renewal, collection, or foreclosure, the agent collecting the money and making loans in the name of the principal, generally on his own judgment, remitting to the principal the collections when required, or investing them in

of a corporation organized under the laws of the taxing State, that State may constitutionally declare by legislative enactment that the *situs* of the stock for purposes of taxation, whether owned by residents or non-residents, shall be at the principal office of the corporation, and may constitute the corporation the agent of the stockholders to receive notice of taxation and to represent them in proceedings for the correction of the assessment.[1]

§ 1390 (787). **Locus of Property; Taxation of Vessels.** — The general rule is that tangible personal property is subject to taxation

new loans, is property taxable in Minnesota. Bristol *v.* Washington County, 177 U. S. 133. See also *In re* Jefferson, 35 Minn. 215. Through an agent in Louisiana, a *foreign corporation loaned money* on collateral security. The collateral was kept in New Orleans, and was not remitted to the home office in Paris. The debts were evidenced by checks drawn by the customers, which were not intended to be paid in the ordinary way. The agent had authority to make loans without consulting his principal in Paris, and the transactions were continuing and large. It was held that the loans evidenced by these checks were taxable in New Orleans. State Board of Assessors *v.* Comptoir National d'Escompte, 191 U. S. 388. If a foreign life insurance company, habitually and regularly makes loans to its policy holders in a State through its agent who collects the interest and receives repayment of the moneys, it is taxable in that State as upon capital invested therein in the business of loaning money within the State, although the notes for the loans may be temporarily sent to the home office in another State. Metropolitan L. Ins. Co. *v.* New Orleans, 205 U. S. 395, aff'g 115 La. 698.

A *corporation of Texas* had an agent at *New Orleans*, who received fruit on its account, sold it, and collected the price. Part of the proceeds was retained by the agent in connection with the business, and part was deposited in bank in New Orleans for use of the company in the business. The company transacted business in New Orleans precisely as did resident merchants, except that it was represented by an agent. It was held that *the cash in bank* had a *situs* in New Orleans for purposes of taxation. Bluefields Banana Co. *v.* New Orleans Board of Assessors, 49 La. An. 43. Municipal bonds *deposited by a foreign insurance company* with the insurance department of a State as required by law for the security of policy holders within the State, are a part of the capital of the company invested within the State and taxable by the State, or under its laws, as such. Scottish Union & Nat. Ins. Co. *v.* Bowland, 196 U. S. 611, 620. United States and other bonds and the stocks of other corporations, which are going concerns, owned by a cable and telegraph company owning lines extending from the taxing State into other States and countries, should be treated as capital employed within the State and as part of the basis upon which a franchise tax on the basis of the capital of such company employed within the State is to be computed, in the absence of proof that they were bought by the corporation out of surplus earnings. People *v.* Morgan, 178 N. Y. 433, rev'g 86 N. Y. App. Div. 577. Where moneys were invested and reinvested in notes secured by mortgages on lands in Ohio and the notes and mortgages were sent to the agent of the lender in Indiana, and such notes, not indorsed by the lender, were in the hands of the agent in Indiana at the time of the death of the lender, *the mere presence of the notes and mortgages in Indiana* does not constitute the debts of which the notes were the written evidence, property within the taxing jurisdiction of that State. The fact that the notes were payable in Indiana as a result of an attempt to escape taxation in Ohio does not confer jurisdiction on Indiana to tax the property. Buck *v.* Beach, 206 U. S. 392, rev'g 164 Ind. 37.

[1] Corry *v.* Baltimore, 196 U. S. 466, aff'g 96 Md. 310.

by the State in which it is permanently located, no matter where the domicil of the owner may be. This rule is not affected by the fact that the property is employed in interstate commerce.[1] Hence, vessels, although engaged in interstate commerce, if employed in such commerce wholly and permanently within the limits of a State, are subject to taxation within that State.[2] But, if vessels ply between ports of different States and are engaged in the coastwise trade, and have no definite and fixed *locus* within any particular State, the domicil of the owner is the *situs* of the vessel for purposes of taxation.[3] The *port where the vessels are enrolled* is

[1] Old Dominion SS. Co. *v.* Virginia, 198 U. S. 299; *supra*, §§ 1356–1362. The power to license is a police power, although it may be also exercised for the purpose of raising revenue. A State has the power to enforce a license fee, either directly or through one of its municipal corporations, upon *ferry keepers* living in the State for boats owned and used in transporting passengers and goods across a navigable river to and from another State. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365. Index — *Ferry*.

[2] Old Dominion SS. Co. *v.* Virginia, 198 U. S. 299. See also Lott *v.* Mobile Trade Co., 43 Ala. 578; National Dredging Co. *v.* State, 99 Ala. 462; Northwestern Lumber Co. *v.* Chehalis County, 25 Wash. 95. In Wheaton *v.* Mickel, 63 N. J. L. 625, a resident of New Jersey was taxed for certain *coastwise and seagoing vessels* then located in Pennsylvania. In Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 207, this case is referred to, and it is remarked, in justification of the taxation of these vessels in New Jersey, that it did not appear that they were *permanently located in Pennsylvania*. In *Alabama*, a municipal corporation, with power to lay taxes on "real and personal property within the city," was held authorized to levy a tax on a *steamboat* owned by a resident of the city and navigating the waters of a stream on which the city was situate. And the authority to tax was declared to extend even to cases where the owner of the boat was a non-resident of the State, if he resided in the city during the business season, and the power to tax was held to exist although the boats were registered and enrolled as coasting vessels under the laws of the United States. Battle *v.* Mobile, 9 Ala. 234. In *Indiana*, where a city had authority by charter to tax all property "within its limits," it was held that the *share of a part owner of a steamboat*, or the boat itself, though in the course of its voyages it necessarily touched at the city, was not subject to taxation by the city, notwithstanding such owner be domiciled or resident therein. New Albany *v.* Meekin, 3 Ind. 481. In *Illinois*, under power to tax property "within the limits of the city," a *steamboat* belonging to a resident of the city but registered elsewhere, and only touching at the city during her trips up and down the river, cannot be taxed. Wilkey *v.* Pekin, 19 Ill. 160. In *Louisiana*, it was held that the owner of a liquor saloon on *board a steamer running* on navigable streams between New Orleans and other points within the State, cannot be compelled by the local authorities, other than those of the home port, to pay a license tax for the privilege of selling spirituous liquors. State *v.* Dennie, 51 La. An. 608.

[3] Ayer & L. T. Co. *v.* Kentucky, 202 U. S. 409; Commonwealth *v.* Southern Pac. Co. (Ky.), 120 S. W. Rep. 311. See also Hays *v.* Pacific Mail SS. Co., 17 How. (U. S.) 596; St. Louis *v.* Wiggin's Ferry Co., 11 Wall. (U. S.) 423; Morgan *v.* Parham, 16 Wall. (U. S.) 471; Wheeling, P. & C. Transportation Co. *v.* Wheeling, 99 U. S. 273. *Steamships* owned and registered in New York and regularly plying between Panama and San Francisco and ports in Oregon, remaining in San Francisco no longer than necessary to land and receive passengers and cargo and in Benicia only for repairs and supplies, were held not subject to taxation in California. Hays

immaterial, and does not confer jurisdiction to levy a tax upon the vessel, because the power of taxation of vessels depends either upon the actual domicil of the owner or the permanent *situs* of the property within the taxing jurisdiction.[1]

§ 1391 (788). **Same Subject.** — So a municipality, under the power to tax property "within the city," has been held not to be authorized to tax the *ferry-boats* of a *foreign* private corporation, whose chief relation to the city was regarded as being "merely that of contact there as one of the termini of their transit across the river in the prosecution of their business."[2] Under the facts, as reported, the question is certainly a close one, and had previously been decided the other way by the Supreme Court of Missouri.[3]

§ 1392 (789). **Taxation of Street Railway Companies; Gas and Water Companies.** — The property of a *street railway company*, including its roadbed, situate *within* the limits of a municipal corporation, is ordinarily subject to its taxing power; and if no different provision be made, it has been held that a street railroad may be taxed as real estate.[4] An exclusive municipal grant to such a rail-

v. Pacific Mail SS. Co., 17 How. (U. S.) 596. A *steamship* was registered in New York under the ownership of the plaintiff. She was employed as a coasting steamer between Mobile and New Orleans, and was regularly enrolled as a coaster of Mobile and received a license as a coasting vessel. It was held that she was not subject to taxation in Alabama. Morgan *v.* Parham, 16 Wall. (U. S.) 471. In *Missouri* it was held that where the home port of a steamboat is in a city and the local owners reside in it also, it is subject to taxation by the city. St. Joseph *v.* Saville, 39 Mo. 460. *Ferry-boat* taxable where owner resides. Mobile *v.* Baldwin, 57 Ala. 61. See also as to taxation of boats and vessels, Oakland *v.* Whipple, 39 Cal. 112; Irvin *v.* New Orleans, St. L. & C. R. Co., 94 Ill. 105; St. Joseph *v.* Hannibal & St. J. R. Co., 39 Mo. 476; Hoyt *v.* New York Tax Com'rs, 23 N. Y. 228. Index — *Ferry*. Taxation of steamboats owned by railway company under the Constitution of California, see California *v.* Central Pac. R. Co., 127 U. S. 1; San Francisco *v.* Central Pac. R. Co. 63 Cal. 467, 469. In *New York* it has been held that where steamers were being built in Delaware for a New York corporation, and the contracts gave the corporation a lien on and ownership in the vessels as the building progressed proportioned to the amount paid upon the contract, the moneys so paid by the New York corporation upon the contract were taxable in New York. People *v.* New York Tax Com'rs, 58 N. Y. 242, aff'g 1 Hun (N. Y.), 143. To the same effect, People *v.* New York Tax Com'rs, 64 N. Y. 541, aff'g 5 Hun (N. Y.), 200.

[1] Ayer & L. T. Co. *v.* Kentucky, 202 U. S. 409, 423; Old Dominion SS. Co. *v.* Virginia, 198 U. S. 299.

[2] St. Louis *v.* Wiggins Ferry Co., 11 Wall. 423.

[3] St. Louis *v.* Wiggins Ferry Co., 40 Mo. 580.

Tax on the basis of tonnage not necessarily in violation of the Constitution of the United States. Lott *v.* Cox, 43 Ala. 697; Northwestern Union Packet Co. *v.* St. Louis, 4 Dillon C. C. R. 10; N. W. Packet Co. *v.* Keokuk, 95 U. S. 80; N. W. Packet Co. *v.* St. Louis, 100 U. S. 423, aff'g 4 Dillon C. C. R. 10. Index — *Ferry*.

[4] North Beach & M. St. R. Co.'s

way company to use the streets in the municipality does not exempt it from municipal control, nor deprive the municipal authorities of the right, otherwise existing, to require the company to pay a license or tax.[1] Nor does the payment of a tax or license of a specified sum or amount on each car employed by a city railway company to the city, as required by the contract between the company and the city, in which certain privileges are secured to the company, exonerate the company from the payment of an *ad valorem* tax on its property, horses, stables, and shops, which are assessable for municipal purposes.[2] So the property of *gas companies* and

Appeal, 32 Cal. 499; People *v.* Cassidy, 2 Lans. (N. Y.) 294; Providence Gas Co. *v.* Thurber, 2 R. I. 15, 21, where gas pipes in streets were taxed as real estate. Compare West Chester Gas Co. *v.* Chester County, 30 Pa. 232. See also Middlesex R. Co. *v.* Charlestown, 8 Allen (Mass.), 330; Prov. & Wor. R. R. Co. *v.* Wright, 2 R. I. 459; Louisville City Ry. *v.* Louisville, 4 Bush (Ky.), 478; St. Louis *v.* St. L. R. Co., 50 Mo. 94, construction of special charter in respect of taxation. A toll-bridge over a navigable river is properly assessed as real estate in the district where located. Hudson River Br. Co. *v.* Patterson, 74 N. Y. 365. The *elevated railways* in the streets of the city of New York are taxable, under the legislation of the State, as "lands" and "real estate." People *v.* N. Y. Tax Com'rs, 82 N. Y. 462. A township of land was granted to a college, with a provision in the charter exempting the land from "public taxes," and it was held not to exempt the land from local municipal taxes to be expended for the immediate benefit of the particular municipality. Morgan *v.* Cree, 46 Vt. 773.

For purposes of taxation a distinction may be made between street railroads and steam railroad companies, although the latter class may use the city streets. Savannah, T. & I. H. R. R. Co. *v.* Savannah, 198 U. S. 392. A distinction may also be made between street surface railroads and sub-surface railroads. Metropolitan St. R. Co. *v.* New York, 199 U. S. 1, aff'g 174 N. Y. 417. So far as the Federal Constitution is concerned, it is within the *power of a State* to tax the *franchise* of a railroad company at a different rate from its tangible property in the State. Coulter *v.* Louisville & N. R. Co., 196 U. S. 599. The *assessable value* for taxation of a railroad track can only be determined by looking to the elements on which the financial condition of the company depends, — its traffic as evidenced by the rolling stock and gross earnings in connection with its capital stock. Franklin County *v.* Nashville, C. & St. L. R. Co., 12 Lea (Tenn.), 521. Assessment of railroad property in New Jersey. See Long Dock Co. *v.* State Board of Assessors (N. J. L.); 73 Atl. Rep. 53.

[1] State *v.* Herod, 29 Iowa, 123; Los Angeles *v.* Southern Pac. R. Co., 67 Cal. 433, applying the rule to a steam railroad; Columbus *v.* Street R. Co., 45 Ohio St. 98. The grant to a railroad company of the right to lay and maintain its track over a bridge belonging to the city, and to use and operate the same, in an ordinance which contains no reservation respecting tolls or other charges, is within the municipal authority; and the city cannot, by a subsequent ordinance, impose such charges. Des Moines *v.* Chicago, R. I. & P. R. Co., 41 Iowa, 569; *ante*, § 1232.

[2] Louisville City Ry. Co. *v.* Louisville, 4 Bush (Ky.), 478. As to license fees, see New York *v.* Broadway & S. A. R. Co., 17 Hun (N. Y.), 242; Union Pass. R. Co. *v.* Philadelphia, 101 U. S. 528. Index — *Licenses*.

The fact that a street railway company has *agreed to pay for the privilege of using the streets* for a given term, either in a lump sum or by payments in instalments or percentages of the receipts, does not prevent the municipality from exercising statutory authority to *impose license fees* or taxes. New Orleans City & L. R. Co. *v.* New Orleans, 143 U. S. 192; Metropolitan St. R. Co. *v.* New York, 199 U. S. 1; St. Louis *v.* United Railways Co., 210

of *water companies* within the municipality, is ordinarily, taxable by it.[1]

The power to tax property within the State or municipality includes not only the power to tax the rails and roadbed of a railway in a street or highway, *but also the power to tax the intangible right or franchise* granted to the company by the State, or by the municipality under delegated authority, to construct, maintain, and operate the railway or other public utility in public streets and highways.[2]

U. S. 266; State *v.* Herod, 29 Iowa, 123; San Jose *v.* San Jose & S. C. R. Co., 53 Cal. 476, 481; Wyandotte *v.* Corrigan, 35 Kan. 21; New Orleans *v.* New Orleans R. Co., 40 La. An. 587; New Orleans *v.* Orleans R. Co., 42 La. An. 4; Springfield *v.* Smith, 138 Mo. 645; Newport News & O. P. R. & E. Co. *v.* Newport News, 100 Va. 157; State *v.* Hilbert, 72 Wis. 184. A stipulation in the charter of a railroad company that the surplus above certain expenses and certain dividends shall be divided between the government and the stockholders of the company does not exempt the company from taxation on its franchises in the absence of an express exemption. Honolulu R. T. & Land Co. *v.* Wilder, 211 U. S. 137, aff'g 18 Hawaii, 668.

[1] Commonwealth *v.* Lowell Gasl. Co., 12 Allen (Mass.), 75. Pipes laid in the streets of a city by a gas company, under a grant in their charter, are fixtures, and taxable as real estate. Providence Gas Co. *v.* Thurber, 2 R. I. 15. But see West Chester Gas Co. *v.* Chester County, 30 Pa. St. 232. Lessee and proprietor of city water-works for a term of years, whose contract of lease did not stipulate for exemption from city taxation, was held taxable in respect to such works, they being treated as real estate. Stein *v.* Mobile, 24 Ala. 591; S. P. in Stein *v.* Mobile, 17 Ala. 234. *Contra*, Stein *v.* Mobile, 49 Ala. 362; but *quære?*

The legislature may restrict the tax authorized to be levied for water-works for the supply of water to the inhabitants of cities, and for extinguishing fires, to the district which is benefited and protected by such works. Grant *v.* Davenport, 36 Iowa, 396. In the case last cited it was also ruled where an ordinance provided that, in consideration of certain covenants by a water company to supply the city with water, its franchise and all property actually required for the management of its water-works shall be exempt from municipal taxation, that such provision was not an exemption from taxes, but was in effect a payment of the taxes by the performance of the covenants on the part of the water company; but *quære?* As to the basis for the valuation of a water power, see Winnipiseogee Lake C. & W. Mfg. Co. *v.* Gilford, 64 N. H. 337; Flax Pond Water Co. *v.* Lynn, 147 Mass. 31. Agreements by municipalities to satisfy or pay taxes against property of public utility corporations in consideration of public service. See *ante*, § 1310.

[2] People *v.* Tax Com'rs, 174 N. Y. 417, aff'd 199 U. S. 1. See further as to the taxation of "special franchises" in streets under the *New York statutes*, People *v.* Priest, 181 N. Y. 300, rev'g 101 N. Y. App. Div. 223. In Adams Express Co. *v.* Ohio, 166 U. S. 185, 218, the court said with reference to the taxation of *intangible* property: "In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things, or in the limitations of the Federal Constitution which restrains a State from taxing at its real value such intangible property. . . . It matters not in what this intangible property consists — whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country." In Metropolitan St. R. Co.

§ 1393 (790). **Taxation of Property of Banks; Railway Property.** —A *general statute of the State* provided that the capital stock of

v. New York, 199 U. S. 1, 39, Mr. Justice *Brewer* said: "A franchise, though intangible, is none the less property, and oftentimes property of great value. Indeed, growing out of the conditions of modern business, a large proportion of valuable property is to be found in intangible things like franchises."

The *statutes of New York* designate the right or privilege to use streets or highways for the purposes of railways and for the pipes and mains of gas and water companies and other public utilities as "*special franchises*," and these special franchises are distinct from the general right or franchise to do business as a corporation. On this subject, *Vann*, J., said in People *v.* Tax Com'rs, 174 N. Y. 417, 435: "The *general* franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the State. The general franchise of a street railway company, for instance, is the special privilege conferred by the State upon a certain number of persons known as the corporators to become a street railroad corporation and to construct and operate a street railroad upon certain conditions. Such a franchise, however, gives the corporation no right to do anything in the public highways without special authority from the State, or some municipal officer or body acting under its authority. When a right of way over a public street is granted to such a corporation, with leave to construct and operate a street railroad thereon, the privilege is known as a *special franchise*, or the right to do something in the public highway, which, except for the grant, would be a trespass."

It is problematical whether the intangible right or franchise to construct, maintain, and operate a street railway or other public utility in a street has any value apart from that which it imparts to the physical structure of the street. Speaking of this subject, *Vann*, J., said in People *v.* Tax Com'rs, 174 N. Y. 417, 440, 441: "The relation between the intangible right to run cars in the streets and the tangible property in the rails to run the cars on, is so intimate as to be inseparable in any practicable system of estimating values. . . . All the mains and pipes, poles and wires, rails and ties of the relators, when separated from their special franchises, have no value except as firewood or old iron. Their only substantial value is the right to use them in connection with the franchise, and, hence, they are incidental to the franchise. As a part of the franchise they are worth something, but severed from it, nothing to speak of. . . . Taking the broad and practical view of the subject, which the legislature had the right to take in creating the new system, they have no assessable value worthy of notice, except through the actual and constant use made of them, as incidental to the special franchises. The value of either resides in the union of both, and can be practically ascertained only by treating them as a unit. Unless assessed together, both cannot be adequately assessed. . . . We regard the tangible property as an inseparable part of the special franchises mentioned in the statute, constituting with them a new entity, which, as a going concern, can neither be assessed nor sold to advantage, except as one thing, single and entire."

It is to be observed that the *corporate franchise*, and the *special franchise* or privilege to use streets and highways, are frequently taxed under different methods, by the same taxing power. In People *v.* Tax Com'rs, 174 N. Y. 417, 436, *Vann*, J., said: "Prior to the passage of this act [of 1899] general franchises had been taxed for the benefit of the State under a valuation made by a State officer, with the sanction of the courts. Special franchises, however, had never been lawfully assessed either by local or State authority, but were made taxable property by the act before us, for the first time in the history of the State. People *v.* Barker, 146 N. Y. 304; People *v.* Neff, 19 N. Y. App. Div. 590, aff'd 154 N. Y. 763." A "special franchise" which is taxable under the statute means some special privilege derived from some governmental body or some political body having authority to grant the rights sought to be taxed. If pipes be maintained in a public highway without any legislative or municipal grant, and

the State bank should be taxable *only for State purposes*, and afterwards a city corporation undertook to levy and collect a municipal tax on certain real estate owned by the bank and forming part of its capital stock; but this, it was adjudged, could not be done, the city and its powers being entirely under the control of the legislature.[1]

upon the consent merely of the owner of the fee of the highway, the owner of the pipes has no special franchise which is taxable. People *v.* Priest, 75 N. Y. App. Div. 131, aff'd 175 N. Y. 511.

Under the *New York* statute for the taxation of *special franchises* the property owner is entitled to a deduction from the tax of any payment by it "in the nature of a tax." Payment of a percentage of the gross receipts of a street railway which is required to be made to the city as a condition of its franchise, is a payment in the nature of a tax, and to be deducted as such. Heerwagen *v.* Crosstown St. R. Co., 179 N. Y. 99, modifying 90 N. Y. App. Div. 275. See also Metropolitan St. R. Co. *v.* New York, 199 U. S. 1; Brooklyn City R. Co. *v.* New York, 199 U. S. 48. Similar construction of *Maryland* statute, see Baltimore *v.* United R. & E. Co., 107 Md. 250. The *lessee or operator* of an underground railroad *constructed by the City of New York and owned by it*, but leased to an operating company, is not subject to special franchise tax under the New York statute. People *v.* Tax Com'rs, 126 N. Y. App. Div. 610, aff'd 195 N. Y. 618.

In *Maryland* the right of a street railway company to use the city streets, when exercised, is an easement and property which is subject to taxation as such. Whilst the right is unexercised, it is a franchise, which, separately considered, has no substantial value for purposes of direct taxation. United R. & E. Co. *v.* Baltimore, 111 Md. 264; 73 Atl. Rep. 633. The *value of an easement or right* to use city streets for street railways for purposes of taxation depends upon its producing value to the corporation owning the right, and that value can only be determined by a consideration of all the elements affecting the productiveness of the railways. United R. & E. Co. *v.* Baltimore, 111 Md. 264; 73 Atl. Rep. 633.

Tax upon *gross receipts of a street railroad company* held to include, as an element thereof, a tax upon the easement or property right of the company to use the city streets and operate cars therein, and to be a substitute for a direct tax upon the easement or property right to use the streets. United R. & E. Co. *v.* Baltimore, 111 Md. 264; 73 Atl. Rep. 633. The property or estate which a *gas company* has in the streets and highways of a city is an easement which may be properly assessed to the company as real estate. Consolidated Gas Co. *v.* Baltimore, 101 Md. 541.

[1] State Bank of Indiana *v.* Madison, 3 Ind. 43; State Bank of Indiana *v.* Brackenridge, 7 Blackf. (Ind.) 395. See also Gardner, Assessor, *v.* State (holding under a charter that a State tax was in lieu of all local taxes), 21 N. J. L. 557. So, in *Louisiana*, a restriction upon the State in reference to the taxation of banks was held to extend to municipal corporations deriving their authority from the State. New Orleans *v.* Southern Bank, 11 La. An. 41; Municipality No. 1 *v.* La. State Bank, 5 La. An. 394; New Orleans *v.* Com. Bank of N. O., 10 La. An. 735; New Orleans *v.* Mech. & T. Bank, 15 La. An. 107. A village corporation was authorized "to raise money by a tax to be assessed upon the freeholders and *inhabitants*, according to law," and it was decided that a banking corporation located and doing business in the village was an *inhabitant*, and taxable. Ontario Bank *v.* Bunnell, 10 Wend. (N. Y.) 186.

As to taxation of *banks and bank stock by municipalities* in which the banks are located: Gordon *v.* Appeal Tax Court, 3 How. (U. S.) 133; Mercantile Bank *v.* New York, 121 U. S. 138; Davenport Bank *v.* Davenport Board of Equalization, 123 U. S. 83; Bank of Redemption *v.* Boston, 125 U. S. 60; Bank of Georgia *v.* Savannah, Dudley (Ga.), 130; Savannah *v.* Hartridge, 8 Ga. 23; Cherokee Ins. & B. Co. *v.* Whitfield, 28 Ga. 121; Macon *v.* Macon Sav. Bank, 60 Ga. 133; State Bank of Indiana *v.* Madison, 3 Ind. 43;

The extent to which and the manner in which the municipal authorities may *tax railroads* within their limits and *the property of railway companies* depend upon the provisions of the statutes applicable thereto. These are so various that they cannot be usefully referred to. Some of the leading decisions are collected in the notes.[1]

Evansville *v.* Hall, 14 Ind. 27; Connersville *v.* Bank of Indiana, 16 Ind. 105; King *v.* Madison, 17 Ind. 48; Madison *v.* Whitney, 21 Ind. 261; Gordon *v.* Baltimore, 5 Gill (Md.), 231; O'Donnell *v.* Bailey, 24 Miss. 386; Oswego Bank *v.* Oswego, 12 Wend. (N. Y.) 544; People *v.* Coleman, 135 N. Y. 231; Ætna Ins. Co. *v.* New York, 7 N. Y. App. Div. 145, aff'd 153 N. Y. 331; First Nat. Bank *v.* Binghamton, 72 N. Y. App. Div. 354; Bulow *v.* Charleston, 1 Nott & McC. (S. Car.) 527 (shares in United States Bank); State Bank of S. Car. *v.* Charleston, 3 Rich. Law (S. Car.) 342 (real property); State *v.* Charleston, 5 Rich. Law (S. Car.) 561 (dividends); Bank of Chester *v.* Chester, 10 Rich. Law (S. Car.) 104; Nashville *v.* Thomas, 5 Coldw. (Tenn.) 600; City Bank of Dallas *v.* Bogel, 51 Tex. 351.

Taxation, generally, of the franchises and property of banks and of bank shares. See 1 Desty, Taxation, § 78, pp. 367–372. *Situs* of corporate shares of stock. *Ib.* 62, 364, 365, 400. 1 Hare, Am. Const. Law, 259. In State *v.* Dowling, 50 Mo. 134, it was decided that a city had the power to tax the stock of the citizens in a national bank located therein, though the capital of the bank be invested in United States stocks, which are exempt from taxation. And it was further held, in the same case, that the action of the city assessor in assessing such stock, and of the city council sitting in appeal on such assessment, might be reviewed on *certiorari*.

[1] *Municipal taxation of railroads.* Railroad track and property held liable to municipal taxation in the towns or cities where situate. Prov. & Wor. R. R. Co. *v.* Wright, 2 R. I. 459; approved, People *v.* Com'rs of Taxes, 101 N. Y. 322; Northern Indiana R. Co. *v.* Connelly, 10 Ohio St. 159, 164. To same effect, Mohawk & H. R. R. Co. *v.* Clute, 4 Paige (N. Y.), 384; Wheeler *v.* Rochester & S. R. Co., 12 Barb. (N. Y.) 227; Sangamon & M. R. Co. *v.* Morgan County, 14 Ill. 163. And such property is subject also to *special taxes and assessments.* Northern Indiana R. Co. *v.* Connelly, 10 Ohio St. 159–164; Burlington & Mo. R. R. Co. *v.* Spearman, 12 Iowa, 112; *supra*, § 789, note. Further, as to the liability, under special statute or charter provisions, of *railroads*, their property and stock, to municipal taxation. People *v.* Barker, 165 N. Y. 305; Davenport *v.* Miss. & Mo. R. R. Co. (rolling stock and real estate), 16 Iowa, 348. The views of *Wright*, C. J., and *Dillon*, J., were subsequently adopted by the court. Of this case the court subsequently says that it should not be regarded as having the force of a precedent, since but two members of the bench concurred in the reasoning by which its conclusions were reached. *Per Beck*, J., *Day*, J., concurring. Dubuque *v.* Ill. Cent. R. R. Co., 39 Iowa, 56; Dunleith & D. Br. Co. *v.* Dubuque, 32 Iowa, 427; Bibb Co. Ord. *v.* Central R. & B. Co., 40 Ga. 646; Orange & A. R. Co. *v.* Alexandria, 17 Gratt. (Va.) 176; distinguished, Richmond *v.* Richmond & D. R. Co., 21 Gratt. (Va.) 604; Toledo & W. R. Co. *v.* Lafayette, 22 Ind. 262, as to power and mode of taxing railroads in *Indiana;* Louisville & N. A. R. Co. *v.* State (rolling stock), 25 Ind. 177; Applegate *v.* Ernst, 3 Bush (Ky.), 648; Rome R. Co. *v.* Rome, 14 Ga. 275; Augusta *v.* Georgia R. & B. Co., 26 Ga. 651; Richmond *v.* Daniel, 14 Gratt. (Va.) 385; Baltimore *v.* Baltimore & O. R. Co., 6 Gill (Md.), 288; North Mo. R. Co. *v.* Maguire, 49 Mo. 482; State *v.* Severance, 55 Mo. 378. In *California*, fences erected upon roadway of railroad company taxable as "improvements" by local authorities, not by the State Board as part of roadway. Santa Clara County *v.* Southern Pacific R. Co., 118 U. S. 394.

Rolling stock held to be taxable as personal property at the place of the principal office of the company. Philadelphia, W. & B. R. R. Co. *v.* Appeal Tax Ct., 50 Md. 397; App. Tax Ct. of Balt. *v.* No. Cent. Ry., 50 Md. 417;

§ 1394 (794). **Municipal Taxation of Agricultural Lands.** — The extent of the power of the legislature over municipal corporations generally,[1] including the power to *fix and change the corporate boundaries*,[2] has been before considered. The great weight of authority supports the view that it is not only within the power of the legislature to fix and to change the corporate boundaries of municipalities, but also to establish, subject always to the requirements and restrictions of the Constitution, the rule or principle upon which all property within the municipality shall be taxed for municipal purposes; and the fact that property so taxed is agricultural or farming lands or otherwise of such a nature that it cannot receive any advantages, benefit, or protection from the municipal government, will not exempt such property from taxation for municipal purposes, or justify the courts and the judiciary in reviewing, overruling, or

Dubuque *v.* Illinois Cent. R. R. Co., 39 Iowa, 56; Hoyle *v.* Plattsburgh & M. R. Co., 54 N. Y. 314; Randall *v.* Elwell, 52 N. Y. 522; Hill *v.* La Crosse R. Co., 11 Wis. 214; Coe *v.* Columbus, P. & I. R. Co., 10 Ohio St. 372; Boston, C. & M. R. Co. *v.* Gilmore, 37 N. H. 410; Pierce *v.* Emery, 32 N. H. 484; Minnesota *v.* St. Paul, 2 Wall. 609; Stevens *v.* Buffalo & N. Y. C. R. Co., 31 Barb. (N. Y.) 590; Beardsley *v.* Ontario Bank, 31 Barb. (N. Y.) 619; Howe *v.* Freeman, 14 Gray (Mass.), 566; Pacific R. Co. *v.* Cass County, 53 Mo. 17; Meyer *v.* Johnson, 53 Ala. 241; Williamson *v.* New Jersey So. R. Co., 29 N. J. Eq. 311; State Treas. *v.* Somerville & E. R. Co., 28 N. J. L. 21; Bement *v.* Plattsburgh & M. R. Co., 47 Barb. (N. Y.) 314; Chicago & N. W. R. Co. *v.* Fort Howard, 21 Wis. 44. See Herman on Mortgages of Real Estate, p. 84 *et seq.*, where the cases are collected. Green's Brice's Ultra Vires (2d ed.), and 1 Desty, Taxation, 399, and cases; 1 Hare, Am. Const. Law, 322.

Taxation of insurance companies. St. Louis *v.* Indep. Ins. Co. of Mass., 47 Mo. 146, 168; Tripp, Treas., *v.* Merch. Mut. F. Ins. Co., 12 R. I. 435; Dubuque *v.* Northwestern L. Ins. Co., 29 Iowa, 9; Republic L. Ins. Co. *v.* Pollak, 75 Ill. 292; Porter *v.* Rockford, R. I. & St. L. R. Co., 76 Ill. 561; 1 Desty, Taxation, 228, and cases.

Taxation of corporations. Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556; Pacific Hotel Co. *v.* Lieb, 83 Ill. 602; Danville Lumber & M. Co. *v.* Parks, 88 Ill. 463; St. Louis, V. & T. H. R. Co. *v.* Surrell, 88 Ill. 535; People *v.* Coleman, 126 N. Y. 433; People *v.* Barker, 146 N. Y. 304; People *v.* Feitner, 92 N. Y. App. Div. 518.

Choses in action, &c. In Johnson *v.* Oregon City, 2 Oreg. 327, notes and mortgages belonging to a resident inhabitant were held taxable, although deposited outside of the city. But in Johnson *v.* Lexington, 14 B. Mon. (Ky.) 648, 661, authority to a municipality to tax real and personal property was held limited to visible property actually situated within it, and *not to extend to debts and choses in action.* See in same State, Louisville *v.* Henning, 1 Bush (Ky.), 381, as to taxability of money and things in action. Power to a municipality "to levy and collect a tax upon every species of property, real and personal, within the city, subject to taxation by the laws of the State," was held in *Georgia* to give no authority to levy a tax upon *notes* belonging to a resident, and within the city, where the makers do not reside therein. Bridges *v.* Griffin, 33 Ga. 113. Compare Augusta *v.* Dunbar, 50 Ga. 387, 392, as to locality of choses in action. See People *v.* Ogdensburgh, 48 N. Y. 390. Power to tax *all personal estate* gives authority to tax *money loaned.* Jacksonville *v.* McConnel, 12 Ill. 138; *supra*, §§ 1355, note, 1388 and note, 1389. For the purposes of taxation, a debt has its *situs* at the residence of the creditor. Kirtland *v.* Hotchkiss, 100 U. S. 491.

[1] *Ante*, chap. iv. § 90 *et seq.*

[2] *Ante*, chap. x. §§ 352, 355, 358. Index — *Boundaries.*

qualifying the action of the legislative body in subjecting it to taxation.[1]

[1] Kelly *v.* Pittsburgh, 104 U. S. 78; s. c. 85 Pa. 170; Kountze *v.* Omaha, 5 Dillon C. C. R. 443; Vestal *v.* Little Rock, 54 Ark. 321, 327; Santa Rosa *v.* Coulter, 58 Cal. 537; Dixon *v.* Mayes, 72 Cal. 166; Denver *v.* Coulehan, 20 Colo. 471, 477; Linton *v.* Athens, 53 Ga. 588; Cary *v.* Pekin, 88 Ill. 454; Logansport *v.* Seybold, 59 Ind. 225; Tarlton *v.* Franklin, 62 Ind. 212; Bluffton *v.* Silver, 63 Ind. 262, 266; Taggart *v.* Claypool, 145 Ind. 590, 596; Mendenhall *v.* Burton, 42 Kan. 570; Hurla *v.* Kansas City, 46 Kan. 738; Levitt *v.* Wilson, 72 Kan. 160; Groff *v.* Frederick City, 44 Md. 67, 78; Merrill *v.* Humphrey, 24 Mich. 170; Mitchell *v.* Negaunee, 113 Mich. 359, 362; Pioneer Iron Co. *v.* Negaunee, 116 Mich. 430, 438; Lewick *v.* Glazier, 116 Mich. 493, 499; Martin *v.* Dix, 52 Miss. 53; Giboney *v.* Cape Girardeau, 58 Mo. 141; State *v.* McReynolds, 61 Mo. 203, 212; Turner *v.* Althaus, 6 Neb. 54 (overruling Bradshaw *v.* Omaha, 1 Neb. 16); Bailey *v.* Manasquan, 53 N. J. L. 162; Wood *v.* Quimby, 20 R. I. 482; Norris *v.* Waco, 57 Tex. 635; Madry *v.* Cox, 73 Tex. 538; Kimball *v.* Grantsville, 19 Utah, 368 (overruling People *v.* Daniels, 6 Utah, 288; Ellison *v.* Linford, 7 Utah, 166; and Kaysville *v.* Ellison, 18 Utah, 163); Ferguson *v.* Snohomish, 8 Wash. 668; Frace *v.* Tacoma, 16 Wash. 69; Davis *v.* Point Pleasant, 32 W. Va. 289; Bloxton *v.* McWhorter, 46 W. Va. 32, 38; Washburn *v.* Oshkosh, 60 Wis. 453; Land, Log, & Lumber Co. *v.* Brown, 73 Wis. 294; See also Paulison *v.* Taylor, 35 N. J. L. 184, 187; Combes *v.* Vanhorne, 39 N. J. L. 444; Cook *v.* Crandall, 7 Utah, 344.

Taxation of rural property in corporate limits for urban uses. See also New Orleans *v.* Michoud, 10 La. An. 763; Municipality No. 3 *v.* Ursuline Nuns, 2 La. An. 611; Same *v.* Michoud, 6 La. An. 605; Serrill *v.* Philadelphia, 38 Pa. 355. In Kelly *v.* Pittsburgh, 85 Pa. 170, the Supreme Court of *Pennsylvania* held that where farm lands situated within the boundaries of a city are taxed for the support of the city government, the fact that such tax is unfairly burdensome, or that the lands, owing to their distance from the built-up portion of the city, are not within the reach or protection of particular departments of the city government for the support of which they are taxed, does not render the tax unconstitutional. In this case, under authority af an act of the legislature of *Pennsylvania*, the city of Pittsburgh extended its boundaries by the annexation of adjacent territory. In this territory was situated a tract of land used exclusively for farm purposes, and which, on account of its distance from the built-up portion of the city, was not within the reach of the water, fire, police, and other departments of the city government. The city, however, for the support of these departments levied a tax on such farm, the amount of which was largely in excess of the farm's annual productive value. It was held that the tax was not unconstitutional. The court sustained its conclusion by the cases of Weber *v.* Reinhard, 73 Pa. 370; Philadelphia Assoc. for Dis. Firemen *v.* Wood, 39 Pa. 73, and Kirby *v.* Shaw, 19 Pa. 258, where the principle was held that a tax cannot, in the absence of special constitutional restriction, be pronounced unconstitutional upon the mere grounds of injustice and inequality. The general rule is that a tax must be considered valid unless it be for a purpose in which the community taxed has no palpable interest, and where it is apparent that the burden is imposed for the benefit of others. See also Kelly *v.* Pittsburgh, 104 U. S. 78; Sharpless *v.* Philadelphia, 21 Pa. 147; Speer *v.* Blairsville, 50 Pa. 150, *Agnew*, C. J., and *Sterrett*, J., dissenting; Hewitt's Appeal, 88 Pa. 55; Scranton *v.* Penna. Coal Co., 105 Pa. 445; noted *supra*, § 761, note; Henderson *v.* Jackson County, 2 McCrary C. C. R. 615.

In Barker *v.* State, 18 Ohio, 514, it was held (the constitutional question not being raised) that, for the improvement of streets, alleys, and sidewalks (the charter discriminating between this and a tax for "*corporation purposes*"), a municipal tax might be levied on *farming land*, not laid out into lots and recorded as such, if within the corporate limits. In Benoist *v.* St. Louis, 15 Mo. 668; St. Louis *v.* Allen, 13 Mo. 400, and St. Louis *v.* Russell, 9

In the absence of any constitutional provision qualifying or prohibiting the exercise of the legislative authority, it would seem, however, to be *within the power of the legislature* to provide that farming or unplatted lands shall not be taxed for city purposes, or to prescribe a different rate of taxation therefor.[1] But *constitutional*

Mo. 507, the only constitutional question decided was that the legislature had the power to extend the city limits and subject the property in the annexed territory to taxation against the will or without the consent of the inhabitants affected thereby. The legislature may include within the corporate limits adjoining farming lands, if no constitutional provision is thereby violated. Giboney *v.* Cape Girardeau, 58 Mo. 141, and cases cited; State *v.* McReynolds, 61 Mo. 203.

The fact that a *bridge across a navigable river* is so situated, and is of such a nature, that it can receive no benefit from municipal taxation, or protection from the municipal government, does not exempt it from municipal taxation. St. Louis Bridge Co. *v.* East St. Louis, 121 Ill. 238. *Contra*, in Iowa, see Arnd *v.* Union Pac. R. Co., 120 Fed. Rep. 912.

Agricultural lands within city limits may, under proper conditions, *be subject to special assessments* for street and other local improvements. Leitch *v.* La Grange, 138 Ill. 291; Clark *v.* Chicago, 166 Ill. 84; Leeper *v.* So. Bend, 106 Ind. 375; Taber *v.* Grafmiller, 109 Ind. 206; Dickerson *v.* Franklin, 112 Ind. 178; Barber Asphalt Pav. Co. *v.* Gaar, 115 Ky. 334; Duker *v.* Barber Asphalt Pav. Co. (Ky.), 74 S. W. Rep. 744; State *v.* Lewis Co., 72 Minn. 87; Medland *v.* Linton, 60 Neb. 249; Riddle *v.* Charlestown, 43 W. Va. 796.

[1] Lee *v.* Thomas, 49 Mo. 112; Kansas City *v.* Cook, 69 Mo. 127. The injustice of taxing rural property for such urban uses as sewers, lamps, pavements, &c., will justify a legislative classification of the two kinds of property in respect of the taxes which may be levied and assessed upon each kind. 1 Hare, Am. Const. Law, 299. In Baldwin *v.* Hastings, 83 Mich. 639, it was held that a statutory provision which exempted unplatted lands, containing ten acres or more, from taxation for fire department purposes was reasonable and valid.

A provision in a charter extending the city limits, that land in the annexed territory, *used exclusively for farming purposes*, or *vacant and unoccupied*, should be taxed not exceeding a specified rate, construed, and it was held not to be an exemption, and therefore to be strictly construed, but an equitable apportionment of burdens with reference to benefits, and the court regarded the *practical and beneficial use* to which the land was put, and not the purpose for which it was held. Gillette *v.* Hartford, 31 Conn. 351. See Carriger *v.* Morristown, 1 Lea (Tenn.), 116. The corporate boundaries of *a city were extended so as to embrace farming or agricultural lands*. The council of the city were by the legislative act making the extension required to so discriminate in laying taxes as not to impose on the rural portions those expenses which belong exclusively to the built-up portion of the city, for which purposes the assessors were required by the act to distinguish in their returns what property was agricultural or rural, not having the benefit of lighting, paving, police, water, &c. It was further provided that the lands used for farming and not having any of such urban privileges should be assessed as farm lands and taxed as such. It was held that the decision of the city councils as to what lands were farm lands within the meaning of the above provision is conclusive, if the councils keep within the scope of their jurisdiction and authority. The court, however, adds: "The whole question of discrimination is by the statute committed to the discretion of the city councils; that discretion is, of course, not absolute; it is not to be exercised according to mere pleasure or caprice, but under the law. If abused, no doubt the power of a court of equity would be adequate to restrain the perpetration of a palpable wrong." Erie *v.* Reed's Ex., 113 Pa. 468.

Construction of statutes exempting from municipal taxation farming or unplatted lands. See also Leeper *v.* South Bend, 106 Ind. 375; Dickerson

provisions are now frequently to be found to the effect that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, or prohibiting the exemption of any property other than that specifically mentioned in the Constitution, and these provisions have been held to deprive the legislature of the power to exempt agricultural or unplatted lands from taxation for city purposes.[1]

§ 1395 (794, 795). — **Same Subject; Rule in Kentucky and Iowa.** But these views, in the preceding section, although supported by the great weight of authority, have not been accepted in some jurisdictions. Where the boundaries have been originally fixed or subsequently changed so as to include within them rural or agricultural lands, which have never been platted, which are not needed for town lots, and which receive no direct benefit from the municipal government or expenditures, questions have arisen respecting the right to subject such lands to ordinary municipal taxation. The power of the legislature to fix or enlarge the corporate boundaries has not been disputed, but the power to require such lands to contribute to the municipal treasury has been controverted. The courts of Kentucky at an early date adopted the principle that the taxation of lands for local purposes which do not receive any benefit actual or presumed, from the municipal government imposing

v. Franklin, 112 Ind. 178; South Bend v. Cushing, 123 Ind. 290; People v. Weaver, 41 Hun (N. Y.), 133; Carriger v. Morristown, 1 Lea (Tenn.), 116.

[1] Smith v. Americus, 89 Ga. 810; Hayward v. People, 145 Ill. 55; Pence v. Frankfort, 101 Ky. 534; Frankfort v. Scott, 101 Ky. 615; Nicholasville v. Rarick, 102 Ky. 352; Latonia v. Hopkins, 104 Ky. 419; Hughes v. Carl, 106 Ky. 533; Shuck v. Lebanon, 107 Ky. 252; State v. O'Brien, 89 Mo. 631; Copeland v. St. Joseph, 126 Mo. 417; Westport v. McGee, 128 Mo. 152; State v. Wardell, 153 Mo. 319; Birch v. Plattsburg, 180 Mo. 413; State v. Birch, 186 Mo. 205. See also Knowlton v. Rock County, 9 Wis. 410; Slauson v. Racine, 13 Wis. 398, 404. But compare Powell v. Parkersburg, 28 W. Va. 698. But in *Maryland* it was held that a statute providing for the annexation of territory to a city, which declared that for a specified period the rate of taxation in the annexed territory should not exceed the existing tax rate in the county in which the annexed lands were situated, did not violate a constitutional provision that "Every person in the State, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government according to his actual worth in real or personal property." Daly v. Morgan, 69 Md. 460. In *Pennsylvania* a statutory provision declaring that rural lands within a city should be assessed and taxed at only two thirds of the rate prescribed for general city taxation was sustained as constitutional. The court, however, declared that its members, although unanimously sustaining the statute, were not in agreement as to any of the questions involved, except that they concurred in holding that the Constitution did not destroy the power of the legislature to classify property for purposes of taxation. Roup's Case, 81½ Pa. 211.

the taxation is a taking of private property for public use without compensation, and therefore within the constitutional provision on that subject;[1] and the principle was applied to exempt from municipal taxation agricultural lands which had not been surveyed and platted into lots, unless these lands were so situated that the court might fairly determine that they received some benefit or protection from the municipality.[2] In applying these rules the judiciary of Kentucky declared that the "courts will in such cases control and limit the taxing power to that point or line where it ceases to operate beneficially to the proprietor in a municipal point of view."

But upon the *adoption of a new Constitution in Kentucky* it was provided[3] that taxes should be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and when the question again came before the court it was held that real estate within the limits of municipal corporations is, by virtue of this constitutional provision, subject to municipal taxation without regard to any question of benefit or protection derived from the municipal government, and hence that agricultural or unplatted lands cannot escape municipal taxation because they are so situated that they derive no benefit from the municipal government,

[1] See remarks of Mr. Justice *Harlan* in Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 618.

[2] Cheaney *v.* Hooser, 9 B. Mon. (Ky.) 330; Covington *v.* Southgate, 15 B. Mon. (Ky.) 491; Sharp's Exr. *v.* Dunavan, 17 B. Mon. (Ky.) 223; Maltus *v.* Shields, 2 Met. (Ky.) 553; Arbegust *v.* Louisville, 2 Bush (Ky.), 271; Courtney *v.* Louisville, 12 Bush (Ky.). 419; Louisville Bridge Co. *v.* Louisville, 81 Ky. 189; Parkland *v.* Gaines, 88 Ky. 562; Henderson Bridge Co. *v.* Henderson, 90 Ky. 498, 502; Elkton *v.* Gill, 94 Ky. 138; Benedictine Order *v.* Central Covington, 99 Ky. 9; Covington *v.* Arthur (Ky.), 14 S. W. Rep. 121; Pineville *v.* Creech (Ky.), 26 S. W. Rep. 1101; Louisville & N. R. Co. *v.* Commonwealth (Ky.), 30 S. W. Rep. 624. See also Eifert *v.* Central Covington, 91 Ky. 194; Briggs *v.* Russellville, 99 Ky. 515; Lebanon *v.* Edmonds, 101 Ky. 216; United States *v.* Memphis, 97 U. S. 284; Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 618.

The legislature may tax suburban property within city limits, as such, to support needed local government and the enforcement of police regulations *in and about the property taxed;* but it cannot embrace such property within corporate limits merely for revenue purposes, in order to lessen the burden of others. Arbegust *v.* Louisville, 2 Bush (Ky.), 271. See United States *v.* Memphis, 97 U. S. 284.

Under the rule originally adopted in *Kentucky* it was held that a bridge, although so situated that it was not benefited by the municipal government, was taxable for school and railroad purposes, when it was situated within a district formed for these purposes. Henderson Bridge Co. *v.* Henderson, 90 Ky. 498, 502. *Bennett*, J., said: "Independent of this principle [*i. e.*, the limitation of taxation for city purposes to property benefited by the municipal government] this court has long since and often distinguished between the power of the city to tax real estate situated within its limits, for city or municipal purposes only, and for such district purposes as the legislature might authorize; that the legislature might create a city boundary, or designate any other boundary, with reference to existing civil or political districts, into taxing districts for certain local purposes."

[3] Const. Ky. 1890, § 171.

either actual or presumptive.[1] By reason of this construction of the constitutional provision referred to, the rule of decision in Kentucky now conforms to the rule which is generally adopted in other jurisdictions. In Iowa the rule laid down by the original decisions of the Kentucky courts has been followed and applied in a long line of cases.[2]

[1] Briggs *v.* Russellville, 99 Ky. 515; Pence *v.* Frankfort, 101 Ky. 534; Frankfort *v.* Scott, 101 Ky. 615; Nicholasville *v.* Rarick, 102 Ky. 352; Latonia *v.* Hopkins, 104 Ky. 419; Hughes *v.* Carl, 106 Ky. 533; Shuck *v.* Lebanon, 107 Ky. 252; Richmond *v.* Gibson (Ky.), 46 S. W. Rep. 702; Ryan *v.* Central City (Ky.), 54 S. W. Rep. 2; Central Covington *v.* Park (Ky.), 56 S. W. Rep. 650; Louisville Bridge Co. *v.* Louisville (Ky.), 58 S. W. Rep. 598.

[2] Morford *v.* Unger, 8 Iowa, 82; Butler *v.* Muscatine, 11 Iowa, 433; Burlington & M. R. R. Co. *v.* Spearman, 12 Iowa, 112; Langworthy *v.* Dubuque, 13 Iowa, 86; Langworthy *v.* Dubuque, 16 Iowa, 271; Fulton *v.* Davenport, 17 Iowa, 404; Buell *v.* Ball, 20 Iowa, 282; Davis *v.* Dubuque, 20 Iowa, 458; O'Hare *v.* Dubuque, 22 Iowa, 144; Deeds *v.* Sanborn, 26 Iowa, 419; s. c. 22 Iowa, 214; Deiman *v.* Ft. Madison, 30 Iowa, 541; Durant *v.* Kauffman, 34 Iowa, 194; Grant *v.* Davenport, 36 Iowa, 396, 405; Brooks *v.* Polk County, 52 Iowa, 460; Winzer *v.* Burlington, 68 Iowa, 279; Tubbesing *v.* Burlington, 68 Iowa, 691; Perkins *v.* Burlington, 77 Iowa, 553; Taylor *v.* Waverly, 94 Iowa, 661.

The case of Durant *v.* Kauffman, 34 Iowa, 194, declares an adherence to the rule established by the previous cases, but evinces no disposition to extend the exemption from municipal taxation. *Beck*, C. J., in the course of his opinion, remarks: "The mere fact that lands are included within the limits of a municipal corporation does not authorize their taxation for general city purposes. Under certain conditions, they are exempt therefrom. These conditions are such that the property proposed to be taxed derives no benefits from being within the city limits. This is the rule recognized by the various decisions of this court upon this subject. To enable us correctly to apply the rule above stated, we must consider and determine the character of the benefits which will render lands within a city liable to general municipal taxation. These are not such as attach to all lands near a city or large town whereby they are rendered more valuable, but are such as accrue to the lands considered as city property. Lands lying contiguous to or near a city, though incapable of any use except for agricultural purposes, are nevertheless of greater value on account of their location than those more remotely situated. Convenience to a market, &c., adds to their value. Therefore, lands within a city kept and alone used for agriculture, and not capable of being used as city property, and not demanded for that purpose, nor possessing a value based upon adaptation for the purpose of dwellings or business, cannot be considered directly benefited by the fact of their being within the city limits. Such lands cannot be taxed for general municipal purposes. In determining the benefits accruing to such lands, a controlling fact to be considered is the purpose for which they are held. If held as city property, to be brought upon the market as such whenever they reach a value corresponding with the views of the owner, they ought to be taxed as city property. There would neither be reason nor justice in permitting a proprietor of a large tract of land within a city to hold it for an opportunity to bring it into the market as city lots, and for no other purposes, under the pretence that it is agricultural lands, thus escaping taxation for the general improvement of the city, — the very thing which will bring his lands into market, and thus add greatly to their value, — a direct benefit to the owner. In such a case, the general improvement of the city, the building of streets near or in the direction of the lands so held, the construction of water-works, public buildings, &c., by which the prosperity of the city is advanced, and an invitation to population is held out, all bestow direct benefits upon the owner of such property. The lands

The rule that it is within the legislative power, in the absence of special constitutional restriction, to subject all lands within a city to taxation for municipal purposes without regard to their use and without regard to benefits thereto from the municipal government, seems to the author to be founded upon sound constitutional principles. The question whether lands should be taxed for municipal purposes is one which should be determined by the legislature in its enactments, and is not one which can properly be decided by the courts. It must be admitted that, in the absence of specific constitutional restrictions, the difficulties in the way of pronouncing legis-

being a part of the city, in fact, and held by their owner for the increase in value which he expects because they are city lots, are benefited by the municipal government, and share in the benefits derived by the expenditure of revenue raised by taxation. If property be so held within a city, whether it be subdivided into lots, and streets thereon are dedicated to public use, or be inclosed and cultivated as agricultural lands, it ought to be subject to general municipal taxation. This result is directly deducible from the rule established by the decisions of this court." In Buell *v.* Ball, 20 Iowa, 282, *supra*, *Cole*, J., in delivering the opinion, says: "The ground upon which courts interfere in such cases is, that private property shall not be taken for public use without just compensation. It is the fact of taking without compensation, and not the time or manner, which constitutes the infraction of the constitutional inhibition. The fact may be as effectually accomplished by an original incorporation as by an amendment, and the constitutional guaranty would be of little avail if it could be avoided by mere form." The *Kentucky* cases decided prior to the new Constitution rest upon the same ground. But the exemption even in *Iowa* is limited to *municipal taxes, i. e.*, taxes required for purposes strictly municipal, and from which the property receives no benefit. A tax voted for the purpose of aiding the construction of a railroad is not a municipal tax, and agricultural lands in a city are liable therefor. Sears *v.* Iowa Midland R. Co., 39 Iowa, 417. Statute exempting unplatted property used for agricultural or horticultural purposes from taxation for city purposes *held constitutional*. See Leicht *v.* Burlington, 73 Iowa, 29. As to the construction of the statute, see Winzer *v.* Burlington, 68 Iowa, 279; Tubbesing *v.* Burlington, 68 Iowa, 691; Perkins *v.* Burlington, 77 Iowa, 553. The exemption declared by the statute is only from "taxation," and does not relieve from liability to "special assessment." Farwell *v.* Des Moines Brick Mfg. Co., 97 Iowa, 286; Allen *v.* Davenport, 107 Iowa, 90, 103.

In *Iowa*, in order to exempt unplatted land from taxation by a city it must appear that it is used *exclusively* for agricultural purposes. Tubbesing *v.* Burlington, 68 Iowa. 691. Although lands have always been used for agricultural purposes, if they are in fact bought for speculative purposes with the intention to lay them off into lots in the near future, they are not exempt from taxation under the Iowa statute, although their use for agricultural purposes is continued until they are required. Farwell *v.* Des Moines Brick Mfg. Co., 97 Iowa, 286; Allen *v.* Davenport, 107 Iowa, 90, 102. The statute does not exempt from taxation a plot containing sixteen acres upon which is erected a valuable building used as a home fronting on a prominent city street, and near other fine residences. Windsor *v.* Polk County, 109 Iowa, 156.

The eastern half of *a railroad bridge across the Missouri River* at Council Bluffs was held not to be taxable by that city, although within the corporate limits thereof, under the established rule of decision in *Iowa* that the taxation of property for municipal purposes which receives no benefit of protection directly or indirectly from a municipal government is a taking of property for public use without just taxation in violation of the Constitution. Arnd *v.* Union Pac. R. Co., 129 Fed. Rep. 912.

lation subjecting agricultural or unplatted lands to taxation for municipal purposes unconstitutional, or of affording judicial relief in such cases, are almost insurmountable.[1]

§ 1396 (773). **Municipal Property not Taxable.** — The general statutes of the State upon the subject of taxing property undoubtedly *refer to private property*, and not to that owned by the State; and, in view of the public nature of municipalities, and the purposes for which they are established, heretofore explained,[2] the author is of opinion that such enactments do not, by *implication*, extend to any property owned by them, — certainly to none owned by them for public uses.[3] On this principle the city of Brooklyn cannot impose a tax upon land in that city owned and used by the city of New York and by its lessee *as a ferry landing* in connection with the ferry franchise granted, by its charters, to the last named city.[4] On the same ground it was held that a sale of lands, the

[1] Santa Rosa *v.* Coulter, 58 Cal. 537, approving text.

[2] *Ante*, chap. i. § 15 *et seq.*; chap. ii. § 30 *et seq.*; chap. iv. § 92 *et seq.* A municipal corporation cannot levy a tax on the bonds issued by the State even though they be property within the corporate limits. It is not to be presumed that the State intended, without an express grant to that effect, to confer upon a municipal corporation a power thus to depreciate the State securities, and do what the State itself ought not to be presumed to have done, in the absence of clear language so declaring. Augusta *v.* Dunbar, 50 Ga. 387; *infra*, § 1398 and note.

[3] *Ante*, chap. xxi. as to Corporate Property, §§ 991, 992; Camden *v.* Camden, 77 Me. 530, 534, quoting text; Galveston Wharf Co. *v.* Galveston, 63 Tex. 14; State *v.* Gaffney, 34 N. J. L. 131, 133, holding that land in good faith acquired by *the city for waterworks* is not taxable though not actually in use for such purpose.

[4] People *v.* Brooklyn Board of Assors (citing text), 111 N. Y. 505. The substance of the reasoning of *Andrews*, J., who delivered the opinion of the court, is that the ferry franchise was granted to New York by its charters for public purposes. Its acceptance imposed upon the city a corresponding duty, which could not be performed without a landing-place on the Brooklyn side; and that the franchise to maintain the ferry, conjoined with the ownership of the landing, constitute together a ferry property belonging to the city devoted to public uses, and in the absence of special provision to the contrary is exempt from taxation. The fact that the city of New York operated the ferry through lessees, deriving its revenues from the rental, did not change the status of the property. Whether there is any distinction in principle between the taxation of property of a municipality strictly devoted to public uses, and property which it owns, though not acquired for a public use, although it may be held on the general trust applicable to all property of the corporation, but the acquisition or holding of which has no essential connection with the public functions of the municipality, the court preferred to express no opinion. The court also observes that the tax was sought to be imposed on *the land as the property of the city*, and not on the lessees in respect of their interest.

So a *public wharf* owned by a municipal corporation, or the rights of a municipal corporation in a public wharf, cannot, in the absence of a statute authorizing it, be taxed, being property owned by the municipality for public purposes, and therefore not subject to the general laws applicable to taxation. Galveston Wharf Co. *v.* Galveston, 63 Tex. 14.

property of a city corporation, and constituting part of the *city cemetery*, for taxes, was void.[1] The sound principle is that property owned by the United States, by a State, or by a municipality for public uses, is not subject to be taxed unless so provided by positive legislation.[2] But the immunity of the property of the State

[1] People *v.* Doe, 36 Cal. 220; Doyle *v.* Austin, 47 Cal. 353; Tyler *v.* People, 66 Ill. 322; *ante*, § 739, note. The land of a county used for a *court-house* and other county purposes cannot be taxed by the city in which it is situated, nor is it liable, it was held, to a sewer assessment. Worcester County *v.* Worcester, 116 Mass. 193.

[2] Board of Improvement *v.* School District, 56 Ark. 354, 360, citing text; Ahern *v.* Texarkana Impt. Dist., 69 Ark. 68, 73; Hall *v.* Marysville, 19 Cal. 391; People *v.* Shearer, 30 Cal. 645; People *v.* Doe, 36 Cal. 220; Low *v.* Lewis, 46 Cal. 549; West Hartford *v.* Hartford Water Com'rs, 44 Conn. 360; State *v.* Kilburn, 81 Conn. 9; Atlanta *v.* First Presbyterian Church, 86 Ga. 730, 736; People *v.* Salomon, 51 Ill. 37; Fort Dodge *v.* Moore, 37 Iowa, 388; Baltimore County *v.* Maryland Hospital for Insane, 62 Md. 127, 129, quoting text; Boston *v.* Boston & A. R. Co., 170 Mass. 95, 99; Somerville *v.* Waltham 170 Mass. 160; Miller *v.* Fitchburg, 180 Mass. 32, 37; Lancy *v.* Boston, 186 Mass. 128; Milford Water Co. *v.* Hopkinton, 192 Mass. 491, 495; Big Rapids *v.* Mecosta County, 99 Mich. 351, 352, quoting text; State *v.* Gaffney, 34 N. J. L. 131; Green *v.* Hotaling, 44 N. J. L. 347, aff'd 46 N. J. L. 207; Newark *v.* Clinton, 49 N. J. L. 370; Camden County *v.* Washington Township, 60 N. J. L. 367, 369; Trustees of Public Schools *v.* Trenton, 30 N. J. Eq. 667; Rochester *v.* Rush, 80 N. Y. 302; People *v.* Brooklyn Board of Assessors, 111 N. Y. 505, 511, citing text; Matter of Hamilton, 148 N. Y. 310; People *v.* Buffalo, 63 N. Y. App. Div. 563, 566; Piper *v.* Singer, 4 Serg. & R. (Pa.) 354; Erie County *v.* Erie, 113 Pa. 360; Nashville *v.* Smith, 86 Tenn. 213; Smith *v.* Nashville, 88 Tenn. 464; Springville *v.* Johnson, 10 Utah, 351.

Local law determines the construction of statutory power to tax property or to levy a special assessment as applicable or inapplicable to municipal property, and *the Federal courts are bound* by the decisions of the State courts on that subject. New Orleans *v.* Warner, 175 U. S. 120, 140. A municipality is a public instrumentality created by the State; its charter is not a contract; and if the legislature chooses to subject to taxation property held by the municipality for public purposes, such legislation does not violate any provision of the Federal Constitution. Covington *v.* Kentucky, 173 U. S. 231.

Lands purchased by a city *within the limits of another city* to obtain gravel for constructing and repairing the streets and used for that purpose are held for a public use, and are not subject to taxation in the absence of positive statutory provision. Somerville *v.* Waltham, 170 Mass. 160. If title to property is vested in the municipality by proceedings under the law of eminent domain before a tax against it becomes a lien, a tax assessed against the owner or the property prior thereto cannot be collected. So held where the tax was assessed as of January; the title to the property vested in the city in July, the assessment roll was confirmed in August, and by statute the tax became a lien in October. Buckhout *v.* New York City, 176 N. Y. 363, 369.

In *New York*, it is held that a *private corporation* organized pursuant to statute, which has contracted to *furnish a town or village with water facilities* for an agreed compensation, is not a governmental agency, and its property is subject to taxation under a general statutory provision. People *v.* Forrest, 97 N. Y. 97. But in *Massachusetts* a different view appears to be adopted and such property is not subject to taxation in the absence of positive legislation. Milford Water Co. *v.* Hopkinton, 192 Mass. 491. This is also the rule as to *railroad property* in *Massachusetts*. Worcester *v.* Western R. Co., 4 Metc. (Mass.) 564; Boston *v.* Boston & A. R. Co., 170 Mass. 95. A *city corporation* cannot tax a bank wholly owned by the *State*, though there be no express provision exempting the property of the bank from tax-

and of its political subdivisions from taxation does not result from any want of power in the legislature to subject such property to taxation. The State may, if it sees fit, subject its property and the property owned by its municipal divisions to taxation in common with other property within its territory.[1] Hence, the general rule is sometimes modified and the property of municipal corporations held for public purposes, particularly when situated beyond the municipal limits, is subjected by express provision to general taxation by the municipality or taxing authorities having jurisdiction of the *locus* where the property is.[2] It is also to be observed that, when property is held by a municipal corporation *for purely private purposes*, and is not devoted to or used or intended to be used, for public purposes, it has been held that it is not excepted from the operation of the general statutory provisions providing for the tax-

ation. Nashville *v.* Bank of Tenn., 1 Swan (Tenn.), 269.

Express statutory exemptions of municipal property are frequently found. Thus, in Augusta *v.* Augusta Water District, 101 Me. 148, it was held that *a water district created by statute* to supply the inhabitants of a city with water, is a public municipal corporation within the meaning of a statute which exempts "the property of any public municipal corporation of this State appropriated to public uses," and that the water plant of the district is thereby relieved from taxation by the city in which it is situated.

In *New Jersey*, a statute exempted "the property of counties, townships, cities, and boroughs of this State." It was held that this provision exempted the property of counties and cities, although situated beyond the county or city limits. Camden County *v.* Washington Township, 60 N. J. L. 367; Perth Amboy *v.* Barker, 74 N. J. L. 127 (city water works). *Real estate* held by municipalities is also exempt under this express provision, although *not used for public purposes*. Camden County *v.* Washington Township, 60 N. J. L. 367; Newark *v.* Belleville, 61 N. J. L. 455; Hackettstown *v.* Mt. Olive, 63 N. J. L. 191.

A statute of *Massachusetts* exempted from taxation "the property of the Commonwealth, except real estate of which the Commonwealth is in possession under a mortgage for condition broken." It was held that land belonging to the Commonwealth, for which the Commonwealth had given bond for a deed, and which was in the possession of the obligee, who would become entitled to a deed upon payment of the purchase money, and who had erected buildings on the land and did business there, was not subject to taxation. Corcoran *v.* Boston, 185 Mass. 325. A *New Jersey* statute which declared that "all lands the property of any county and all lands the property of any taxing district which are situated within the limits of any other taxing district," should be subject to taxation held to be unconstitutional as *special legislation*. Essex County Park Com'n *v.* West Orange, 77 N. J. L. 575; 73 Atl. Rep. 511, rev'g 75 N. J. L. 376.

Under the provision of the *New York* tax law exempting from taxation property of municipalities "held for a public use," a bequest to a municipality to construct a *library building* is exempt from collateral inheritance or transfer tax, — that tax being only imposed on bequests to corporations not "exempted by law from taxation." Matter of Thrall, 157 N. Y. 46, modifying 30 N. Y. App. Div. 271.

[1] Trustees of Public Schools *v.* Trenton, 30 N. J. Eq. 667; Matter of Hamilton, 148 N. Y. 310; People *v.* Buffalo, 63 N. Y. App. Div. 563, 567.

[2] People *v.* Hess, 157 N. Y. 42; Rochester *v.* Coe, 25 N. Y. App. Div. 300; People *v.* Duryea, 59 N. Y. App. Div. 488; People *v.* De Witt, 59 N. Y. App. Div. 493.

ation of property, and is subject to be taxed in the same manner as the property of individuals.[1]

§ 1397 (774). **Same Subject. Kentucky Decisions.** — The view just expressed did not, however, receive at first, in its full extent, the sanction of the Court of Appeals in Kentucky. Under the statute laws of that State, there was *no express exemption of municipal property from taxation*, and the State, for State revenue, assessed against the city of Louisville a large amount of property, including the city hall, market-houses, fire-engines, wharves, &c., and the case presented the question whether the property was or was not exempt, by implication, from taxation by the State. And the judgment of the court was, that whatever property was used and held by the city for carrying on its municipal government, or was necessary or useful for that purpose, was not taxable by the State, and this would include public buildings, prisons, and property dedicated to charity; but that whatever is not so used, but is owned by the city in its "social or commercial capacity," and for its own *profit*, such as vacant lots, market-houses, fire-engines, and the like, is subject to taxation.[2] But the views so expressed by the Court of

[1] Ft. Smith School Dist. *v.* Howe, 62 Ark. 481; Bonner *v.* St. Francis Levee Dist., 77 Ark. 519, 522; Essex County *v.* Salem, 153 Mass. 141; Newark *v.* Clinton, 49 N. J. L. 370; Clark *v.* Sprague, 113 N. Y. App. Div. 645. Lands purchased by a county to enlarge a jail and jail grounds, but let for private purposes and a source of income to the county, are taxable under a general statute by the city within which the lands are situated. Essex County *v.* Salem, 153 Mass. 141. In *Pennsylvania*, it is held that property yielding a revenue is liable to taxation — under the *statute* of that State — although owned by a municipality and used for public purposes. Erie County *v.* Erie Water Com'rs, 113 Pa. 368; Sewickley *v.* Sholes, 118 Pa. 165. To warrant such a result the legislative intention ought, we think, to be plain and unmistakable.

In Springville *v.* Johnson, 10 Utah, 351, a tract of land containing 900 acres, within the city limits, was owned by the city and was rented as pasturage for cattle and yielded a revenue. It was assessed for county and territorial taxes, although by statute it was provided that "all property situate in this Territory is taxable, except . . . property owned by this Territory, or any county, city, or school district." The court held that it was exempt from taxation and that the levy of taxes and the sale therefor were void. The exemption was sustained on the general principle that the land was not subject to taxation in the absence of a positive legislative enactment as well as under the express statutory exemption.

Under the Code of *Iowa*, exempting from taxation the property of incorporated towns "devoted *entirely* to public use and not held for pecuniary profit," lots devised in trust for the use and benefit of a town for the improvement of a public park were held to be for pecuniary profit, and subject to taxation; but *quære?* Mitchellville *v.* Polk County, 64 Iowa, 554.

[2] Louisville *v.* Commonwealth, 1 Duvall (Ky.), 295. The author, with deference to the learned court, ventures to observe that, in his judgment, the exemption should have been extended to all the property. Municipal corporations are not usually allowed to hold or deal in property directly for

Appeals of Kentucky have since been modified. By the Constitution of that State, it is provided that "public property used for public purposes" shall be exempt from taxation.[1] In considering the application and effect of this constitutional provision the court at first held that the words "for public purposes" had the same meaning as the phrase "for governmental purposes," and that therefore the Constitution did not exempt from taxation for State and county purposes, the water works of a municipality used to supply the municipality and its inhabitants with water, these works not being property used for governmental purposes.[2] In other and later cases the court reconsidered the reasoning in its earlier decisions, and held that fire department property of a city, including engine houses, grounds for the same, fire engines, hose reels, hook and ladder wagons, hose and necessary horses,[3] and also the public parks,[4] of a city are "public property used for public purposes" within the meaning of the constitutional exemption and consequently not subject to taxation by the State or county. Further consideration of the question by the court resulted in a complete reversal of its original decision, and it is now properly held that the

profit; and this is not the purpose for which authority is given to erect market-houses or wharves, or to purchase and own fire-engines. Of course the State might provide for the taxation of property owned by its municipalities, but its revenue laws should not be construed to extend to such property unless the legislative intention to that effect be manifest. See People *v.* McCreery, 34 Cal. 432; Doyle *v.* Austin, 47 Cal. 353; Nashville *v.* Bank of Tenn., 1 Swan (Tenn.), 269. *School property* held in trust by a school board *for the use of the State*, being State property, does not require an exception in the law to exempt it from assessment for street improvements. Louisville *v.* Leatherman, 99 Ky. 213. A similar ruling was made as to a *school of reform* created under special statute, and used as one of the agencies of the State. Louisville *v.* McNaughten (Ky.), 44 S. W. Rep. 380.

[1] Ky. Const. 1890, § 170. This *constitutional provision* does not operate to exempt property used for public purposes from liability to special assessments, and the legislature may provide that property of the State, or property held in trust for the public use of the State, may be specially assessed by a city for the expense of a public improvement. Hager *v.* Gast, 119 Ky. 502. See also Louisville *v.* McNaughten (Ky.), 44 S. W. Rep. 380.

[2] Commonwealth *v.* Makibben, 90 Ky. 384; Clark *v.* Louisville Water Co., 90 Ky. 515; Newport *v.* Commonwealth, 106 Ky. 434; Covington *v.* Commonwealth, 107 Ky. 680, aff'd 173 U. S. 231. See also Negley *v.* Henderson (Ky.), 59 S. W. Rep. 19. In so holding the court also held that the franchise or privilege of a city for water purposes is taxable for State and county purposes in the same manner as similar franchises or privileges of individuals under State laws imposing a tax thereon. Newport *v.* Commonwealth, 106 Ky. 434.

[3] Owensboro *v.* Commonwealth, 105 Ky. 344, modifying Louisville *v.* Commonwealth, 1 Duvall (Ky.), 295. The court cited the text of previous editions of this treatise and recognized the justice of the author's criticism of its earlier decision.

[4] Owensboro *v.* Commonwealth, 105 Ky. 344; Louisville Park Com'rs *v.* Prinz, 127 Ky. 460, 466.

words "for public purposes" in the constitutional exemption from taxation have the meaning which they are to receive in construing the provision of the Constitution which declares that taxes shall be levied and collected "for public purposes,"[1] that property acquired with the taxes thus levied and collected should be regarded as acquired and used for public purposes, and hence that municipal water and light plants are "public property used for public purposes," and exempt from taxation under the Constitution.[2]

§ 1398 (775). **Governmental Instrumentalities not Taxable.**— It is settled by the Supreme Court of the United States that the *general government has no authority to tax the means and instrumentalities employed by a State* in conducting its governmental operations, and discharging its public duties.[3] In so far as *municipalities* are agencies of the State, the principle referred to extends to them, and so it has been decided by that court, where the point involved was the right of Congress to tax the income or property of a municipal corporation.[4] The question arose in this way: The city of Baltimore, under legislative authority, issued its bonds for a large amount, and made a loan of the proceeds to the railroad company defendant, taking a mortgage upon the road and franchises to secure the loan. The interest thus secured the United States sought to tax under the Internal Revenue Act.[5] The court held that the tax could not be collected; that the nature of munici-

[1] Const. Ky. 1890, § 171.

[2] Frankfort *v.* Commonwealth (Ky.), 94 S. W. Rep. 648 (bonds of electric light company received by city as price of municipal plant sold); Commonwealth *v.* Paducah, 126 Ky. 77 (fire apparatus, electric light plant, &c.).

[3] Collector *v.* Day, 11 Wall. (U. S.) 113; *ante*, § 1355.

[4] United States *v.* Baltimore & O. R. Co., 17 Wall. (U. S.) 322. The income tax portion of the Federal revenue Act of 1894, contained the provision "that nothing herein contained shall apply to States, counties, or municipalities." In Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 586 (Income Tax case), it was contended that although the property or revenues of the States or their instrumentalities could not be taxed under said Act, nevertheless the income derived by others from State, county, and municipal securities could be taxed. The court held that there was no distinction in this respect, saying: "It is obvious that taxation on the interest [from municipal securities] would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money and consequently repugnant to the Constitution." By statute of *Illinois* all applicants to whom licenses to sell liquor in the city of Chicago were granted were required to give bond. Two such bonds were given as required by the State statute, but the applicant failed to affix thereto United States revenue stamps. It was held that, as instrumentalities of government, these bonds were not taxable under the Federal war revenue Acts. Ambrosini *v.* United States, 187 U. S. 1.

[5] Sec. 122 of the Act of 1862 as amended in 1864.

pal corporations was such, and such was their relation to the State in the business of municipal rule, that they partook of the State's exemption from the power of the general government to tax its agencies and instrumentalities; and that, as respects the transaction out of which the case before the court arose, the city was acting within the scope of its public or municipal duties as an arm of the State, which might, if it had so chosen, have compelled the city, against its assent or that of its citizens, to have laid a tax, and made an appropriation of the proceeds to the railroad company.[1] But freedom from taxation by the Federal government is limited to those agencies and instrumentalities of the State which are of a strictly governmental character; if the State engages in business of a private nature that business is not withdrawn from the taxing power of the nation.[2]

§ 1399. **Taxation of State and Municipal Bonds.** — The bonds of States and of municipal corporations are very frequently declared by the statutes authorizing their issue, to be *exempt from*

[1] United States *v.* Baltimore & O. R. Co., 17 Wall. (U. S.) 322. The following is an extract from the opinion of the court: "We admit the proposition of the counsel that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus, if an individual should make the city of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of private trustee. It would occupy a place which an individual could occupy with equal propriety. It would not, in that action, be an auxiliary or servant of the State, but of the individual creating the trust. There is nothing of a governmental character in such a position. It is not necessary, however, to speculate upon hypothetical cases. We are clear in the opinion that the present transaction is within the range of the municipal duties of the city, and that the tax cannot be collected."

But as to property held by a city for public objects, or upon charitable trusts of a public nature, there would seem, in the author's judgment, to be no ground for asserting a distinction and holding such property liable to taxation. *Ante*, § 982 *et seq.* Of course, if a corporation is acting purely as a "private trustee," an exemption from taxation could not be claimed. *Ante*, § 336. Index — *Trustees and Trust Property.*

Inasmuch as *Territories* organized under act of Congress, usually called the "Organic Act," are instrumentalities of the United States for the government of the inhabitants of the territory, bonds of such territory issued by it or by its public or municipal corporations under the authority conferred by the Organic Act would seem to the author upon the authority of Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 583, 586, and Grether *v.* Wright, 75 Fed. Rep. 742, to stand, as respects exemption from taxation by the States, upon the same footing as bonds issued by the United States, and not therefore taxable by the States without the assent of Congress. But the point yet remains to be settled by adjudication.

[2] South Carolina *v.* United States, 199 U. S. 437, aff'g 39 Ct. of Claims Rep. 257. In this case it was held that *State dispensaries* were subject to the payment of the internal revenue tax on the sale of liquor.

taxation. But independently of such an express declaration of emption, they are not necessarily or inherently exempt therefro It has been said that a State may tax any of its creditors *within jurisdiction* for the debt due to him by it, and may regulate amount of the tax by the rate of interest the debt bears, if its prc ise be left unchanged. A tax thus laid impairs no obligation sumed. It leaves the contract untouched.[2] Within this princi

[1] When there is no constitutional prohibition, a statutory provision in force at the time of the issuance of bonds that they shall be exempt from taxation, *constitutes a contract* with the holder of the bonds which cannot be impaired by subsequent legislation. Newark City Bank *v.* Assessor, 30 N. J. Law, 13; Merchants' Ins. Co. *v.* Newark, 54 N. J. Law, 138, 141. In *New Jersey* it has been held that statutory provisions conferring authority on municipal corporations to exempt from taxation bonds issued by them were abrogated by the constitutional amendments of 1875. Merchants' Ins. Co. *v.* Newark, 54 N. J. Law, 138, 141; Jersey City *v.* North Jersey St. R. Co. (N. J. Law), 73 Atl. Rep. 609. A statute authorizing the issue of county bonds, held to be not unconstitutional because it contained a provision declaring the bonds exempt from taxation. Lumberton Imp. Co. *v.* Robeson County, 146 N. Car. 353. The court declared that whether the bonds could be exempt from taxation could only be determined when some portion of them was found in the possession and ownership of a citizen of the State, who refused to list and pay taxes on them.

A statutory exemption from taxation of State or municipal bonds *only operates within the limits of the State* by which the law is enacted. A State may tax the stocks, bonds, or certificates of public debt issued by other States or by municipalities in other States, although they are exempt from taxation by the law of the States issuing them, provided they are owned by citizens or residents of the State exercising the power of taxation. Bonaparte *v.* Tax Court, 104 U. S. 592; Appeal Tax Court *v.* Patterson, 50 Md. 354, aff'd 104 U. S. 592; Appeal Tax Court *v.* Gill, 50 Md. 377; Bonaparte *v.* Baltimore, 63 Md. 465; Webb *v.* Burlington, 28 Vt. 188. State Tax on Foreign Held Bonds, 15 Wall. 3 asserting that the power of taxat of a State is limited to persons, pr erty, or business within her juris tion and that all taxation must rel to one of these subjects. The Sta power of taxation is limited to pers business, or property within its ju diction, and to tax property out of the State and not within its ju diction is to take property with due process of law. Delaware R road Tax, *Re*, 18 Wall. (U. S.) 2 Louisville & J. Ferry Co. *v.* Kentuc 188 U. S. 385; Delaware, L. & W. R. Co. *v.* Pennsylvania, 198 U. S. 3 Union Refrigerator Transit Co. Kentucky, 199 U. S. 194; People Equitable Trust Co., 96 N. Y. 387, 3

[2] *Per* Mr. Justice *Strong* in Mur *v.* Charleston, 96 U. S. 432, 445. I in Murray *v.* Charleston, *supra*, it held by the court that an ordina of a city directing that the tax lev be deducted from the interest paya on the city bonds, was unconsti tional as impairing the obligation the contract. See also Hartman Greenhow, 102 U. S. 672, 683; A toni *v.* Greenhow, 107 U. S. 769, 7 But under a statute of Pennsylvan the city treasurer is required to *ded and retain the State tax on mun pal bonds* held by a *resident* of State. This statute was sustained *Pennsylvania* as constitutional. Co monwealth *v.* Martin, 107 Pa. 1 Wilkes-Barre Dep. & Sav. Bank Wilkes-Barre, 148 Pa. 601. In Mur *v.* Charleston, *supra*, the court express doubt whether a statute authorizi the taxation of "property" was tended to empower a city to tax its own benefit the debts (in that c in the form of bonds) it might owe its creditors. But the State court h sustained the power to tax the bo thereunder, and the Supreme Court the United States had no authority review its decision on that point.

State bonds held by residents of the State by which they are issued may be taxed by the State, or by its authority, if there be no contract with the holder exempting them from taxation.[1] Similarly, if there is no such contract, the *bonds of a city or other municipal corporation* are subject to taxation by the State or by other municipal corporations pursuant to statutory authority,[2] or by the city by which they are issued.[3] But the power of a State, or of a municipal corporation acting under statutory authority, to tax the bonds issued by the State or a city *depends upon the residence* of the holder of the bonds being within the jurisdiction of the taxing authority. If the holder of the bonds be not a resident within the jurisdiction of the taxing power, the bonds are not subject to taxation by it,[4] unless possibly in cases where the bonds have an actual *situs* within such State and are protected by its laws. But it has been held that express statutory authority is essential to the validity of a tax imposed by a city of the State upon *State* bonds [5] or upon *its own bonds* in the hands of a resident.[6]

[1] People *v.* Home Ins. Co., 29 Cal. 533; Hall *v.* Middlesex County, 10 Allen (Mass.), 100; People *v.* Com'rs of Taxes, 76 N. Y. 64, 77; Champaign County Bank *v.* Smith, 7 Ohio St. 42; Commonwealth *v.* Maury, 82 Va. 883; Commonwealth *v.* Larkin, 84 Va. 517; Cuthbut *v.* Commonwealth, 85 Va. 899.

[2] Western Assur. Co. *v.* Halliday, 126 Fed. Rep. 257; State *v.* Board of Assessors, 111 La. 982, 1004; Hall *v.* Middlesex County, 10 Allen (Mass.), 100; People *v.* Com'rs of Taxes, 76 N. Y. 64, 76; Commonwealth *v.* Martin, 107 Pa. 185; Commonwealth *v.* Chester, 123 Pa. 626; Wilkes-Barre Dep. & Sav. Bank *v.* Wilkes-Barre, 148 Pa. 601.

[3] Bank of Russellville *v.* Russellville (Ky.), 118 S. W. Rep. 921.

[4] Murray *v.* Charleston, 96 U. S. 432; DeVignier *v.* New Orleans, 16 Fed. Rep. 11; Baltimore *v.* Hussey, 67 Md. 112; State Tax on Foreign Held Bonds, *Re*, 15 Wall. (U. S.) 300.

In *Missouri* it has been held that if municipal bonds are sent to another State, and kept there for safe keeping, and not for the purpose of avoiding taxation, they cannot be taxed in Missouri although owned by a resident of the State. State *v.* Howard County Court, 69 Mo. 454; Valle *v.* Ziegler, 84 Mo. 214, 218. But *quære?*

[5] Augusta *v.* Dunbar, 50 Ga. 387; Miller *v.* Wilson, 60 Ga. 505; Penick *v.* Foster, 129 Ga. 217.

[6] Macon *v.* Jones, 67 Ga. 489; Penick *v.* Foster, 129 Ga. 217, 223. Statutory authority to tax "all property, real and personal, within the corporate limits of the city," was construed as *not* sufficient to authorize the taxation of the bonds of the city seeking to enforce the tax. Macon *v.* Jones, 67 Ga. 489; Penick *v.* Foster, 129 Ga. 217. Bonds issued under special legislative authority by a State or city to aid in the construction of railroads, are included in the term "public stocks" in a taxing statute, and are taxable as such. Hall *v.* Middlesex County, 10 Allen (Mass.), 100.

In People *v.* Home Ins. Co., 29 Cal. 533, State *bonds owned by a foreign insurance company*, which had been deposited with a bank pursuant to a statute regulating foreign insurance companies doing business in the State, were held to be property within the State within the meaning of a tax law, and subject to taxation. See also Western Assur. Co. *v.* Halliday, 126 Fed. Rep. 257. Bonds owned by a foreign insurance company, which are deposited with the insurance commissioner of a State, pursuant to statutes regulating the right of the company to do business in the State, were held to be a part of the capital stock of the company invested in the

In construing constitutional provisions, either expressly or by implication, requiring the taxation of all "property" within the territorial limits of the taxing authority, it has been declared that these provisions are not to be given a meaning which will require the taxing of public property or of any of the lawful instrumentalities of government, and it has been held that municipal bonds, issued as evidences of a loan made to a city are instrumentalities of the government which creates the municipal corporation, and that these constitutional provisions *do not require* that taxes be levied thereon as a part of the property which must of necessity be taxed.[1]

§ 1400 (751). **Retrospective Taxation; Omitted Property; Undervaluation.** — The legislature may, unless restricted or controlled by

State where they are deposited, and to be included within the statutory definition of personal property required to be returned by the company for taxation. Scottish Union & Nat. Ins. Co. *v.* Bowland, 196 U. S. 611. In People *v.* Com'rs of Taxes, 76 N. Y. 64, 77, *city bonds* were held to be taxable pursuant to statute as a part of the *capital and surplus* of the corporation owning them, and the court used language from which it might be inferred that these bonds were taxable under any general authority of sufficient scope to include them.

[1] The Constitution of *Georgia* declares that "all taxation shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax." In a case in which it was sought to subject the bonds of a city to taxation for State and county purposes, the court held that a city is an instrumentality of the government of the State; that bonds issued by a municipal corporation as evidences of a loan made to it are instrumentalities of the government which creates the municipal corporation; that taxing laws will not be so construed as to authorize the taxation of such instrumentalities *unless express language requires it;* that the word "property" in the constitutional provision referred to, when properly construed, did not require the taxing of public property, or any of the lawful instrumentalities of government; and hence that municipal bonds were not required to be taxed thereby. Penick *v.* Foster, 129 Ga. 217. In *Louisiana* constitutional provisions are to be found, which require the taxation of "all property" except certain enumerated property, municipal bonds not being mentioned in the exception. In construing these constitutional provisions, the court pointed out that municipal bonds had never been taxed in Louisiana; that a literal application of the constitutional provision would include bonds of the United States, which are not taxable in any event; and, for these reasons, it held that these constitutional provisions should not be construed as authorizing or requiring the taxing of municipal bonds. State *v.* Board of Assessors, 35 La. An. 651; State *v.* Board of Assessors, 111 La. 982. But in *Louisiana,* if a corporation is taxable in respect of its capital, it cannot escape liability therefor, either wholly or in part, because its capital, or some portion thereof, is *invested in bonds of the United States,* or of the *State,* which are exempt from taxation; First Nat. Bank *v.* Board of Reviewers, 41 La. An. 181; *or in exempt city bonds.* Home Ins. Co. *v.* Board of Assessors, 42 La. An. 1131; Parker *v.* Sun Ins. Co., 42 La. An. 1172. See also State *v.* Board of Assessors, 47 La. An. 1498. But see Bank of Commerce *v.* New York City, 2 Black (U. S.), 620; Bank Tax Case, 2 Wall. (U. S.) 200; Van Allen *v.* Albany Board of Assessors, 3 Wall. (U. S.) 573; Banks *v.* Mayor, 7 Wall. 16, 26; National Bank of Louisville *v.* Commonwealth, 9 Wall. (U. S.) 353. Gray, Lim. on Taxing Power, § 755 *et seq.*, cites the State and Federal cases on the subject.

constitutional provision, authorize a municipality *to levy and collect retrospective taxes* upon property which was subject to taxation in past years, but which has escaped taxation through omission from the assessment roll or otherwise; and for this purpose the municipality may be authorized to use the assessment rolls of a previous year.[1] The legislature has also authority *to re-value and re-assess*

[1] Sturges *v.* Carter, 114 U. S. 511; Vicksburg, S. & P. R. Co. *v.* Dennis, 116 U. S. 665; Winona & St. P. Land Co. *v.* Minnesota, 159 U. S. 526; Florida Cent. & P. R. Co. *v.* Reynolds, 183 U. S. 471; Jackson Lumber Co. *v.* McCrimmon, 164 Fed. Rep. 759, 762; Fairfield *v.* People, 94 Ill. 244, citing text; Galusha *v.* Wendt, 114 Iowa, 597; Municipality No. 1 *v.* Wheeler, 10 La. An. 745; New Orleans *v.* Poutz, 14 La. An. 853; State *v.* Louisiana Sav. Bank & S. D. Co., 32 La. An. 1136; Wilcox *v.* Eagle, 81 Mich. 271; Yazoo & M. V. R. Co. *v.* Adams, 81 Miss. 90, 114; Adams *v.* Kuykendall, 83 Miss. 571; St. Louis *v.* Clemens, 52 Mo. 133; Overing *v.* Foote, 43 N. Y. 290, 294; People *v.* Brooklyn Assessors, 92 N. Y. 430; Delaware Div. Canal Co. *v.* Commonwealth, 50 Pa. 399; Cross *v.* Milwaukee, 19 Wis. 509; Flanders *v.* Merrimack, 48 Wis. 567, 572; Sanderson *v.* Herman, 108 Wis. 662, 669.

In Florida Cent. & P. R. Co. *v.* Reynolds, 183 U. S. 471, aff'g 35 Fla. 625, 39 Fla. 243, it was held that State legislation by which the State reaches backward and collects taxes from certain kinds of property which were not collected at the proper time through lack of statutory authority, or through a misunderstanding of the law, or from neglect of the assessors, *does not violate the Federal Constitution.* Mr. Justice *Brewer* said: "It must be remembered that taxes are not debts in the ordinary sense of the term; that they are the enforced proportional contribution of persons and property, levied by the authority of the State for the support of the government, and for all public needs. They are obligations of the highest character, for only as they are discharged is the continued existence of government possible. They are not cancelled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation, and until payment the State may proceed by all proper means to compel the performance of the obligation. No statutes of limitation run against the State, and it is a matter of discretion with it to determine how far into the past it will reach to compel performance of this obligation." An assessment of property which has been omitted from the tax rolls of previous years does not violate the principle of *uniformity* of taxation. Its tendency is to promote uniformity. Wilcox *v.* Eagle, 81 Mich. 271. In the absence of statutory authority therefor, an assessment for back taxes cannot be made. North Carolina R. Co. *v.* Alamance, 77 N. Car. 4; Johnson *v.* Royster, 88 N. Car. 194. An *assessment for past years upon omitted property* may be made although the property has passed out of existence, or out of the ownership of the person assessed, or out of the assessment district. State *v.* Pors, 107 Wis. 420. See also Shelby County *v.* Mississippi & T. R. Co., 16 Lea (Tenn.), 401, 410.

In *Missouri* it is held that a statutory limitation upon the enforcement of taxes does not commence to run until an assessment is made. Hence, an assessment for omitted back taxes is not barred by the statute until statutory period after the time of the assessment. Omitted taxes of 1884 to 1889 were levied in 1890. It was held that a suit which was begun in 1893 to enforce payment was not barred by a five years' limitation. State *v.* Fullerton, 143 Mo. 682. See also State *v.* Vogelsang, 183 Mo. 17. In *Wisconsin* it was held that an act passed in 1862 (made necessary to avoid difficulties growing out of previous unconstitutional taxation) providing for the reassessment of taxes of 1854, 1855, 1856, and 1857, in one of the cities of that State, was constitutional. Tallman *v.* Jamesville, 17 Wis. 71; *ante*, §§ 127–129, 948 and notes; *post*, § 1469 and cases there cited. In *Kentucky* it has been held that, although a retrospective assessment may not be expressly authorized by statute, it may be made

property which in preceding years has been grossly undervalued; a gross undervaluation of property is within the principle applicable to an entire omission of property.[1] And an *assessment of back taxes*, with the incidental lien upon the property assessed, has been held not to violate any constitutional right guaranteed by either State or Federal Constitutions, although the property has changed owners since the year for which the taxes are levied.[2] A statute which authorizes the assessment of property for the back taxes is remedial in its purpose and it will be given a retrospective effect as conferring power to assess property which has escaped assessment for certain years prior to its enactment.[3] In the absence of any

before the right to assess and collect taxes is barred by limitation. Botto's Exr. *v.* Louisville, 117 Ky. 798; Louisville & J. Ferry Co. *v.* Commonwealth, 108 Ky. 717 (rev'd on other grounds, 188 U. S. 385). See also Stone *v.* Louisville (Ky.), 57 S. W. Rep. 627.

A city cannot be compelled by *mandamus* to levy taxes for past years in the absence of statutory authority therefor. Milster *v.* Spartanburg, 68 S. Car. 26. Where a tax was declared illegal by the courts for want of power to impose it, and the *legislature afterwards legalized the assessment* and conferred power to levy it, the court held that the legislative action was not retrospective, and that if the assessment was such as could have been authorized by the legislature at the time, it could afterwards be legalized for the future action of the city under the new act. Jacksonville *v.* Basnett, 20 Fla. 525. See Index, tit. *Curative Acts.*

[1] Weyerhaueser *v.* Minnesota, 176 U. S. 550, aff'g 68 Minn. 353; Anderson *v.* Ritterbusch, 22 Okla. 761.

Where a *reassessment* is ordered for a previous year, a building upon a lot may be valued at its true value in such year, although the building has since been destroyed by fire. Cross *v.* Milwaukee, 19 Wis. 509. A statute which authorizes the assessment of property omitted in previous years does not authorize increase in the valuation of property which was assessed in previous years. Allwood *v.* Cowen, 111 Ill. 481; German Sav. Bank *v.* Trowbridge, 124 Iowa, 514. Thus, where the plaintiff's credits were assessed and a tax paid thereon, an assessor cannot in a subsequent year impose an additional assessment upon the credits for the past year on the ground that a part thereof was omitted. Allwood *v.* Cowen, 111 Ill. 481. But when the credits were entirely omitted from the assessment of the previous year, an assessment thereon may be imposed under the statute. Sellars *v.* Barrett, 185 Ill. 466.

It has been held in *Iowa* that an assessment made without fraud on the part of the assessor or concealment on the part of the taxpayer is final if no steps are taken to review it in the manner prescribed by statute. *Undervaluation* of taxable property through mere error does not authorize a reassessment if taxes have been levied and paid. People's Sav. Bank *v.* Layman, 134 Fed. Rep. 635. See also German Sav. Bank *v.* Trowbridge, 124 Iowa, 514; Sudderth *v.* Brittain, 76 N. Car. 458.

[2] Winona & St. P. Land Co. *v.* Minnesota, 159 U. S. 526; Weyerhaueser *v.* Minnesota, 176 U. S. 550; United States Trust Co. *v.* New Mexico, 183 U. S. 535; Yazoo & M. V. R. Co. *v.* Adams, 81 Miss. 90, 114; State *v.* Fullerton, 143 Mo. 682. The legislature may provide for collecting *back taxes on real property* without making a similar provision as to back taxes on personal property; Winona & St. P. Land Co. *v.* Minnesota, 159 U. S. 526, aff'g 40 Minn. 512; or *upon railroad property* without making provision for back taxes upon other property. Florida Cent. & P. R. Co. *v.* Reynolds, 183 U. S. 471, 480, aff'g 35 Fla. 625, 39 Fla. 243.

[3] Galusha *v.* Wendt, 114 Iowa, 597; Beresheim *v.* Arnd, 117 Iowa, 83; Robinson *v.* Ferguson, 119 Iowa, 325; State *v.* Baldwin, 62 Minn. 518.

constitutional prohibition, a retroactive law is a valid enactment.[1] But a statute which authorizes the assessment and collection of back taxes upon property liable to taxation for a period of time prior to its enactment *is not a retroactive law* within the constitutional prohibition of the passage of retroactive laws.[2]

§ 1401 (776). **Statutes which exempt Persons or Property from Taxation, strictly construed.** — As the burden of taxation ought to fall equally upon all, statutes exempting persons or property are construed with strictness, and *the exemption should be denied to exist* unless it is so clearly granted as to be free from fair doubt.[3]

[1] Galusha *v.* Wendt, 114 Iowa, 597. Index — *Curative Acts.*

[2] Sturges *v.* Carter, 114 U. S. 511, 519. See also Gager *v.* Prout, 48 Ohio St. 89; State *v.* Pors, 107 Wis. 420, 429. In Sturges *v.* Carter, 114 U. S. 511, a statute of Ohio, enacted in 1878, authorized county auditors to extend inquiries into returns of property for taxation over a period of four years last before that in which the inquiry was made. It was held that this statute authorized the assessment of back taxes for the years 1874, 1875, 1876, and 1877, and that it did not violate the provision of the Constitution of Ohio which declares that "the General Assembly shall have no power to pass retroactive laws." Mr. Justice *Woods* said: "In our opinion, no right of the taxpayer was invaded by the act of 1878. His investments in bonds and stocks were subject to taxation; the taxes upon such investments were due to the State, and the act of 1878 merely provided a method by which the taxes might be assessed and collected in spite of the annual settlements made by the auditor. It gave a new remedy to the State for enforcing a right which it had all the time possessed, namely, the right to the taxes upon property liable to taxation. Such an act is not a retroactive law within the meaning of the Constitution of Ohio. In the case of Society for Propagating the Gospel *v.* Wheeler, 2 Gall. 139, Mr. Justice *Story* thus defines a retroactive, or, as he calls it, a retrospective law: 'Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.' The act of 1878 took away no vested right of the taxpayer, it imposed upon him no new duty or obligation, and subjected him to no new disability in reference to past transactions."

[3] Providence Bank *v.* Billings, 4 Pet. (U. S.) 514, 561; Philadelphia & W. R. Co. *v.* Maryland, 10 How. (U. S.) 376, 393; Delaware Railroad Tax, *Re*, 18 Wall. (U. S.) 206; Trask *v.* Maguire, 18 Wall. (U. S.) 206; North Mo. R. Co. *v.* Maguire, 20 Wall. (U. S.) 46; Memphis Gas Light Co. *v.* Shelby County Taxing District, 109 U. S. 398; Vicksburg, S. & P. R. Co. *v.* Dennis, 116 U. S. 665, 668; Chicago, B. & K. C. R. Co. *v.* Guffey, 120 U. S. 569; Yazoo & M. V. R. Co. *v.* Thomas, 132 U. S. 174; Yazoo & M. V. R. Co. *v.* Delta Com'rs, 132 U. S. 190; New Orleans, C. & L. R. Co. *v.* New Orleans, 143 U. S. 192; Schurz *v.* Cook, 148 U. S. 397, 409; Keokuk & W. R. Co. *v.* Missouri, 152 U. S. 301, 306; Winona & St. P. Land Co. *v.* Minnesota, 159 U. S. 526; Ford *v.* Delta & P. L. Co., 164 U. S. 662; Chicago Theological Seminary *v.* Illinois, 188 U. S. 662; Swarts *v.* Hammer, 194 U. S. 441, aff'g 120 Fed. Rep. 256; Scottish Union & Nat. Ins. Co. *v.* Bowland, 196 U. S. 611; St. Louis *v.* United Railways Co., 210 U. S. 266; Biscoe *v.* Coulter, 18 Ark. 423; State *v.* Bank of Smyrna, 2 Houst. (Del.) 99; Indianapolis *v.* McLean, 8 Ind. 328; Wabash Methodist Episcopal Church *v.* Ellis, 38 Ind. 3; South Bend *v.* Notre Dame Univ., 69 Ind. 344; Washburn College *v.* Shawnee County, 8 Kan. 344; Vail *v.* Beach, 10 Kan. 214; Louisville & P. Canal Co. *v.* Commonwealth, 7 B. Mon. (Ky.) 160; Portland, S. & P. R. Co. *v.* Saco, 60 Me. 196; Camden

Such statutes will be construed most strongly against those claiming the exemption.[1] Under the general rule that an exemption is to be

v. Camden, 77 Me. 530, 538, citing text; Baltimore v. State Bd. of Police, 15 Md. 376; Harvard College v. Boston, 104 Mass. 470; St. Peter's Church v. Scott County, 12 Minn. 395; Anderson v. State, 23 Miss. 459; Hannibal & St. J. R. Co. v. Shacklett, 30 Mo. 550; Washington University v. Rowse, 42 Mo. 308; Pacific R. Co. v. Cass County, 53 Mo. 17; Fitterer v. Crawford, 157 Mo. 51; Trenton v. Humel, 134 Mo. App. 595; State v. Parker, 32 N. J. L. 426; People v. Davenport, 91 N. Y. 574; Stewart v. Davis, 3 Murph. (N. Car.) 244; Lander v. Burke, 65 Ohio St. 532, 542; Hibernian Benevolent Soc. v. Kelly, 28 Oreg. 173, 195; Platt v. Race, 10 Watts (Pa.), 352; Crawford v. Burrell, 53 Pa. 219; Swan Point Cemetery v. Tripp, 14 R. I. 199; Morris v. Lone Star Chapter, 68 Tex. 698, 702; Austin v. Austin Gasl. & C. Co., 69 Tex. 180; Petersburg v. Petersburg Ben. Assoc., 78 Va. 431; Baltimore & O. R. Co. v. Marshall County, 3 W. Va. 319; Lord Colchester v. Kewney, L. R. 1 Exch. 368; 1 Desty, Taxation, ch. vi.

Power of State to exempt. Tomlinson v. Branch, 15 Wall. (U. S.) 460; Munic. v. Bank, 5 Rob. (La.) 151; Jacksonville v. McConnel (constitutional limitation), 12 Ill. 138; Northwestern Univ. v. People, 80 Ill. 333; Orange & A. R. Co. v. Alexandria, 17 Gratt. (Va.) 176, *per Joynes*, J.; People v. McCreery, 34 Cal. 432; Life Assoc. of Am. v. St. Louis Co. Assessors, 49 Mo. 512; State v. Hannibal & St. J. R. Co., 75 Mo. 208; State v. Woodruff, 37 N. J. L. 139; New Jersey R. & T. Co. v. Newark, 26 N. J. L. 519; People v. Eddy, 43 Cal. 333. No provision of the *Federal Constitution* prevents the States from granting exemption from taxation. Metropolitan St. R. Co. v. New York, 199 U. S. 1, aff'g 174 N. Y. 417.

"An intent to exempt any property, or any portion of the value of any property, from taxation must not be presumed, but must be found plainly expressed in the statutes." *Earl*, J., People v. Tax Com'rs, 95 N. Y. 554. "Taxation is the rule, with every presumption to support it, while exemption is the exception, with every presumption against it." *Per Vann*, J., in People v. N. Y. Tax Com'rs, 174 N. Y. 417, 448.

Property in the hands of a *trustee or assignee in bankruptcy* is not exempt from State and municipal taxation. Swarts v. Hammer, 194 U. S. 441, aff'g 120 Fed. Rep. 256. In *Louisiana* an unqualified exemption "from taxation during the period of fifty years" was held to imply an immunity from municipal as well as State taxes. "When the sovereign emancipates he does so munificently." *Per Bermudez*, C. J. New Orleans v. Carondelet Canal & Nav. Co., 36 La. An. 396. But to no greater extent than he plainly expresses.

The *exaction of a license fee from a railroad company* does not exempt the company's property from taxation in the absence of express stipulations of exemption. A license fee is a charge for the privilege of carrying on a business or occupation, and is not the equivalent or in lieu of a property tax. Brooklyn City R. Co. v. New York, 199 U. S. 48.

As to *power of municipality* to exempt property from taxation in any case. State v. Addison, 2 S. Car. 499; Hayzlett v. Mt. Vernon, 33 Iowa, 229. A city has no power to exempt property from general taxes or special assessments, unless such power is vested in it by statute. State v. Hannibal & St. J. R. Co., 75 Mo. 208; Vrana v. St. Louis, 164 Mo. 146. An exemption from municipal taxation granted to a private corporation is not affected by the dissolution of the municipal corporation and its being replaced by another. Mobile & S. H. R. R. Co. v. Kennerly, 74 Ala. 566. A *subsequent statute* exempting property from municipal taxation is valid against the municipality. Richmond v. Richmond & D. R. Co., 21 Gratt. (Va.) 604. Remedy of owner where property exempt from taxation is assessed. Lee v. Thomas, 49 Mo. 112; Jefferson City v. Opel, *Ib.* 190; Walden v. Dudley, *Ib.* 419; St. Louis B. & Sav. Assoc. v. Lightner, 47 Mo. 393; Atlantic & Pac. R. Co. v. Cleino, 2 Dillon C. C. 175.

[1] Providence Bank v. Billings, 4 Pet. (U. S.) 514; Charles River Br. Prop. v. Warren Br. Prop., 11 Pet. (U. S.) 420; Philadelphia & W. R. Co. v.

strictly construed, a general exemption from taxation in favor of an individual or corporation is to be construed as referring only to the property held for the transaction of the business or corporate purposes of the party exempted, and does not include property devoted to other uses in which the funds of the party exempted may be invested for the purpose of producing revenue.[1]

Maryland, 10 How. (U. S.) 376; Jefferson Branch Bank *v.* Skelly, 1 Black (U. S.), 436; People *v.* Whyler, 41 Cal. 351; Seymour *v.* Hartford, 21 Conn. 481; Bridgeport *v.* New York & N. H. R. Co., 36 Conn. 255; Hartford *v.* Hartford Theol. Seminary, 66 Conn. 475, 483; *In re* Swigert, 119 Ill. 83; People *v.* Chicago, 124 Ill. 636; Chicago *v.* Chicago, 207 Ill. 37; Edwards & W. Const. Co. *v.* Jasper County, 117 Iowa, 365, 378; Municipality No. 2 *v.* New Orleans, &c. R. Co., 10 Rob. (La.) 187; Sindall *v.* Baltimore, 93 Md. 526; Lauer *v.* Baltimore, 110 Md. 447, 457; State *v.* Gt. Northern R. Co., 106 Minn. 303; Gordon *v.* Baltimore, 5 Gill (Md.), 231; Kansas City Exposition Driving Park *v.* Kansas City, 174 Mo. 425, citing text; Lincoln St. R. Co. *v.* Lincoln, 61 Neb. 109; Phillips Exeter Acad. *v.* Exeter, 58 N. H. 306; Crawford *v.* Burrell, 53 Pa. 219; State *v.* Newberry, 10 Rich. L. (S. Car.) 339; Yates *v.* Milwaukee, 92 Wis. 352 (agricultural property).

Exemption of Capital Stock as including Property represented thereby. The general tenor of the authorities is to the effect that where there is a general exemption of the stock or capital stock of a corporation, without other explanatory words, the exemption applies equally to the property of the corporation represented by its shares of stock. Central R. & B. Co. *v.* Georgia, 92 U. S. 665; Delaware, L. & W. R. Co. *v.* Pennsylvania, 198 U. S. 341; New Haven *v.* City Bank, 31 Conn. 106; Rome R. Co. *v.* Rome, 14 Ga. 275; Connersville *v.* Bank of Indiana, 16 Ind. 105; Gordon *v.* Baltimore, 5 Gill (Md.), 231; Baltimore *v.* Baltimore & O. R. Co., 6 Gill (Md.), 288; State *v.* Cumberland & P. R. Co., 40 Md. 22; Hannibal & St. J. R. Co. *v.* Schacklett, 30 Mo. 550; State *v.* Hood, 15 Rich. L. (S. Car.) 177. But while in the absence of any words showing a different intent, an exemption of the stock or capital stock of a corporation may imply and carry with it an exemption of the property in which such stock is invested, yet if the legislature uses language at variance with such intention, the courts, which will never presume an intention to exempt any property from its just share of the public burdens, will construe any fair doubt which may arise as to the proper interpretation of the charter against the corporation. Central R. & B. Co. *v.* Wright, 164 U. S. 327; Memphis, &c. R. Co. *v.* Gaines, 97 U. S. 697; St. Louis, I. M. & S. R. Co. *v.* Loftin, 98 U. S. 555; Bank of Commerce *v.* Tennessee, 104 U. S. 493; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365; Tennessee *v.* Whitworth, 117 U. S. 129.

An exemption "of every school house and every building erected for" a "seminary of learning" was held not to exempt a *private boarding school.* Chegarey *v.* New York City, 13 N. Y. 220. A *railroad company* paid the State a specific tax under a law which provided that it should not "be assessed with any tax on its lands, buildings, or equipments." Held not to preclude *municipal* taxation. Orange & A. R. Co. *v.* Alexandria, 17 Gratt. (Va.) 176.

[1] Tucker *v.* Ferguson, 22 Wall. (U. S.) 527; Bank of Commerce *v.* Tennessee, 104 U. S. 493; Ford *v.* Delta & P. L. Co., 164 U. S. 662, 667; Chicago Theol. Seminary *v.* Illinois, 188 U. S. 662; Illinois Cent. R. Co. *v.* Irwin, 72 Ill. 452; *In re* Swigert, 119 Ill. 83; Ramsey County *v.* Chicago, M. & St. P. R. Co., 33 Minn. 537; Todd County *v.* St. Paul, M. & M. R. Co., 38 Minn. 163; McCulloch *v.* Stone, 64 Miss. 378; Worcester *v.* Western R. Co., 4 Metc. (Mass.) 564; State *v.* Mansfield, 23 N. J. L. 510; New Jersey R. & T. Co. *v.* Newark, 25 N. J. L. 315; Railroad Co. *v.* Berks County, 6 Pa. St. 70; American Sunday School Un. *v.* Philadelphia, 161 Pa. 307; Vermont Cent. R. Co. *v.* Burlington, 28 Vt. 193.

Use, and not ownership, is the test as regards churches, schools, &c. Ft. Smith School District *v.* Howe, 62 Ark.

An exemption from taxation conferred by statute may, when appropriate language is used, and when it is the inducement for

481; Ft. Smith School District *v.* Board of Improvement, 65 Ark. 343; Witter *v.* Mission School Dist., 121 Cal. 350; Nugent *v.* Dilworth, 95 Iowa, 49; Washburn College *v.* Shawnee County, 8 Kan. 344; St. Mary's College *v.* Crowl, 10 Kan. 442; New Orleans *v.* St. Anna's Asylum, 31 La. An. 292; Pierce *v.* Cambridge, 2 Cush. (Mass.) 611; Old South Soc. *v.* Boston, 127 Mass. 378; Boston Soc. of Redemptorist Fathers *v.* Boston, 129 Mass. 178; All Saints Parish *v.* Brookline, 178 Mass. 404; Detroit Y. M. Soc. *v.* Detroit, 3 Mich. 172; Phillips Exeter Acad. Trs. *v.* Exeter, 58 N. H. 306; Cooper Hospital *v.* Camden, 68 N. J. L. 691; Cincinnati Col. *v.* State, 19 Ohio, 110; Hibernian Benevolent Soc. *v.* Kelly, 28 Oreg. 173; Willamette Univ. *v.* Knight, 35 Oreg. 33; Pennsylvania Hospital *v.* Delaware County, 169 Pa. 305. See also Board of Improvement *v.* School Dist., 56 Ark. 354; Brodie *v.* Fitzgerald, 57 Ark. 445. A *parsonage* and lot are not exempt. State *v.* Axtell, 41 N. J. L. 117; State *v.* Lyon, 32 N. J. L. 360; State *v.* Krollman, 38 N. J. L. 323; Wabash Meth. E. Church *v.* Ellis, 38 Ind. 3. Nor land upon which a church is being built, under the head of actual places of religious worship. Mullen *v.* Erie County, 85 Pa. 288; Orr *v.* Baker ("church property"), 4 Ind. 86.

As to the *exemption of colleges* and the applicability of such exemption to buildings used exclusively by students as dormitories and dining halls, see Yale University *v.* New Haven, 71 Conn. 316; Griswold College *v.* State, 46 Iowa, 275; Harvard College *v.* Cambridge, 175 Mass. 145; Emerson *v.* Milton Academy, 185 Mass. 414; Amherst College *v.* Amherst, 193 Mass. 168; Ramsey County *v.* Macalester College, 51 Minn. 437; State *v.* Ross, 24 N. J. L. 497; Sisters of Charity *v.* Chatham, 52 N. J. L. 373; Northampton County *v.* Lafayette College, 128 Pa. 132, 144. But compare Phi Beta Epsilon Corporation *v.* Boston, 182 Mass. 457. As to the nature of the occupation of property belonging to literary and other institutions which are declared to be exempted when "occupied by them," see Wesleyan Academy *v.* Wilbraham, 99 Mass. 599; Massachusetts General Hospital *v.* Somerville, 101 Mass. 319; Mt. Hermon Boys' School *v.* Gill, 145 Mass. 139; Salem Lyceum *v.* Salem, 154 Mass. 15; Williams College *v.* Williamstown, 167 Mass. 505; Amherst College *v.* Amherst, 173 Mass. 232; Phillips Academy *v.* Andover, 175 Mass. 118. See also New England Hospital *v.* Boston, 113 Mass. 518; Trinity Church *v.* Boston, 118 Mass. 164; Rural Cemetery *v.* County Commissioners, 152 Mass. 408. Property rented by an institution is not exempt from taxation under a statute exempting the property of institutions "occupied for the purposes for which they were incorporated" although the rents are devoted to the corporate purposes. Salem Lyceum *v.* Salem, 154 Mass. 15. But *an occasional renting of a church building* was held not to destroy a statutory exemption. First Unitarian Society *v.* Hartford, 66 Conn. 368. A statute exempting from taxation lands and buildings so long as they belong to the educational institution exempted, does not relieve *the separate interests of lessees* of portions of the property of the institution from taxation. Jetton *v.* University of the South, 208 U. S. 489, rev'g 155 Fed. Rep. 182.

A statute which imposes on railroad companies a license fee computed upon the gross receipts "*in lieu of all other taxes, assessments, and licenses,*" and which declares that "all personal property, franchises, and real estate owned by such company shall be exempt from assessment and taxation" exempts property owned by the company but not used for railroad purposes, and is not limited to property used for railroad purposes. Milwaukee Elect. R. & L. Co. *v.* Milwaukee, 95 Wis. 42.

The *omission of an assessor to assess* certain parcels of property subject to taxation, whether arising from a misapprehension of the law, — as by giving effect to void provisions of a statute, — or a mistake of fact, will not invalidate his general assessment list. People *v.* McCreery, 34 Cal. 432; Doyle *v.* Austin, 47 Cal. 353, 359; Williams *v.* Lunenburg Sch. Dist., 21 Pick. (Mass.) 75; Weeks *v.* Milwaukee, 10

expenditures on the part of the grantee and therefore supported by a consideration, and when the legislative intent is clear, be *a contract* which is protected by the provisions of the Federal Constitution against impairment by subsequent legislation or by later

Wis. 242; Kneeland *v.* Milwaukee, 15 Wis. 454; Bond *v.* Kenosha, 17 Wis. 284; Dean *v.* Gleason, 16 Wis. 1, 15; Hersey *v.* Milwaukee County, 16 Wis. 185; Hale *v.* Kenosha, 29 Wis. 599. The *illegal exemption* of another from a tax or assessment is no ground for an injunction against the corporation, unless the plaintiff is injured thereby, as by being compelled to pay more than his proportion. Page *v.* St. Louis, 20 Mo. 136; Balfe *v.* Bell, 40 Ind. 337.

The *Wisconsin* cases assert the following rule as to the effect of the omission to tax property liable to taxation: "Omissions of this character, arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws is intrusted, do not necessarily vitiate the whole tax. But intentional disregard of those laws, in such manner as to impose illegal taxation on those who are assessed, does." *Per Paine*, J., in Weeks *v.* Milwaukee, 10 Wis. 242, *supra*. The language was used in a case in which the city council, in view of the benefit which the construction of a new hotel would be to the city, intentionally omitted to cause the lots upon which it was being erected to be taxed. But *quære*, as to this effect of even an *intentional* omission by the city council? Dunham *v.* Chicago, 55 Ill. 357, lays down the true rule. If the illegal exemption does not increase the amount which others are taxed, they are not injured. If it does, should they not compel, by *mandamus*, the city authorities to assess all the property liable to taxation? At all events, it is a very serious doctrine to hold that the omission, even though directed by the council, should have the effect to vitiate and overthrow the *whole tax* list for the year. See Winter *v.* Montgomery, 65 Ala. 403.

The fact that property subject to taxation *is omitted* from the assessment roll, either because of express statutory exemption or because of neglect or default of a State officer, does not infringe any right of a person taxed guaranteed to him by the *Fourteenth Amendment* to the Federal Constitution. Missouri *v.* Dockery, 191 U. S. 165. See also Metropolitan St. R. Co. *v.* New York, 199 U. S. 1, aff'g 174 N. Y. 417.

In *New York a distinction is made* between general taxation and special assessment of property for benefits; and it has been held that the omission of property within the taxing district from the assessment roll renders a special assessment void. Hassen *v.* Rochester, 65 N. Y. 516; Hassan *v.* Rochester, 67 N. Y. 528; Matter of N. Y. Protestant Epis. Pub. School, 75 N. Y. 324; Ellwood *v.* Rochester, 122 N. Y. 229; Van Deventer *v.* Long Island City, 139 N. Y. 133, 139; McKechnie Brewing Co. *v.* Canandaigua, 15 N. Y. App. Div. 139, 147, aff'g 162 N. Y. 631. But in *California*, it is held that the mere omission from the assessment of one of the lots fronting upon the street does not of itself render the assessment void upon its face. This decision is rendered upon the principle that the persons assessed might have appealed, but, having failed to do so, waived the error. Buckman *v.* Landers, 111 Cal. 347; McDonald *v.* Conniff, 99 Cal. 386. In *Illinois* it is held that in special assessments the mere fact that real estate is contiguous to the improvement does not necessarily establish that it is specially benefited thereby so as to make its omission on the assessment roll erroneous. Persons complaining of the omission must prove that the omitted property is benefited, and the extent of the benefit. Chicago, R. I. & P. R. Co. *v.* Chicago, 139 Ill. 573; Rich *v.* Chicago, 152 Ill. 18, 27; Holdom *v.* Chicago, 169 Ill. 109; Sheedy *v.* Chicago, 221 Ill. 111, 114.

A clause in a charter of a street railway company making it subject to "all restrictions, limitations, and conditions" prescribed in a general statute, does not entitle it to a reduction of taxation to a rate specified in the statute. Dauphin & L. F. Streets R. Co. *v.* Kennerly, 74 Ala. 583.

constitutional provision.[1] But no irrepealable contract of exemption from taxation will be implied when the statutory provision conferring the exemption is merely a part of the general scheme of taxation of the State, — when the legislature is not making promises, but is framing a scheme of public revenue and public improvement.[2] A statutory exemption of a railroad or other corporation from taxation, even if it be a contract protected against impairment by the Federal Constitution, *is personal to the corporation* to which the grant is made and can only be transferred to or devolved upon another corporation by express legislative authority.[3] The transfer

[1] Home of the Friendless *v.* Rouse, 8 Wall. (U. S.) 430, 436, 437; Cooper Hospital *v.* Camden, 68 N. J. L. 691. See also cases cited *infra*, in this section. A statutory provision which is asserted as a contractual exemption from taxation is subject to the rule of strict construction. Metropolitan St. R. Co. *v.* New York, 199 U. S. 1, aff'g 174 N. Y. 417.

In Powers *v.* Detroit, G. H. & M. R. Co., 201 U. S. 543, aff'g 138 Fed. Rep. 264, the court held that a special act of the legislature, which made special provision concerning taxation with a view to induce a large expenditure by the corporation and the completion of an unfinished road, whose completion was deemed of great public importance, and where the special provision was, as required, formally accepted, the expenditures made, and the road completed, was a contract which could not be impaired by subsequent legislature. But acceptance of and action upon the statute is essential to a completed contract, and the privilege or immunity may be withdrawn before it is accepted and acted on. Cooper Hospital *v.* Camden, 68 N. J. L. 691. "Before a statute — particularly one relating to taxation — should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt. It is not so expressed, when the existence of the intent arises only from inference or conjecture." Covington *v.* Kentucky, 173 U. S. 231, 239, *per* Mr. Justice *Harlan*. See also to the same effect, Hayward *v.* People, 145 Ill. 55; Miller *v.* Hageman, 114 Iowa, 195; Mt. Pleasant Cemetery Co. *v.* Newark, 50 N. J. L. 66.

In the earlier cases it was stated as ground for holding that no irrepealable contract was created that there was no counter-obligation, service, or detriment, incurred by the party claiming the exemption that could properly be regarded as a consideration for the proposed contract. See Christ Church *v.* Philadelphia County, 24 How. (U. S.) 300; Tucker *v.* Ferguson, 22 Wall. (U. S.) 527; Grand Lodge, &c. of Louisiana *v.* New Orleans, 166 U. S. 143. But it has been pointed out that a State may abolish the requirement of consideration altogether for simple contracts by private persons, and that it might be that it could equally dispense with the requirement for itself. But the presence or absence of consideration is an aid to construction in doubtful cases, — a circumstance to take into account in determining whether the State has purported to bind itself irrevocably, or merely has used words of prophecy, encouragement, or bounty, holding out a hope but not amounting to a covenant. See remarks of Mr. Justice *Holmes* in Wisconsin & M. R. Co. *v.* Powers, 191 U. S. 379, 385, 386.

[2] Wisconsin & M. R. Co. *v.* Powers, 191 U. S. 379, 387. *Yearly ordinances* imposing taxes for city purposes, which declare that city lots held of the city upon the payment of ground rent to the municipality "shall be exempt from taxation," are only exemptions for the year in which each ordinance is passed; and are not irrepealable contracts granting perpetual immunity from municipal taxation. Wells *v.* Savannah, 181 U. S. 531.

[3] Georgia R. & B. Co. *v.* Smith, 128 U. S. 174; St. Louis & S. F. R. Co. *v.* Gill, 156 U. S. 649; Norfolk & W. R. Co. *v.* Pendleton, 156 U. S. 667; Covington & L. T. R. Co. *v.* Sandford, 164 U. S. 578; Minneapolis & St. L. R.

from one corporation to another, pursuant to statutory authority therefor, of "the estate, property, rights, privileges, and franchises," of the grantor, without any language in the statute expressly authorizing the transfer of *exemptions* or *immunities*, will not vest in the grantee a legislative contract with the grantor of immunity from taxation or assessment.[1]

It has also been said, *arguendo*, by a learned justice of the Supreme Court of the United States that it is settled that no corporation can receive by transfer from another an exemption from taxation or governmental regulation, which is inconsistent with its own charter or with the Constitution or laws of the State then applicable; and this is true even though, under legislative authority, the exemption is transferred by words which clearly include it.[2] Although the statutory exemption may, as originally

Co. v. Gardner, 177 U. S. 332; People's Gaslight & Coke Co. v. Chicago, 194 U. S. 1, rev'g 114 Fed. Rep. 384; Lake Shore & M. S. R. Co. v. Grand Rapids, 102 Mich. 374; State v. Gt. Northern R. Co., 106 Minn. 303; Rochester R. Co. v. Rochester, 205 U. S. 236, and the statement of the general principle by Mr. Justice *Moody*, on p. 247, deduced from the cases on pp. 247, 248.

[1] Rochester R. Co. v. Rochester, 205 U. S. 236, aff'g 182 N. Y. 216; State v. Great Northern R. Co., 106 Minn. 303.

"*Privileges*." In the earlier cases, the Supreme Court of the United States held that exemptions from taxation and assessment passed with the corporate franchises and property under statutes authorizing the transfer of corporate "*privileges*." See Humphrey v. Pegues, 16 Wall. (U. S.) 244; Southwestern R. Co. v. Georgia, 92 U. S. 676; Chesapeake & O. R. Co. v. Virginia, 94 U. S. 718; Tennessee v. Whitworth, 117 U. S. 129. But recent decisions of that court essentially modify and distinguish these cases, and hold that legislative authority for the transfer of the "*privileges*" of a corporation is not sufficient to vest the transferee with a statutory exemption from taxation, unless the context of the statute plainly shows that it was the intention of the legislature to do so. Chesapeake & O. R. Co. v. Miller, 114 U. S. 176; Picard v. East Tennessee, V. & G. R. Co., 130 U.S. 637; Wilmington & W. R. Co. v Alsbrook, 146 U. S. 279; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301; Phœnix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66; Rochester R. Co. v. Rochester, 205 U. S. 236. The authorities are learnedly and critically examined at length in the opinion of Mr. Justice *Moody*, in the case last cited. In Rochester R. Co. v. Rochester, 205 U. S. 236, 253, Mr. Justice *Moody* said of the word "immunities" that it would be an apt term to transfer an immunity or exemption from taxation. In State v. Great Northern R. Co., 106 Minn. 303, the contrary view appears to have been adopted by the Supreme Court of *Minnesota*, and it seems to have been held that, although the word "immunities" was used in the statute authorizing the transfer of corporate privileges, exemption from taxation could not be transferred. But if no new corporation is created, and there is simply a new organization or reorganization of a railroad company as a continuance of the old corporation under a special act of the Legislature, a statutory exemption from taxation is not destroyed. Powers v. Detroit, G. H. & M. R. Co., 201 U. S. 543, 555, aff'g 138 Fed. Rep. 264.

[2] *Per* Mr. Justice *Moody*, in Rochester R. Co. v. Rochester, 205 U. S. 236, 254, aff'g 182 N. Y. 99; citing Trask v. Maguire, 18 Wall. (U. S.) 206; Shields v. Ohio, 95 U. S. 319; Maine Cent. R. Co. v. Maine, 96 U. S. 499; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359; Louisville & N. R. Co. v.

conferred, have been an irrepealable contract, it may lose its irrepealable character, if the property and franchises of the corporation grantee are, pursuant to statutory authority, transferred to another corporation whose charter is, by the Constitution or by statute, subject to the reserved power of the legislature to alter, amend, or repeal.[1]

§ 1402 (769). **Prescribed Mode must be pursued.** — As the authority to levy taxes or to make local assessments does not, as we have just seen, exist unless legislatively conferred, so it can be exercised no *further than it is clearly given*;[2] and if the *mode* in which the authority shall be exercised is prescribed, that mode must be pursued.[3] There is, however, some difficulty at times to distinguish

Palmes, 109 U. S. 244; Memphis & L. R. Co. *v.* Railroad Com'rs, 112 U. S. 609; St. Louis, I. M. & S. R. Co. *v.* Berry, 113 U. S. 465; Keokuk & W. R. Co. *v.* Missouri, 152 U. S. 301; Norfolk & W. R. Co. *v.* Pendleton, 156 U. S. 667; Yazoo & M. V. R. Co. *v.* Adams, 180 U. S. 1; Grand Rapids & I. R. Co. *v.* Osborn, 193 U. S. 17; San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304. In the absence of an express exemption, a provision in a charter of a railroad company that, after certain payments from income, the balance shall be divided between the government and the stockholders, does not exempt the corporation from taxation on its franchise. Honolulu R. T. & Land Co. *v.* Wilder, 211 U. S. 137, aff'g 18 Hawaii, 668.

[1] Tomlinson *v.* Jessup, 15 Wall. (U. S.) 454, 458; Maine Cent. R. Co. *v.* Maine, 96 U. S. 499, 510; Shields *v.* Ohio, 95 U. S. 319; Atlantic & G. R. Co. *v.* Georgia, 98 U. S. 359; Louisville Water Co. *v.* Clark, 143 U. S. 1, 12; Keokuk & W. R. Co. *v.* Missouri, 152 U. S. 301; Covington *v.* Kentucky, 173 U. S. 231, 238; Citizens' Sav. Bank *v.* Owensboro, 173 U. S. 636; Yazoo & M. V. R. Co. *v.* Adams, 180 U. S. 1, 17; Northern Cent. R. Co. *v.* Maryland, 187 U. S. 258, aff'g 90 Md. 447; Fair Haven & W. R. Co. *v.* New Haven, 203 U. S. 379, aff'g 77 Conn. 677, Griffin *v.* Kentucky Ins. Co., 3 Bush (Ky.), 592. If a *new corporation* is formed by the consolidation of existing corporations, it is subject to the Constitution and laws existing at the time of consolidation. If the Constitution then existing prohibits the exemption of the property of corporations from taxation, the consolidated corporation cannot acquire the benefit of an exemption existing in favor of one of its constituent companies, and cannot claim the protection of the contract clause of the Federal Constitution. Yazoo & M. V. R. Co. *v.* Vicksburg, 209 U. S. 358. The question whether a statutory exemption has been repealed by subsequent legislation is a question of State law, in the absence of a contract protected against impairment by the Federal Constitution; and the decisions of the State courts on that question are binding on the Federal Courts. Wicomico County *v.* Bancroft, 203 U. S. 112, rev'g 135 Fed. Rep. 977.

[2] Winston *v.* Taylor, 99 N. Car. 210. When the statute authorizes the city council to ascertain the cost of the improvement *after* completion, and thereafter to levy an assessment therefor, a special assessment for the *estimated* cost of the improvement cannot be levied and collected *prior* to completion thereof. Sanborn *v.* Mason City, 114 Iowa, 189. So where a municipality is authorized to levy taxes *after* contracts for lighting and water purposes have been made, they have no power to levy a water and lighting tax *before* the contracts are made. Brewer *v.* Bridges, 164 Ind. 358. Liability of city for failure to levy or collect assessment, when contract is payable from assessment *only*, see *ante*, § 827.

[3] Lott *v.* Ross, 38 Ala. 156; Warren *v.* Chandos, 115 Cal. 382; Union Pav. & Cont. Co. *v.* McGovern, 127 Cal.

provisions which are imperative from those which are directory merely.[1] What requirements of a statute shall be regarded as man-

638; Obermeyer *v.* Patterson, 130 Cal. 531; Witter *v.* Bachman, 117 Cal. 318; D'Antignac *v.* Augusta, 31 Ga. 700; Fitch *v.* Pinckard, 5 Ill. 76; Chicago *v.* Wright, 32 Ill. 192; Butler *v.* Nevin, 88 Ill. 575; Davis *v.* Litchfield, 145 Ill. 313; Brewster *v.* Peru, 180 Ill. 124; People *v.* Mount, 186 Ill. 560, 573, citing text; Holland *v.* People, 189 Ill. 348; People *v.* Florville, 207 Ill. 79; Churchman *v.* Indianapolis, 110 Ind. 259; Cleveland, C., C. & St. L. R. Co. *v.* Jones Co., 20 Ind. App. 87, 50 N. E. Rep. 319; Ottumwa B. & C. Co. *v.* Ainley, 109 Iowa, 386; Collins *v.* Louisville, 2 B. Mon. (Ky.) 134; New Iberia *v.* Weeks, 104 La. 489, quoting text; Henderson *v.* Baltimore, 8 Md. 352; Warren *v.* Boston St. Com'rs, 181 Mass. 6; Frost *v.* Leatherman, 55 Mich. 33; Sewall *v.* St. Paul, 20 Minn. 511, 520, citing text; Leach *v.* Cargill, 60 Mo. 316; Rose *v.* Trestrail, 62 Mo. App. 352; Westport *v.* Mastin, 62 Mo. App. 647, citing text; Leonard *v.* Sparks, 63 Mo. App. 585; West *v.* Porter, 89 Mo. App. 150; State *v.* Babcock, 20 Neb. 522; State *v.* Irey, 42 Neb. 186, citing text; Batty *v.* Hastings, 63 Neb. 26, and cases cited; Portsmouth Sav. Bank *v.* Omaha, 67 Neb. 50; Farmers' Loan & Trust Co. *v.* Hastings (Neb.), 96 N. W. Rep. 104; Trephagen *v.* South Omaha, 69 Neb. 577; State *v.* Jersey City, 24 N. J. L. 662, 666; State *v.* Jersey City, 25 N. J. L. 309; State *v.* Crawford, 36 N. J. L. 394; State *v.* Plainfield, 38 N. J. L. 95; State *v.* Perth Amboy, 38 N. J. L. 425; Rosell *v.* Neptune City, 68 N. J. L. 509, citing text; Cross *v.* Morristown, 18 N. J. Eq. 305; Rathbun *v.* Acker, 18 Barb. (N. Y.) 393; People *v.* Kingston, 189 N. Y. 66, 74; Tifft *v.* Buffalo, 25 N. Y. App. Div. 376; Providence Retreat *v.* Buffalo, 29 N. Y. App. Div. 160; Archer *v.* Mt. Vernon. 63 N. Y. App. Div. 286; Pickton *v.* Fargo, 10 N. Dak. 469, citing text; Brophy *v.* Landman, 28 Ohio St. 542; Joyce *v.* Barron, 67 Ohio St. 264; Strout *v.* Portland, 26 Oreg. 294; Fort Worth *v.* Davis, 57 Tex. 225; Wood *v.* Galveston, 76 Tex. 126; Dallas *v.* Ellison, 10 Tex. Civ. App. 28, citing text; Kerr *v.* Corsicana (Tex. Civ. App.), 35 S. W. Rep. 695; Ardrey *v.* Dallas, 13 Tex. Civ. App. 442; Dallas *v.* Emerson (Tex. Civ. App.), 36 S. W. Rep. 304; Green *v.* Ward, 82 Va. 324; Violett *v.* Alexandria, 92 Va. 561; Haisch *v.* State, 10 Wash. 435; Kline *v.* Tacoma, 11 Wash. 193; Crane *v.* Janesville, 20 Wis. 305; Knox *v.* Peterson, 21 Wis. 247; State *v.* Ashland, 88 Wis. 599; *ante*, §§ 237 *et seq.*, and notes.

Where *mode* of making improvements is prescribed by statute, "*the mode in such cases constitutes the measure of power.*" *Field*, C. J., in Zottman *v.* San Francisco, 20 Cal. 96, 102; approved by *Sanderson*, J., in Nicolson Paving Co. *v.* Painter, 35 Cal. 699; Murphy *v.* Louisville, 9 Bush (Ky.), 189. Any departure in substance from the statute vitiates the proceedings for local assessments. Merritt *v.* Portchester (oath, notice, &c.), 71 N. Y. 309. The grant of power to make local assessments is strictly construed, and must in matters of substance be strictly followed. There is no power to make assessments for local improvements except such as exists in the charter or statute. Allen *v.* Galveston, 51 Tex. 302. The provisions in a city charter in regard to the steps required before the contracts for grading, &c., are let, are *conditions precedent*, and every substantial requirement must be strictly complied with before there can be any liability of adjoining lots for such work. Massing *v.* Ames, 37 Wis. 645; Pound *v.* Chippewa County, 43 Wis. 63; Allen *v.* Galveston, 51 Tex. 302.

[1] A statute requiring a tax to be levied on a day named held directory, and the duty may be performed within a reasonable time thereafter. Gearhart *v.* Dixon, 1 Pa. St. 224 (1845). But in Williamsport *v.* Kent, 14 Ind. 306, an incorporating statute provided that "the board of trustees shall *before* the third Tuesday in May, each year, determine the amount of general tax for the current year," and although it was not expressly declared by the statute that they should not exercise the power after the time named, it was nevertheless decided that a tax levied after the third Tuesday in May was void. *Sed quære?* Description of the improvement. Steckert *v.* East Sagi-

datory and imperative, and what provisions shall be regarded as purely directory, is largely a matter that is controlled by the method or scheme of taxation adopted by the particular State, and by its general polity and course of legislation. An exhaustive examination of the subject is not within the limits of the present treatise, and it is impossible to do more than to indicate in the notes, by way of illustration, some of the questions that have arisen in different jurisdictions.[1]

naw, 22 Mich. 104. Provision as to assessment roll held mandatory. *Ib.* As to mandatory provision, see Starr *v.* Burlington, 45 Iowa, 87. Provisions whose object is to protect the taxpayer are mandatory; those intended merely to promote despatch, method, system, &c., are generally directory.

[1] All the steps required by law *to confer jurisdicion* to order improvement must be complied with. Himmelman *v.* Oliver, 34 Cal. 246; Himmelman *v.* Danos, 35 Cal. 441; Dougherty *v.* Hitchcock, 35 Cal. 512; Nicolson Paving Co. *v.* Painter, 35 Cal. 699; Hewes *v.* Reis, 40 Cal. 255; Hoover *v.* People, 171 Ill. 182; Vennum *v.* People, 188 Ill. 158; Holland *v.* People, 189 Ill. 348; Chicago *v.* Nodeck, 202 Ill. 257; Pittsburgh, C., C. & St. L. R. Co. *v.* Fish, 158 Ind. 525; Hager *v.* Burlington, 42 Iowa, 661; Coggeshall *v.* Des Moines, 78 Iowa, 235; Zalesky *v.* Cedar Rapids, 118 Iowa, 714; Lexington *v.* Headley, 5 Bush (Ky.), 508; Hurford *v.* Omaha, 4 Neb. 336; Fulton *v.* Lincoln, 9 Neb. 358; Moss *v.* Fairbury, 66 Neb. 671; Merrill *v.* Shields, 57 Neb. 78; Cooper *v.* Cape May Point, 72 N. J. L. 164; Eager, *In re*, 46 N. Y. 100; Welker *v.* Potter, 18 Ohio St. 85; Hawthorne *v.* East Portland, 13 Oreg. 271 (defective notice).

Resolution or ordinance. As to when an ordinance is necessary, see, generally, *ante*, §§ 571, 572. Where the organic law of a city is silent as to the manner in which it shall express its determination to improve a street, this may be done by *motion or resolution as well as by ordinance.* Indianapolis *v.* Imberry, 17 Ind. 175; Moberry *v.* Jeffersonville, 38 Ind. 198; Terre Haute *v.* Turner, 36 Ind. 522; Delphi *v.* Evans, 36 Ind. 90. But where, by the organic law, an ordinance is expressly required or is implied by necessary inference, a mere *resolution* to improve a street is void. Newman *v.* Emporia, 32 Kan. 456; McManus *v.* Hornaday, 99 Iowa, 507. Index — *Ordinances.* So also as to *levying taxes.* Warrensburg *v.* Miller, 77 Mo. 56. In *Illinois*, a valid *ordinance* for the making of the improvement is necessary; a resolution is not sufficient. Thaler *v.* West Chicago Park Com'rs, 174 Ill. 211; Pells *v.* Paxton, 176 Ill. 318. If the ordinance is invalid for any reason, the court is without jurisdiction to confirm the assessment. Alton *v.* Middleton's Heirs, 158 Ill. 442; Culver *v.* People, 161 Ill. 89; People *v.* Hurford, 167 Ill. 226; Smith *v.* Chicago, 169 Ill. 257; Johnson *v.* People, 189 Ill. 83; American Hide & Leather Co. *v.* Chicago, 203 Ill. 451. In *Missouri*, a *resolution* is insufficient when the statute requires the passage of an ordinance for the issuance of special tax bills. Westport *v.* Mastin, 62 Mo. App. 647. The *grade of the street* proposed to be improved must be established by ordinance, when the statute so requires. Brewster *v.* Peru, 180 Ill. 124; Craig *v.* People, 193 Ill. 199; Biggins' Estate *v.* People, 193 Ill. 601; Sedalia *v.* Abell, 103 Mo. App. 431. See also Gross *v.* People, 172 Ill. 571. Where an ordinance has been passed establishing the grade of a street, it cannot be altered by resolution, and an assessment levied to defray the cost of improving the street at an altered grade fixed by resolution, is invalid. McManus *v.* Hornaday, 99 Iowa, 507. There may be, perhaps, we suggest, an exception to this rule where the resolution is passed and published with all of the formalities of an ordinance.

City must, unless otherwise provided, affirmatively prove that the ordinance has been complied with. Jeffris *v.* Cash, 207 Ill. 405. Filing of certified copy of tax levy ordinance held necessary. People *v.* Chicago &

§ 1403 (769). **Statutory Limitations of Tax Rate.** — It is not unusual, in the organic acts of municipalities, for the protection of

N. W. R. Co., 183 Ill. 311; Indiana, D. & W. R. Co. *v.* People, 201 Ill. 351; Russellville *v.* Purdy, 206 Ill. 142.

Sufficiency of description. Reference in ordinance *to specifications and plans.* See Chase *v.* Trout, 146 Cal. 350; Clinton *v.* Portland, 26 Oreg. 410. *Reference* in resolution describing taxing district *to map or plat* on file, see Boehme *v.* Monroe, 106 Mich. 401. *Description of work.* Necessity of sufficient description. People *v.* Eggers, 164 Ill. 515; Lundberg *v.* Chicago, 183 Ill. 572; Fehringer *v.* Chicago, 187 Ill. 416; Gage *v.* People, 188 Ill. 92; Vennum *v.* People, 188 Ill. 158; Chicago *v.* Sherman, 192 Ill. 576; Topliff *v.* Chicago, 196 Ill. 215; Duane *v.* Chicago, 198 Ill. 471; Walker *v.* Chicago, 202 Ill. 531; Gage *v.* Chicago, 203 Ill. 26; Steckert *v.* East Saginaw, 22 Mich. 104; Heman *v.* Gilliam, 171 Mo. 258; Smith *v.* Westport, 105 Mo. App. 221.

It will be presumed that the street to be improved is within the city, and the fact that the ordinance does not expressly declare that the street is within the city, is not fatal. Wheeler *v.* People, 153 Ill. 480; Stanton *v.* Chicago, 154 Ill. 23; Meadowcroft *v.* People, 154 Ill. 416; Wisner *v.* People, 156 Ill. 180; Beach *v.* People, 157 Ill. 659; Chytraus *v.* Chicago, 160 Ill. 18. The details and particulars of the work need not be fully set out in the ordinance. Kankakee *v.* Potter, 119 Ill. 324; Adams County *v.* Quincy, 130 Ill. 566; Culver *v.* Chicago, 171 Ill. 399. Reference to established grade in ordinance is sufficient. Cramer *v.* Charleston, 176 Ill. 507. Provision for an *alternative method of doing the work* does not make the description of the work uncertain, there being no uncertainty as to the character of the work. Trimble *v.* Chicago, 168 Ill. 567. Where it is proved that a descriptive term used in the ordinance has a well known and established meaning, an apparent defect in the description will be removed. Levy *v.* Chicago, 113 Ill. 650; Danville *v.* McAdams, 153 Ill. 216; Latham *v.* Willmette, 168 Ill. 153; Shannon *v.* Hinsdale, 180 Ill. 202; Hinsdale *v.* Shannon, 182 Ill. 312; Kuester *v.* Chicago, 187 Ill. 21.

Ordinance held to be invalid because the quality, number, location, and dimensions of flat stones mentioned therein were not specified, nor data given from which to make an intelligent estimate of the cost of the proposed improvement. Kelly *v.* Chicago, 193 Ill. 324. See to the same effect, Sheridan *v.* Chicago, 175 Ill. 421; Lusk *v.* Chicago, 176 Ill. 207; Gage *v.* Chicago, 179 Ill. 392; Foss *v.* Chicago, 184 Ill. 436; Holden *v.* Chicago, 185 Ill. 526; Moll *v.* Chicago, 194 Ill. 28. But a petitioner may, on a second trial, offer proof that the term "flat stones" is not, in view of the local meaning in which it is claimed to have been used in the ordinance, indefinite or uncertain as a matter of description. Kuester *v.* Chicago, 187 Ill. 21; Chicago *v.* Holden, 194 Ill. 213.

Description in special assessment ordinance held sufficient where data given by which description might be defined and applied. Rich *v.* Chicago, 152 Ill. 18; Barber *v.* Chicago, 152 Ill. 37; Michael *v.* Mattoon, 172 Ill. 394; Ryder's Estate *v.* Alton, 175 Ill. 94; Claflin *v.* Chicago, 178 Ill. 549; Shannon *v.* Hinsdale, 180 Ill. 202; Sawyer *v.* Chicago, 183 Ill. 57; Mead *v.* Chicago, 186 Ill. 54; Rollo *v.* Chicago, 187 Ill. 417; Givins *v.* Chicago, 188 Ill. 348; Hyman *v.* Chicago, 188 Ill. 462; White *v.* Chicago, 188 Ill. 392; Houston *v.* Chicago, 191 Ill. 559; Gage *v.* Chicago, 196 Ill. 512; Smythe *v.* Chicago, 197 Ill. 311. If a city does not ask for an assessment for a portion of an improvement insufficiently described in an ordinance, the insufficiency of the description is immaterial. Halsey *v.* Lake View, 188 Ill. 540. Description in new ordinance levying new assessment for completed work need not describe improvement in detail. Chicago *v.* Hulbert, 205 Ill. 346. *Defect in description* if not objected to in the original proceeding for confirmation of the assessment will be held to be waived; Rich *v.* Chicago, 187 Ill. 396; Fiske *v.* People, 188 Ill. 206; and it is not a defence on an application for judgment of sale, unless of such a character as to render the ordinance void. Nicholes *v.* People, 171 Ill. 376; Gross *v.* People, 172 Ill. 571; Foster *v.* Alton, 173 Ill. 587; Dempster *v.*

the citizens, to *limit the rate of taxation*, or the amount of taxes that may be raised during any one year; and where the power is thus

Chicago, 175 Ill. 278; Blount *v.* People, 188 Ill. 538; Gage *v.* People, 207 Ill. 61; Thompson *v.* People, 207 Ill. 334. Assessment cannot be *collaterally attacked* for insufficient description of property and of the improvement. Jebb *v.* Sexton, 84 Ill. App. 45, citing Coburn *v.* Litchfield, 132 Mass. 449, and People *v.* Lingle, 165 Ill. 65. See also Perry *v.* People, 206 Ill. 334.

The defence that a provision of an ordinance is without statutory authority and not within the power of the council, or that the ordinance does not comply with a positive requirement of the statute necessary to make a valid enactment, *is available on application for judgment of sale.* Culver *v.* People, 161 Ill. 89; Mansfield *v.* People, 164 Ill. 611; Cass *v.* People, 166 Ill. 126; Hull *v.* People, 170 Ill. 246.

Resolution of Intention. Work must be sufficiently described by resolution of intention. White *v.* Harris, 116 Cal. 470; Schwiesau *v.* Mahon, 128 Cal. 114; Fay *v.* Reed, 128 Cal. 357; Williamson *v.* Joyce, 137 Cal. 107; Williamson *v.* Joyce, 140 Cal. 669; San Jose Imp. Co. *v.* Auzerais, 106 Cal. 498; Buckman *v.* Hatch, 139 Cal. 53. Sufficiency of description in resolution of intention. Cohen *v.* Alameda, 124 Cal. 504; Haughawout *v.* Hubbard, 131 Cal. 675; Belser *v.* Allman, 134 Cal. 399; King *v.* Lamb, 117 Cal. 401; Boehme *v.* Monroe, 106 Mich. 401; Voght *v.* Buffalo, 133 N. Y. 463; Delaware & H. Canal Co. *v.* Buffalo, 39 N. Y. App. Div. 333; Clinton *v.* Portland, 26 Oreg. 410.

Where a charter does not require *the paving material to be specified* in the resolution of intention, it is not necessary to do so. Waco *v.* Chamberlain, 92 Tex. 207. A description of the work as "grading" and "macadamizing" instead of "regrading" and "remacadamizing" held sufficient. Wells *v.* Wood, 114 Cal. 255. A city council has no jurisdiction *to order additional work* which was not included in the resolution of intention; the inclusion of the cost of such additional work vitiates the entire assessment. Piedmont Paving Co. *v.* Allman, 136 Cal. 88.

Engineer's report. Sufficiency, see Voght *v.* Buffalo, 133 N. Y. 463. Defective engineer's certificate cannot constitute the basis of a valid assessment lien. Ryan *v.* Altschul, 103 Cal. 174; Rauer *v.* Lowe, 107 Cal. 229; Warren *v.* Ferguson, 108 Cal. 535; Frenna *v.* Sunnyside Land Co., 124 Cal. 437. Sufficiency of confirmation of engineer's report. Auditor-General *v.* Hoffman, 132 Mich. 198.

The function of commissioners to assess damages and benefits for a local improvement is *judicial*, with the consequences which attach to this proposition, such as that the commissioners shall have no special interest in the assessment, etc. State *v.* Crawford, 36 N. J. L. 394. Under the special act in question in the case it was held fatal to a special assessment that the commissioners did not take the *oath* required by statute; and it was also held fatal that the commissioners did not, in fact, have any *meeting* at a public place at the time named in the notice of the assessment. Wheeler *v.* Chicago, 57 Ill. 415; State *v.* Perth Amboy, 38 N. J. L. 425. *Commissioners' report must show* that they have determined the value of the lot assessed, when by statute the assessment must not exceed one half the value of the lot. Matter of New York City, 83 N. Y. App. Div. 513.

Assessment Roll, etc. The assessment must show on its face that it was made according to the rule prescribed. Davis *v.* Litchfield, 145 Ill. 313; Stebbins *v.* Kay, 123 N. Y. 31; Wood *v.* Galveston, 76 Tex. 126 (holding that compliance with the provision of a charter that two-thirds of the aldermen must vote for the improvement must be affirmatively shown); Blanchard *v.* Barre, 77 Vt. 420; Liebermann *v.* Milwaukee, 89 Wis. 336; Hayes *v.* Douglas County, 92 Wis. 429.

Where the statute required that the cost of paving to be apportioned *according to frontage*, an assessment *according to superficial area* was held invalid. Barber Asphalt Pav. Co. *v.* Watt, 51 La. An. 1345. Necessity for authentification and certification of assessment roll. Hamilton *v.* Chopard, 9 Wash. 352. Sufficiency of certificate to assessment roll. Nelson *v.* Saginaw, 106 Mich. 659. Assessment

limited, it is not ordinarily enlarged by implication by other provisions of the charter, general in their nature, conferring the power

roll not signed by board of assessors makes the assessment void. Thompson v. Detroit, 114 Mich. 502. Delegate may not sign name of president of board of public works to tax bills or compute the tax. McQuiddy v. Vineyard, 60 Mo. App. 610; Dollar Sav. Bank v. Ridge, 62 Mo. App. 324; Menefee v. Bell, 62 Mo. App. 659.

The failure of a city clerk *to register tax bills* for special assessments, as required by the *Missouri* statute, does not deprive the holder of his right to compensation for labor and material, the statute being directory. Field v. Barber Asphalt Paving Co., 117 Fed. Rep. 925.

Description of property assessed. Property assessed for taxes must be described so as to be capable of identification by some lawful mode such as a government survey or reference to an authenticated plat, or by metes and bounds; unless it is so described as to be capable of such identification, the assessment and judgment will be void. People v. Chicago & A. R. Co., 96 Ill. 369; People v. Dragstran, 100 Ill. 286; People v. Eggers, 164 Ill. 515; People v. Clifford, 166 Ill. 165; Upton v. People, 176 Ill. 632. In *California*, all that is necessary is that the description be sufficient to identify the land assessed, and that the "relative location of each lot to the work done" be shown. Himmelmann v. Bateman, 50 Cal. 11; San Francisco v. Quackenbush, 53 Cal. 52; Norton v. Courtney, 53 Cal. 691; Neilson v. Lee, 60 Cal. 555; Gillis v. Cleveland, 87 Cal. 214; McDonald v. Conniff, 99 Cal. 386; Diggins v. Hartshorne, 108 Cal. 154; Blanchard v. Ladd, 135 Cal. 214. Insufficient description of property as "Tract of land, north side, between Front St. and O. and M. R. R." Becker v. Baltimore & O. S. W. R. Co., 17 Ind. App. 324. *As to sufficiency of description*, see also Auditor General v. Calkins, 136 Mich. 1; Walker v. Detroit, 136 Mich. 6. *Estoppel* to question description of property assessed in assessment roll by payment of assessment for year by same description. Harts v. People, 171 Ill. 373; Harts v. People, 171 Ill. 458.

In *Missouri*, substantial compliance with the specifications contained in a contract for street improvements is required before tax bills issued to the contractor to pay therefor are collectible. Heman v. Gerardi, 96 Mo. App. 231. As the right to levy a special tax or special assessment for a local improvement is purely statutory, it is held in *Illinois* that a statutory requirement of an itemized bill of the cost of a street improvement, showing in separate items the cost of grading, materials, laying down, and supervision is for the protection of the property holder and cannot be dispensed with. Holland v. People, 189 Ill. 348; Meservey v. People, 208 Ill. 646.

The statute or charter may expressly provide that "*no error or irregularity* in the assessment of property shall invalidate the assessment or any proceedings under same" unless the party objecting is materially injured thereby, in which case irregularities are not jurisdictional. Burlington v. Quick, 47 Iowa, 222; Ottumwa B. & C. Co. v. Ainley, 109 Iowa, 386; Kansas Town Co. v. Argentine, 5 Kan. App. 50; Gleason v. Barnett, 106 Ky. 125; Frankfort v. Farmers' Bank of Kentucky (Ky.), 61 S. W. Rep. 458; State v. Blake, 86 Minn. 37. Technical irregularity held insufficient to vitiate proceeding in the absence of evidence of injury to owner of property assessed. Voght v. Buffalo, 133 N. Y. 463.

The *burden of showing* fatal defects in the proceedings held to be upon the party seeking to enjoin the collection of the assessment. Parrotte v. Omaha, 61 Neb. 96. But when a lien is sought to be enforced against real estate, or a sale made thereof for non-payment of special taxes or assessments, he who asserts the lien and seeks to enforce it has the burden of showing the validity of the tax lien. Smith v. Omaha, 49 Neb. 883; Leavitt v. Bell, 55 Neb. 57; Equitable Trust Co. v. O'Brien, 55 Neb. 735; Merrill v. Shields, 57 Neb. 78; Grant v. Bartholomew, 58 Neb. 839.

In *Kentucky* it is held that an assessment for improving or constructing a street or alley will not be disturbed unless it affirmatively appears that under a different and proper method of assessment the defendant

to make contracts or to incur liabilities, or even giving authority to make improvements, or to erect usual or ordinary buildings.[1] But *special authority* to borrow money for a designated pur-

would be charged materially less. McHenry *v.* Selvage, 99 Ky. 232; Barber Asphalt Pav. Co. *v.* Gaar, 115 Ky. 334; Barret *v.* Falls City Artificial Stone Co. (Ky.), 52 S. W. Rep. 947; Chawk *v.* Beville (Ky.), 56 S. W. Rep. 414; Levi *v.* Coyne (Ky.), 57 S. W. Rep. 790; Button *v.* Gast (Ky.), 73 S. W. Rep. 1014; Snyder *v.* Barber Asphalt Pav. Co. (Ky.), 73 S. W. Rep. 1118; Zender *v.* Barber Asphalt Pav. Co. (Ky.), 74 S. W. Rep. 201; Schuster *v.* Barber Asphalt Pav. Co. (Ky.), 74 S. W. Rep. 226; Baldrick *v.* Gast (Ky.), 79 S. W. Rep. 212. This is also the rule in *New Jersey*. Righter *v.* Newark, 45 N. J. L. 104; Davis *v.* Newark, 54 N. J. L. 144, 147; Humphreys *v.* Bayonne, 60 N. J. L. 406.

[1] Benoist *v.* St. Louis, 19 Mo. 179; Clark *v.* Davenport, 14 Iowa, 494; Learned *v.* Burlington, 2 Am. Law Reg. (N. S.) 394, and note; Leavenworth *v.* Norton, 1 Kan. 432; Burnes *v.* Atchison, 2 Kan. 454. But see Commonwealth *v.* Pittsburgh, 34 Pa. 496; Amey *v.* Allegheny City, 24 How. (U. S.) 364; Fosdick *v.* Perrysburg, 14 Ohio St. 472; Butz *v.* Muscatine, 8 Wall. (U. S.) 575; Quincy *v.* Jackson, 113 U. S. 332, noted *infra; ante*, §§ 322, 1377, 1380.

Statutory limitations on the rate or amount of taxation. Under the *Minnesota* statute as to *limitation upon the rate of taxation*, the plaintiff and a board of county commissioners entered into a contract in writing, whereby the former agreed to build a jail for the use of the county, to be completed by July 1, 1873, the latter party agreeing to pay therefor $1,300, in county orders, upon the completion. It was held: 1, that the agreement to issue the county orders, if valid, was the incurring of a pecuniary liability on the part of the county; 2, that in considering whether a given amount of pecuniary liability could be incurred, the county board was bound to inquire whether such amount of money could be raised by a levy of prescribed number of mills on a dollar of the taxable property of the county, as the same appeared upon the subsisting grand list of the county, which was in this case the grand list made in 1872; 3, that as $930.45 was all that could be levied on such grand list at the rate of ten mills on the dollar, the agreement for the building of the jail and payment therefor was void as respected the county. Johnston *v.* Becker County, 27 Minn. 64.

A statute of *Iowa* authorized a tax of six mills on the dollar for ordinary county revenue. The Supreme Court of the United States held that where it appeared that the entire collection was needed for the current expenses of the county, the Circuit Court of the United States was not justified in awarding a *mandamus* to compel the levy of an amount to pay a judgment recovered against the county. Clay County *v.* McAleer, 115 U. S. 616. *Ante*, chapter on Contracts; *post*, chapter on Mandamus. Under the statute of *Georgia* limiting the power of municipal corporations to levy taxes for "ordinary current expenses," the cost of fitting up a building for city purposes was held to be a necessary expense which could lawfully be included in the tax. Rome *v.* McWilliams, 67 Ga. 106. Where by charter the right to tax was limited to one per cent per annum on all taxable property, and a levy of three mills was required to be made to meet interest on the bonded debt, the Supreme Court of the United States held that the disposition of the remaining seven-tenths was within the discretion of the council, and was not subject to judicial order in advance of an ascertained surplus. East St. Louis *v.* Zebley, 110 U. S. 321, and see East St. Louis *v.* Underwood, 105 Ill. 308; Weber *v.* Traubel, 95 Ill. 427; *post*, § 1508; *ante*, § 322.

A special act authorizing a municipality to issue bonds in payment of a railroad subscription, held to confer authority to levy taxes for payment of the debt in excess of the limit of taxation authorized by the charter for ordinary municipal purposes; distinguishing United States *v.* Macon County, 99 U. S. 582; Quincy *v.* Jackson, 113 U. S. 332. See also on this subject, United States *v.* New Orleans, 98 U. S. 381, 393; Ralls County Ct. *v.* United States, 105 U. S. 733, 735; Parkersburg *v.*

pose may, and if such be the legislative intention will, impliedly repeal, *pro tanto*, existing charter limitations upon the rate of taxation.[1] Where the charter limit as to the amount of taxes or rate of taxation for any given year is not exceeded, there may be different levies of taxes in the same year, which, where the charter is silent on the point, may be either a fiscal year or calendar year, in the discretion of the council.[2]

§ 1404 (770). **General Revenue Laws and Special Charter Provisions construed.** — The general statutes of every State contain elaborate *revenue laws*, declaring what property is taxable and in what manner it shall be taxed; but municipalities, as we have seen, must have a clear grant of power to authorize *them* to levy and collect taxes, and the manner in which it is conferred often leaves it to be determined by judicial construction *how far the provisions of the general law apply to municipal corporations.* The ordinary principles of construction, where there is a conflict between the general and special legislation, have been referred to in a previous chapter.[3] In some instances, municipal charters have been held to authorize the corporations to tax in a different mode, or upon different principles, from that adopted by the legislature in respect to State taxation.[4]

§ 1405 (771). **Same Subject. General Law held not to limit Charter Power.** — In Virginia, the *general laws* imposing taxes for the

Brown, 106 U. S. 487, 501; Scotland County Court *v.* United States, 140 U. S. 41.

[1] *Ante*, § 322, and cases there cited. In Commonwealth *v.* Pittsburgh, 34 Pa. 496, above cited, a city, by a special act of the legislature, was authorized to create a large debt for a particular purpose, to borrow money therefor, and to make provision for the payment thereof by the assessment and collection of such tax as might be necessary therefor; this was held, as respects the particular debt thus created, to be a repeal of any pre-existing restrictions upon the power of taxation. See *supra*, §§ 1377, 1380.

[2] Benoist *v.* St. Louis, 19 Mo. 179. But, in the aggregate, the charter limit must not be exceeded. *Ib.* The levy of a municipal tax exceeding the aggregate amount limited by the charter for a single year is illegal, and cannot be sustained. Wattles *v.* Lapeer, 40 Mich. 624. Where there is no restriction in the charter as to the time or amount of levy, the city council, on ascertaining that the first levy will prove insufficient, may levy an additional tax during the same year. Municipality No. 2 *v.* Orleans Cot. Press Co., 6 Rob. (La.) 411.

[3] *Ante*, chap. vii. § 235, and cases cited; State *v.* Branin, 23 N. J. L. 485.

[4] Adams *v.* Somerville, 2 Head (Tenn.), 363; Columbia *v.* Beasly, 1 Humph. (Tenn.) 232, 240; Shoalwater *v.* Armstrong, 9 Humph. (Tenn.) 217; Glass *v.* White, 5 Sneed (Tenn.), 475. *Instances of general law not applying to cities.* Langdon *v.* N. Y. Fire Dept., 17 Wend. (N. Y.) 234; Furman *v.* Knapp, 19 Johns. (N. Y.) 248; Municipality No. 2 *v.* N. O. & Car. R. R. Co., 10 Rob. (La.) 187; Municipality No. 2 *v.* Com. Bank of N. O., 5 Rob. (La.) 151. See Saunders *v.* McLin, 1 Ired. L. (N. Car.) 572; Kansas City *v.* Johnson, 78 Mo. 661; Savannah *v.* Jesup, 106 U. S. 563; *supra*, §§ 236, note, 1376, note.

support of the State government required railroad companies to pay into the State treasury, for every passenger transported, one mill for every mile of transportation, and then provided that "every company paying such tax shall not be assessed with *any tax* on its lands, buildings, or equipments." The charter of a city in that State gave it power to "raise money by taxes for the use of the city, provided the laws for that purpose be not repugnant to the laws of the State." It was held that the general tax law was intended to refer only to *State* taxation, and did not extend to municipalities; that the proviso in the city charter did not limit the power of the city to tax only such property or subjects as are taxed by the State; and that, under the above-mentioned power in its charter, the city could tax the real estate and personal property of the company permanently located therein; and the opinion was expressed that, as the residence or domicile of the company was in that city, it could also tax the rolling stock employed on the road of the company.[1]

§ 1406 (772). **Charter Power held to refer to General Law.** — But authority conferred by the charter of a village corporation to assess taxes "upon the freeholders and inhabitants of said village *according to law*," means according to the provisions and principles of the general tax law in force at the time the assessment is made.[2]

[1] Orange & A. R. R. Co. *v.* Alexandria, 17 Gratt. (Va.) 176; *ante*, § 235.

[2] Ontario Bank *v.* Bunnell, 10 Wend. (N. Y.) 186; approved, Buffalo *v.* Le Couteulx, 15 N. Y. 451, 455; American Transp. Co. *v.* Buffalo, 20 N. Y. 381, 391, *per Denio*, J.; State Bank of Indiana *v.* Madison, 3 Ind. 43; Gardner *v.* State, 21 N. J. L. 557; *ante*, § 235.

"There are numerous bodies in this State, like the village in question, which possess to a limited extent the power of local taxation, and, I presume, in every instance the principles and mode of imposing a tax are ascertained by reference to the *general law;* and we should lament to be obliged to give to their several powers such a construction as would prevent a participation in the improvements of the system of taxation which are made from time to time, and to be found only in the general law on the subject." *Per Nelson*, J., in Ontario Bank *v.* Bunnell, 10 Wend. (N. Y.) 186; *ante*, § 235.

How far the *general laws of the State* in regard to taxation *apply to villages, towns, and cities*, see Troy *v.* Mutual Bank, 20 N. Y. 387; American Transp. Co. *v.* Buffalo, 20 N. Y. 381, 388. In this last case, p. 391, *Denio*, C. J., lays down this proposition: "Where the general law is made applicable [to municipalities] in this way [that is, by words of reference to the general laws contained in their charters], any change in the general law would produce a corresponding change in the method of taxation by municipal corporations, the reference being to the law as it shall exist for the time being." Same principle. Ontario Bank *v.* Bunnell, 10 Wend. (N. Y.) 186; Buffalo *v.* Le Couteulx, 15 N. Y. 451; Davenport *v.* Miss. & Mo. R. R. Co., 16 Iowa, 348. The view of *Wright* and *Dillon*, JJ., in the case last cited, was subsequently adopted by the Supreme Court. Dunleith & D. Br. Co. *v.* Dubuque, 32 Iowa 427; State *v.* Mt. Pleasant, 8 Rich. L. (S. Car.) 214. Where a city is authorized "to levy a tax upon the taxpayers of the city, taxable under the revenue laws of the State," such tax must be levied upon the same persons and property as prescribed by the State revenue laws. The phrase "taxpayers of the city, taxable under the revenue

So authority in the charter of a city to "assess all *taxable* real and personal property within the city" refers to the general State law to ascertain what kind of property is subject to taxation, and the corporation has power to assess not only what was then taxable, but also whatever might afterwards be made subject to taxation by any general statute.[1]

§ 1407 (762). **Road Taxes and Compulsory Street Labor.** — In a previous chapter, the subject of municipal authority over streets, and also over roads and highways within the corporate limits of municipalities, has been considered.[2] Special provision for *road or street labor* is not unfrequently made in charters; and unless there be some restrictive constitutional provision, the legislature may empower the municipal authorities to require the inhabitants to pay road taxes, or perform road labor, which is in effect a tax.[3] Not only so, but the legislature has the constitutional power

laws of the State," designates both the person and subject of taxation. Barret *v.* Henderson, 4 Bush (Ky.), 255.

[1] Buffalo *v.* Le Couteulx, 15 N. Y. 451; Ontario Bank *v.* Bunnell, 10 Wend. (N. Y.) 186, *supra;* Davenport *v.* Miss. & Mo. R. R. Co., 16 Iowa, 348; *supra;* s. p. Tackaberry *v.* Keokuk, 32 Iowa, 155; Lot *v.* Ross, 38 Ala. 156, construing the words "taxable property." But in *South Carolina*, in cases arising under the charter of the city of Charleston, which is authorized "to assess those who hold *taxable property* within the same," the words "taxable property" were construed "to mean *all property not exempt by law from taxation*," whether the State taxes the particular kind of property or not for State purposes. The words are not equivalent to the phrase, "property taxed by the State"; but *quære?* State *v.* Charleston Council, 10 Rich. L. 240; Charleston *v.* St. Philip's Church, 1 McMul. Eq. (S. Car.) 139; State *v.* Charleston, 4 Strob. L. (S. Car.) 217; State *v.* Charleston, 1 Mill Const. (S. Car.) 40; State *v.* Charleston, 5 Rich. L. (S. Car.) 561; Charleston *v.* Condy, 4 Rich. L. (S. Car.) 254; State *v.* Charleston, 2 Speers L. (S. Car.) 719; *Ib.* 623.

[2] *Ante*, chap. xxiv. §§ 1120 *et seq.*

A uniform road land "tax of four dollars to each quarter section of land," irrespective of value, was sustained, there being no constitutional limitation in respect to the rule of apportionment of the public burdens. Burlington & M. R. R. Co. *v.* Lancaster County, 4 Neb. 293.

[3] It has been held that *compulsory labor* upon the public roads is *not a tax*, but a *duty* like service upon juries, &c., which may be required to be rendered to the State without compensation. Pleasant *v.* Kost, 29 Ill. 490; Fox *v.* Rockford, 38 Ill. 451; Dale *v.* Irwin, 78 Ill. 170, 183; State *v.* Sharp, 125 N. Car. 628. But other cases seem to assimilate the burden or obligation to taxation. A statute which requires compulsory road labor by the residents of the road districts, with the privilege of providing a substitute or paying a stipulated sum in lieu of personal service, is not "levying taxes by the poll" within the prohibition of the *Maryland* Constitution. Short *v.* State, 80 Md. 392. See to the same effect under the *Ohio* Constitution, Dennis *v.* Simon, 51 Ohio St. 233. But in *Nevada*, it was held that the performance of road duty, although a service, is an exercise of the taxing power. A statute which requires each resident of a road district to pay an annual road tax of four dollars imposes a capitation or poll tax, and comes within constitutional provisions regulating the amount of the poll taxes and their application. Hassett *v.* Walls, 9 Nev. 387. In Lewin *v.* State, 77 Ala. 45, the word "*road-tax*" in a statute

to authorize a city corporation to levy taxes or expend money to improve public roads outside of, but leading into, the city.[1] And the grant in the charter of a city of power to require road labor from all male residents, between certain ages, is not an infringement of the provision of the State Constitution which requires "that the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of his property," the court being of the opinion that this clause was intended to direct a uniform mode of taxing property, but not to deprive the legislature of the power to resort to other species of taxation if it saw fit to do so.[2]

conferring certain exemptions was construed as meaning *road-duty*, any other interpretation of the word depriving it of all operative effect.

The compulsory performance of road work upon an assessment payable in labor is *not involuntary servitude* within the meaning of constitutional provisions prohibiting such servitude. *In re* Dassler, 35 Kan. 678. See also State *v.* Topeka, 36 Kan. 76; *In re* McCort, 52 Kan. 18; Topeka *v.* Boutwell, 53 Kan. 20; Dennis *v.* Simon, 51 Ohio St. 233. Labor on the roads is a "necessary expense" within the meaning of the provisions of the *North Carolina* Constitution, and the levy of a tax therefor may be authorized without a previous vote of the people. Crocker *v.* Moore, 140 N. Car. 429. As to the constitutionality of a special system for working roads under the North Carolina Constitution, see State *v.* Godwin, 123 N. Car. 697. A *highway tax* cannot be imposed without express legislative authority. Ryerson *v.* Laketon, 52 Mich. 509. Being the performance of a duty, according to the decisions, sickness causing inability to perform road labor, is a full defence to an indictment for neglecting to do so. State *v.* Covington, 125 N. Car. 641. Under a statute which requires labor of "able bodied" persons, a person who is unable to perform the labor is not liable. Martin *v.* Gadd, 31 Iowa, 75. See further as to liability to road duty under statute, Fanning *v.* Wilkes County, 119 Ga. 315. Persons *temporarily sojourning* within a town are not subject to road duty. Chinese Tax Cases, 14 Fed. Rep. 338; Spann *v.* State, 14 Ala. 588; Taylor *v.* State, 147 Ala. 131; State *v.* Hinton, 131 N. Car. 770. Compare State *v.* Johnston, 118 N. Car. 1188.

Necessity and sufficiency of notice to perform road labor. See State *v.* Wainwright, 60 Ark. 280; Sims *v.* Hutcheson, 72 Ga. 437; McDonald *v.* Madison County, 43 Ill. 22; Chicago & N. W. R. Co. *v.* People, 171 Ill. 525; Chicago & N. W. R. Co. *v.* People, 183 Ill. 196; Chicago & E. I. R. Co. *v.* People, 200 Ill. 237; State *v.* Yoder, 129 N. Car. 544; State *v.* Telfair, 130 N. Car. 645. *Indictment* for neglect to perform road duty. See State *v.* Sharp, 125 N. Car. 628. *Enforcement* of road labor *by fine.* See State *v.* Cox, 52 La. An. 2049. To enable it to enforce street labor or the payment of a tax in lieu thereof, a city may by ordinance require that boarding-house keepers shall furnish the names of boarders. Topeka *v.* Boutwell, 53 Kan. 20. Adoption of money tax by municipality in *lieu of road labor* under enabling statute. See Crawford *v.* Crow, 114 Ga. 282; Haisten *v.* Glower, 114 Ga. 992; McGinnis *v.* Ragsdale, 116 Ga. 245; Gordon County Road Com'rs *v.* Burns, 118 Ga. 112; Maxwell *v.* Willis, 123 Ga. 319; Ryerson *v.* Laketon, 52 Mich. 509. Perrizo *v.* Stephenson, 141 Mich. 167.

[1] Skinner *v.* Hutton, 33 Mo. 244. The legislature of the State has the power, unless expressly restrained by the Constitution, to authorize a municipal corporation to levy a tax upon, or require a license from, persons using the paved streets of a city, for the purpose of keeping the same in repair. Chess *v.* Birmingham, 1 Grant (Pa.) Cas. 438; Brooklyn *v.* Breslin, 57 N. Y. 591. See Bennett *v.* Birmingham, 31 Pa. 15; *ante*, § 1164; *post*, § 1412.

[2] Sawyer *v.* Alton, 4 Ill. 130; Tipton *v.* Norman, 72 Mo. 380.

Power to the corporate authorities of a town "to make such rules, orders, regulations, and ordinances as to them shall seem meet for repairing streets," was held, in view of the general legislation on the same subject, to give authority to require the inhabitants *compulsorily to labor on the streets* for the purpose of repairing them, and this, although there was also express power (regarded by the court as cumulative) to levy a tax, to be expended, among other purposes, for street repairs.[1]

Under a constitutional provision requiring "all taxes to be as nearly equal as may be," the legislature may authorize *the levy of poll-tax* by municipal corporations, and may exempt the members of fire companies from the payment of such tax, — this construction being aided by the long acquiescence of the people in laws and charters authorizing such taxes.[2]

§ 1408 (768). **Taxing and Police Powers distinguished; Scope of Power to license Occupations.** — The *taxing power* is to be distinguished from the *police power*, the general nature of which has been before adverted to.[3] The power to license and regulate particular branches of business or specified matters is usually a police power; but when license fees or exactions are plainly imposed for the sole or main purpose of revenue, they are, in effect, taxes.[4] The authority to license and regulate various enumerated matters is very generally

[1] State *v.* Halifax, 4 Dev. L. (N. Car.) 345.

[2] Faribault *v.* Misener, 20 Minn. 396. In Thurston County *v.* Tenino Stone Quarries, 44 Wash. 351, it was held (citing text), that the Constitution of Washington does not require uniformity in the levy of poll-taxes; and that a poll-tax restricted to males over twenty-one years and under fifty years was based on a reasonable and proper classification, and was valid. But compare State *v.* Ide, 35 Wash. 576, where a statute imposing a poll-tax, but exempting members of volunteer fire companies therefrom, was held to be void for lack of uniformity. *Statutory exemptions* from road labor. *Constitutionality.* See State *v.* Womble, 112 N. Car. 862. Exemptions prohibited by *Mississippi* Constitution. Chidsey *v.* Scranton, 70 Miss. 449. Exemptions to members of *fire companies.* Lewin *v.* State, 77 Ala. 45; Porter *v.* State, 141 Ind. 488; Leedy *v.* Bourbon, 12 Ind. App. 486. Members of *National Guard* of State. See Jackson *v.* State, 101 Tenn. 138. Exemptions of *railroad employees* under railroad charters. See Johnson *v.* State, 88 Ala. 176; State *v.* Womble, 112 N. Car. 862.

[3] *Ante*, chap. viii. § 141. Index — *Licenses; Police Power and Regulations; Telegraph and Telephone Companies.* The distinction between the two powers is well stated by *Depue*, J., State *v.* Hoboken, 33 N. J. L. 280, cited *infra; supra*, § 1379.

[4] *Ante*, chap. xvi. §§ 661–676; Ward *v.* Maryland, 12 Wall. (U. S.) 418, *per Clifford*, J.; St. Louis *v.* Spiegel, 75 Mo. 145, citing text; State *v.* Bengsch, 170 Mo. 81, 109, citing text. An ordinance prohibiting all persons, including druggists, from selling spirituous liquors without having first obtained a license, is not void as in restraint of trade; and such a license may be exacted as a condition of a druggist doing business, it being required not as a tax, but under the police power. Rochester *v.* Upman, 19 Minn. 108; *ante*, § 276.

conferred upon the municipal councils, and there is, as we have seen in a former chapter, some difference of judicial opinion as to the extent of power thus conferred, particularly in reference to using it for purposes of revenue.[1] Ordinarily, the mere power to license or to subject to police regulations, does not give the power to tax distinctly for revenue purposes;[2] but it may give the power when such appears from the nature of the subject-matter, and upon the whole charter or enactment, to have been the legislative intent, but not otherwise.[3] Taxes upon occupations or businesses are usually

[1] *Ante*, chap. xvi. §§ 661–676, and cases there cited. *License fee* for carrying on a business or vocation is a tax only when revenue is the main object for which it is imposed. St. Louis *v.* United Railways Co., 210 U. S. 266, 273; St. Louis *v.* Spiegel, 75 Mo. 145, 146; State *v.* Bengsch, 170 Mo. 81, 109. The *distinction* between "police regulation" and "taxation for revenue" is fully considered and illustrated by *Gray* in his recent work on *Limitations of Taxing Power and Public Indebtedness.* Index — *Police Power and Regulations; Telegraph and Telephone Companies.* "When authority is given to require the possession of a license as a condition for selling, a reasonable fee, to cover probable expenses, can be demanded. But the exaction of sums in excess of such expenses, and graduated by the amount of business done, can be nothing else than a tax upon such business." *Per Knapp*, J., in Muhlenbrinck *v.* Long Branch Com'rs, 42 N. J. L. 364, 369.

[2] Van Hook *v.* Selma, 70 Ala. 36; Fayetteville *v.* Carter, 52 Ark. 301; Arkadelphia Lumber Co. *v.* Arkadelphia, 56 Ark. 370, 374; Fort Smith *v.* Hunt, 72 Ark. 556, 563; Stamps *v.* Burk, 83 Ark. 351, 354; Waters-Pierce Oil Co. *v.* Hot Springs, 85 Ark. 509; New Haven *v.* New Haven Water Co., 44 Conn. 105; State *v.* Glavin, 67 Conn. 29; Jacksonville *v.* Ledwith, 26 Fla. 163; Atkins *v.* Phillips, 23 Fla. 281, 298; Burlington *v.* Putnam Ins. Co., 31 Iowa, 102; Burlington *v.* Bumgardner, 42 Iowa, 673, 674; Ottumwa *v.* Zekind, 95 Iowa, 622, 626; Easterly *v.* Irwin, 99 Iowa, 694; Vansant *v.* Harlem Stage Co., 59 Md. 330, 335; State *v.* Rowe, 72 Md. 548; People *v.* Russell, 49 Mich. 617; Chaddock *v.* Day, 75 Mich. 527; Saginaw *v.* Saginaw Circuit Judge, 106 Mich. 32; Littlefield *v.* State, 42 Neb. 223; Benson *v.* Hoboken, 33 N. J. L. 280; North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71; Muhlenbrinck *v.* Long Branch Com'rs, 42 N. J. L. 364; Clark *v.* New Brunswick, 43 N. J. L. 118; Johnson *v.* Asbury Park, 60 N. J. L. 427, 430; Blanke *v.* Hoboken Board of Health, 64 N. J. L. 42; Cape May *v.* Cape May Transportation Co., 64 N. J. L. 80; Fielders *v.* North Jersey St. R. Co., 68 N. J. L. 343, 357; State *v.* Bean, 91 N. Car. 554; State *v.* Moore, 113 N. Car. 697; Stull *v.* De Mattos, 23 Wash. 71. Index — *Licenses; Police Power and Regulations.*

[3] *Ib.*; St. Joseph *v.* Ernst, 95 Mo. 360; Mulcahy *v.* Newark, 57 N. J. L. 513, 515; Baker *v.* Cincinnati, 11 Ohio St. 534. See also *ante*, § 276; Essex County *v.* Barber, 6 N. J. L. 64. Power to license inns gives no power to tax. *Ib.* Same principle. Kip *v.* Paterson, 26 N. J. L. 298; New York *v.* Second Av. R. Co., 32 N. Y. 261; St. Louis *v.* Boatmen's Ins. & T. Co., 47 Mo. 150, 163; Commonwealth *v.* Markham (dog ordinance), 7 Bush (Ky.), 486; Van Hook *v.* Selma, 70 Ala. 361 (license for selling goods); Davis *v.* Macon, 64 Ga. 128; *ante*, chap. xvi. Thus, agreeably to the rule stated in the text, it was held in the State *v.* Hoboken, 33 N. J. L. 280, that the power given to a municipal corporation to *regulate streets* and the *building of vaults* will not authorize an exaction or assessment which amounts to a tax upon the owners of lots for permission to build vaults in the streets in front of their property, or to improve the streets for their more convenient use. *Supra*, § 1378.

Power to license *vending of intoxicating liquors* within a short distance of the municipality valid as a police regulation. Falmouth *v.* Watson, 5 Bush (Ky.), 660; Mason *v.* Lancaster,

collected by means of licenses. But a revenue tax upon an occupation does not necessarily imply a license.[1] Under delegated authority a municipality may impose an occupation tax upon a business or profession, although the business or profession may already have been authorized or licensed by the authority of the State.[2]

4 Bush (Ky.), 406. Where, by its charter, a city is authorized to assess a tax on licenses to do certain kinds of business, it may require the *payment* of the tax as *a condition precedent* to issuing the license. Sights *v.* Yarnalls, 12 Gratt. (Va.) 292. Property taxed for revenue purposes may also be subject to license tax. St. Louis *v.* Bucher, 7 Mo. App. 169. Statutory power to levy and collect a "license tax" authorizes the imposition of a tax for purposes of revenue. Fretwell *v.* Troy, 18 Kan. 271; Newton *v.* Atchison, 31 Kan. 151, 156; *In re* Chipchase, 56 Kan. 357; *In re* Martin, 62 Kan. 638; Kansas City *v.* Overton, 68 Kan. 560, 564; St. Joseph *v.* Ernst, 95 Mo. 360, 366. Power conferred by statute upon a municipality "to grant licenses for any lawful purpose and to fix by ordinance the amount to be paid therefor" authorizes the exaction of *a license tax for revenue as well as license fees* under the police power. Fleetwood *v.* Read, 21 Wash. 547, 552. See to the same effect, Adams Express Co. *v.* Owensboro, 85 Ky. 265, 268; Flanagan *v.* Plainfield, 44 N. J. L. 118.

The provision of the *Kentucky Constitution*, 1899, § 181, permitting the legislature to impose or to delegate to municipalities the power to impose and collect "license fees on stock used for breeding purposes, on franchises, trades, occupations, and professions" construed upon the context as permitting the imposition of license and occupation taxes for revenue purposes. Baker *v.* Lexington (Ky.), 53 S. W. Rep. 16. See also Commonwealth *v.* Fowler, 96 Ky. 166; Levi *v.* Louisville, 97 Ky. 394; Wilson *v.* Lexington, 105 Ky. 765. Power "to license for purposes of regulation and revenue" every kind of business, authorizes the imposition of license or occupation taxes for revenue. Stull *v.* De Mattos, 23 Wash. 71. In *Illinois*, it seems to be the rule that mere power to regulate a calling or business without express power of taxation, authorizes the exaction of license fees or taxes which will yield a revenue. See Braun *v.* Chicago, 110 Ill. 186; United States Distilling Co. *v.* Chicago, 112 Ill. 19; Dennehy *v.* Chicago, 120 Ill. 627; Kinsley *v.* Chicago, 124 Ill. 359; Banta *v.* Chicago, 172 Ill. 204, 218, 220; Price *v.* People, 193 Ill. 114. But compare Bessette *v.* People, 193 Ill. 334.

[1] "Taxes upon business are usually collected in the form of license fees; and this may possibly have led to the idea that seems to have prevailed in some quarters, that a tax implied a license. But there is no necessary connection whatever between them. A business may be licensed and yet not taxed, or it may be taxed and yet not licensed. And so far is the tax from being necessarily a license, that provision is frequently made by law for the taxation of a business that is carried on under a license existing independent of the tax." *Per Cooley*, J., in Youngblood *v.* Sexton, 32 Mich. 406, 425. "An *occupation tax* (imposed in the form of a license as in the case before us) *does not create a contractual relation* between the municipal corporation and the licensee so as to absolutely require the corporation to permit the pursuit of the occupation for the whole period of the license. The corporation in the exercise of the police power may even prohibit the occupation during the currency of the term of the license, without thereby impairing a contractual obligation of the city. But whether or not, in such event, the city would be bound to return the license fee need not be decided in this case." St. Charles *v.* Hackman, 133 Mo. 634, 642, *per Barclay*, J., citing Phalen *v.* Virginia, 8 How. (U. S.) 163; Ætna F. Ins. Co. *v.* Reading, 119 Pa. 417; Sullivan *v.* Borden, 163 Mass. 470.

[2] Wendover *v.* Lexington, 15 B. Mon. (Ky.) 258; State *v.* Bennett, 19 Neb. 191; Napier *v.* Hodges, 31 Tex. 287; Ould *v.* Richmond, 23 Gratt. (Va.) 464. The fact that *lawyers are admitted and licensed to practice by the courts* does not exempt them from oc-

When considered as a tax, an occupation tax comes within th general proposition concerning taxation that it knows no limit othe than the necessities of the public treasury and the discretion withi constitutional limits of the taxing power.[1] But the decisions, al though they have not clearly defined the limits of the taxing powe support the view that occupation or business taxes, particularl when imposed by municipal ordinance, must stop short of confisca tion, and must not be so oppressive as to prohibit the individu from following the ordinary and usual useful occupations.[2] But a

cupation taxes, imposed by a municipality under statutory authority. *Ex parte* Williams, 31 Tex. Crim. Rep. 262; Ould *v.* Richmond, 23 Gratt. (Va.) 464, 471. A city may, when authorized by statute, exact *both a license fee* as a condition of the right to do business, *and a tax* on the occupation. State *v.* Bennett, 19 Neb. 191. But if the statute expressly declares that the payment of a license tax to the State shall preclude any other privilege tax, no license tax can be imposed by a municipality. Douglass *v.* Anniston, 104 Ala. 291.

[1] In Fretwell *v.* Troy, 18 Kan. 271, 274, 275, *Brewer*, J., in discussing the validity of *a license tax of five dollars per day on auctioneers*, said: "Regarded as a tax, it comes within the general proposition concerning taxation, that it knows no limit other than the necessities of the public treasury, and the discretion of the taxing power. Or perhaps more correctly, it may be said in respect to this, as a municipal tax, that the whole amount of the tax does not prove its invalidity. The amount of the city indebtedness, the necessary expenditures of the municipality, may require an equally high rate of taxation upon all employments and all property, so that however large this might seem to be, being in harmony with all other taxation, and necessary to meet the legitimate demands on the treasury, it could not be said to be unreasonable. This seems to avoid the argument of the learned counsel, that such a license amounting in a single year to over fifteen hundred dollars is oppressive, unreasonable, and in restraint of trade. For while it may not be true that a city having authority to collect revenue by license may impose any sum, however large, as license, and thus in effect destroy certain kinds of business, yet before i such a case an ordinance imposing license is declared void on account the amount therefor, it should appe that the necessities of the city do n require so large a revenue, or that the has been an unjustifiable attempt t discriminate against certain kinds business by casting the whole burde of taxation upon them."

[2] Stull *v.* De Mattos, 23 Wash. 71 *In re* Garfinkle, 37 Wash. 650, 65 The Supreme Court of *Kansas* in hold ing that the amount of a license ta is left to legislative judgment and di cretion, said, *per Johnston*, J., "We d not say that such discretion is abs lutely unreasonable. If the licens tax were flagrantly unreasonable, u just and oppressive, courts migh properly interfere; but we have n such case before us." *In re* Martin, 6 Kan. 638, 640. See also Chipchas *In re*, 56 Kan. 357; Steiner *v.* Ligget 67 Kan. 822. As to *reasonableness* a a prerequisite to the validity of mu nicipal ordinances, see *ante*, chap. x on Ordinances. In Caldwell *v.* Lin coln, 19 Neb. 569, it is said that a li cense tax imposed by ordinance mus be reasonable in amount considerin the nature of the business, and n so oppressive as to prohibit. Whe the statute requires that license taxe shall be just and reasonable, an ord nance imposing a tax which is a pa pable attempt to destroy and forb a legitimate and commendable bus ness, is void. But the evidence mu establish a flagrant case of excessi and oppressive abuse of power by th city authorities. Lyons *v.* Cooper, 3 Kan. 324. But compare *In re* Chi chase, 56 Kan. 357; Steiner *v.* Ligget 67 Kan. 822; Lebanon *v.* Zandito 75 Kan. 273, 274.

a general rule, the amount of the tax must be determined by the legislative discretion of the municipal authorities.[1]

§ 1409. **Taxation of Vocations; Fourteenth Amendment as to Equal Protection of the Laws.** — The *provision of the Fourteenth Amendment to the Federal Constitution*, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all accustomed, proper, and reasonable ways. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products. These exactions, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature, or of the people of the State in framing their Constitution.[2] The *Fourteenth Amendment* does not require that the States shall tax all persons and property, or all trades and vocations within their respective jurisdictions. It does not prevent the legislature of a State from classifying occupations and vocations for purposes of taxation. It only requires the same methods to be applied impartially to all the constituents of the class which is subjected to taxation, so that the law shall operate equally and uniformly upon all persons in similar circumstances.[3] But the *right to classify is not unlimited*

[1] *In re* Martin, 62 Kan. 638, 640; Kansas City *v.* Overton, 68 Kan. 560; Fleetwood *v.* Read, 21 Wash. 547; Stull *v.* De Mattos, 23 Wash. 71; *In re* Garfinkle, 37 Wash. 650, 655. The reasonableness or unreasonableness of a license tax cannot be determined by the extent of the business of a single individual. There may be competition, or negligence on his part, or other considerations affecting the extent of his business. Nashville, C. & St. L. R. Co. *v.* Attalla, 118 Ala. 362; Nashville, C. & St. L. R. Co. *v.* Alabama City, 134 Ala. 414.

[2] Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 237, *per* Mr. Justice *Bradley*.

[3] Kentucky Railroad Tax Cases, 115 U. S. 321, 337; Home Ins. Co. *v.* New York, 134 U. S. 594, 606; Pacific Express Co. *v.* Seibert, 142 U. S. 339; Magoun *v.* Illinois Trust & Sav. Bank, 170 U. S. 283, 293; American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89; Kehrer *v.* Stewart, 197 U. S. 60, aff'g 117 Ga. 969; Cook *v.* Marshall County, 196 U. S. 261; Savannah, T. & I. H. R. Co. *v.* Savannah, 198 U. S. 392; Armour Packing Co. *v.* Lacy, 200 U. S. 226.

Classification of persons, property or transactions *for purposes of taxation* must be based on some *real distinction* to satisfy the constitutional guarantee of equality. The general rule of equality is that all persons subject to legislation "shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the limitations imposed." Hayes *v.* Missouri, 120 U. S. 68, 71. Another statement of the rule is that equality is secured "if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." Duncan *v.* Missouri, 152 U. S. 377, 382. In Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181, 188, it was said: "The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for

and unqualified; it is subject to the same restrictions and qualific tions as classifications which are permitted under other constit

discriminating and hostile legislation." In Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 560, 561, Mr. Justice *Harlan* said: "The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. . . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground — some difference which bears a just and proper relation to the attempted classification — and is not a mere arbitrary selection.' Gulf, C. & S. F. R. Co. *v.* Ellis, 165 U. S. 150, 155, 159, 160, 165." In the case cited (Gulf, Colorado & Santa Fé R'y Co. *v.* Ellis) it was said of the statute there involved, which provided for the recovery of attorneys' fees by successful litigants in actions against railway companies only: "The statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties — duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or o class of individuals, and visit a pe alty upon them which is not impos upon others guilty of like delinquenc this statute cannot be sustained. *B arbitrary selection can never be justifi by calling it classification. The equ protection demanded by the Fourteen Amendment forbids this"* (165 U. S. p. 159).

Classification for the purpose taxation is subject to this rule of equ ity. In Santa Clara County *v.* Sout ern Pac. R. Co., 18 Fed. Rep. 385, M Justice *Field* said: "The first secti of the Fourteenth Amendment plac a limit upon all the powers of t State, including among others th of taxation." . . .

"Unequal taxation, so far as can be prevented, is, therefore, wi other unequal burdens, prohibited b the amendment. There undoubted are, and always will be, more or le inequalities in the operation of general legislation arising from t different conditions of persons fro their means, business, or position life, against which no foresight c guard. But this is a very differe thing, both in purpose and effec from a carefully devised scheme produce such inequality; or a schem if not so devised, necessarily produci that result. Absolute equality m not be attainable, but gross and d signed departures from it will nece sarily bring the legislation authorizi it within the prohibition. The amen ment is aimed against the perpetr tion of injustice, and the exercise arbitrary power to that end. T position that unequal taxation is n within the scope of its prohibito clause would give to it a singular mea ing. It is a matter of history th unequal and discriminating taxatio levelled against special classes, has be the fruitful means of oppressions, a the cause of more commotions a disturbance in society, of insurre tions and revolutions, than any oth cause in the world. It would, indee as counsel in the San Mateo Ca ironically observed, be a charmi spectacle to present to the civiliz world, if the amendment were to rea as contended it does in law: 'Nor sh

tional provisions. The classification must be reasonable, and based upon facts which bear a just and proper relation to the purposes of the enactment; the right to classify for purposes of taxation does not justify or warrant clear and hostile discriminations against particular classes and persons.[1]

any State deprive any person of his property without due process of law, *except it be in the form of taxation;* nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation.'* No such limitation can be thus ingrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws" (pp. 397, 399). Accordingly, a provision of the California Constitution which discriminated in taxation against railroad and other *quasi*-public corporations, was declared invalid as denying to them the equal protection of the laws.

In Central R. Co. *v.* State Board of Assessors, 48 N. J. L. 1, a State tax upon the property of railroads and canal companies, and not upon other property, was declared unconstitutional, Chief Justice *Beasley* saying, at pages 19, 20: "Its effect simply is to segregate certain property from the mass of similar property; not to put upon it a proportionate part of a general tax, but to charge the part so segregated with the whole amount of a separate tax. . . . We think this is plainly arbitrary selection and not classification." In Matter of Pell, 171 N. Y. 48, a tax was held invalid for the reason among others that it was confined to a limited class of remainder estates and therefore an arbitrary discrimination. It is true that the constitutional requirement of equality is applied more sparingly and reluctantly to tax laws than to general legislation, but nevertheless it is applicable to them. Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 562, 563. In Magoun *v.* Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 296, Mr. Justice *McKenna*, referring to the rule of equality required by the Fourteenth Amendment, said: "The rule is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may." He also said, "There is, therefore, no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

For purposes of a tax on gross receipts, a *distinction* may be made between *express companies* conveying goods under contract with railroad and steamboat companies, and *railroad and steamboat companies* engaged in the ordinary transportation of merchandise. Pacific Express Co. *v.* Seibert, 142 U. S. 339. An exception in a statute imposing a license tax on the "business of refining sugar and molasses," of "planters and farmers grinding and refining their own sugar and molasses," does not violate the Fourteenth Amendment. American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89. In Kidd *v.* Alabama, 188 U. S. 730, 733, in discussing the *reasonableness of classification* for purposes of taxation, Mr. Justice *Holmes* said, "What is reasonable is a question of practical details, into which fiction cannot enter." In Cook *v.* Marshall County, 196 U. S. 261, 274, Mr. Justice *Brown* said, that, in laws imposing taxes "the right of classification is held to permit of discrimination between different trades and callings when not obviously exercised in a spirit of prejudice or favoritism." A classification which distinguishes between ordinary *street railways* and *steam railroads* held, under the facts of the case, not to violate the Fourteenth Amendment. Savannah, T. & I. H. R. Co. *v.* Savannah, 198 U. S. 392.

[1] In Bell's Gap R. Co. *v.* Pennsyl-

§ 1410. **Taxation of Vocations; Constitutional Provisions.** — In the absence of any constitutional prohibition or restriction, *it is within the undoubted power of the legislature* to impose a tax upon employments, occupations, or vocations, or to authorize municipal authorities so to do.[1] The usual provisions in the

vania, 134 U. S. 232, 237, Mr. Justice *Bradley* said: "Clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise." In Gulf, C. & S. F. R. Co. *v.* Ellis, 165 U. S. 150, 165, Mr. Justice *Brown* said: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground, — some difference which bears a just and proper relation to the attempted classification, — and is not a mere arbitrary selection." In American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89, 92, Mr. Justice *Brown* said: "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction of principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations, having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes."

[1] Osborne *v.* Mobile, 44 Ala. 493; Southern Exp. Co. *v.* Mobile, 49 Ala. 404; Goldthwaite *v.* Montgomery, 50 Ala. 486; *Ex parte* Montgomery, 64 Ala. 463; Van Hook *v.* Selma, 70 Ala. 361; Nashville, C. & St. L. R. Co. *v.* Attalla, 118 Ala. 362; Gamble *v.* Montgomery, 147 Ala. 682; Wiggins *v.* Chicago, 68 Ill. 372; Huck *v.* Chicago & A. R. Co., 86 Ill. 352; Howland *v.* Chicago, 108 Ill. 496; Braun *v.* Chicago, 110 Ill. 186; Banta *v.* Chicago, 172 Ill. 204; Fretwell *v.* Troy, 18 Kan. 271; Newton *v.* Atchison, 31 Kan. 151; Girard *v.* Bissell, 45 Kan. 66, 68; Mason *v.* Lancaster, 4 Bush (Ky.), 406; Kniper *v.* Louisville, 7 Bush (Ky.), 599; State *v.* McVea, 26 La. An. 151; Rohr *v.* Gray, 80 Md. 274; State *v.* Applegarth, 81 Md. 293; Applegarth *v.* State, 89 Md. 140; American Un. Exp. Co. *v.* St. Joseph, 66 Mo. 675, 680; St. Louis *v.* McCann, 157 Mo. 301, 307; State *v.* Camp Sing, 18 Mont. 128; State *v.* Bennett, 19 Neb. 191; Magneau *v.* Fremont, 30 Neb. 843, 852; Western Un. Tel. Co. *v.* Fremont, 39 Neb. 692; German American F. Ins. Co. *v.* Minden, 51 Neb. 870, 874; York *v.* Chicago, B. & Q. R. Co., 56 Neb. 572; *Ex parte* Robinson, 12 Nev. 263; State *v.* Hayne, 4 S. Car. 403; State *v.* Columbia, 6 S. Car. 1; Charleston *v.* Oliver, 16 S. Car. 49, 51; Norfolk *v.* Griffith-Powell Co., 102 Va. 115, 119; Gordon *v.* Newport News, 102 Va. 649.

"The *power of the State to tax professions* is unquestioned, Simmons *v.* State, 12 Mo. 268; St. Louis *v.* Steinberg, 4 Mo. App. 453 (tax on lawyers in the shape of license sustained); and the State may delegate the authority [to municipal corporations], but it should be done in clear and unambiguous terms." *Per Wagner*, J., St. Louis *v.* Laughlin, 49 Mo. 559.

In *Arkansas*, the State cannot impose a license tax for the purpose of raising a State revenue, but there is no restraint on the power of the legislature to authorize counties and towns and cities to regulate or tax callings and pursuits. McGehee *v.* Mathis, 21 Ark. 40; Straub *v.* Gordon, 27 Ark. 625; Little Rock *v.* Barton, 33 Ark. 436; Little Rock *v.* Board of Impts., 42 Ark. 152, 160; Baker *v.* State, 44 Ark. 134, 137; Little Rock *v.* Prather, 46 Ark. 471; State *v.* Washmood, 58 Ark. 609.

California. The *Constitution* of this State provides that "The legislature

Constitutions of the different States concerning taxation do not prohibit the legislatures from imposing or authorizing municipal authorities to impose taxes upon trades, special professions, and occupations.[1] Many of these constitutional provisions are construed as being applicable only to the taxation of property, and as having no application to the taxation of occupations or businesses.[2] But the courts have construed *the constitutional provi-*

shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purpose, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." Const. 1879, Art. xi. § 12. This provision applies to occupation taxes and license fees as well as to taxes upon property, and precludes the legislature from itself imposing an occupation tax or license fee for local or municipal purposes. People *v.* Martin, 60 Cal. 153; San Francisco *v.* Liverpool & L. & G. Ins. Co., 74 Cal. 113. See also El Dorado County *v.* Meiss, 100 Cal. 268. Taxation by license of occupations and businesses for municipal purposes is a "municipal affair," for which, under the provisions of the California Constitution, provision may be made in a freeholder's charter. *Ex parte* Braun, 141 Cal. 204, 210; *Ex parte* Helm, 143 Cal. 553; *Ex parte* Lemon, 143 Cal. 558; *Ex parte* Jackson, 143 Cal. 564.

The right to impose *specific taxes* is recognized by the Constitution of *Michigan*. Walcott *v.* People (taxation of express companies), 17 Mich. 68; Williams *v.* Detroit (paving tax), 2 Mich. 560; Woodbridge *v.* Detroit, 8 Mich. 274; Youngblood *v.* Sexton (tax on liquor dealers), 32 Mich. 406. An occupation tax on the *business of publishing a newspaper* does not infringe the freedom of the press. *In re* Jager, 29 S. Car. 438; Norfolk *v.* Norfolk Landmark Pub. Co., 95 Va. 564.

National Banks. It has been held that under the *legislation of Congress* the only tax which can be imposed by authority of the State is on the shares of national banks, and that the *legislature* cannot authorize a municipality to levy a license or occupation tax upon national banks. Carthage *v.* First Nat. Bank, 71 Mo. 508. See also Chattanooga Nat. Bank *v.* Chattanooga, 8 Heisk. (Tenn.) 814.

[1] Mobile *v.* Yuille, 3 Ala. 137; Cousins *v.* State, 50 Ala. 113; Goldthwaite *v.* Montgomery, 50 Ala. 486; Little Rock *v.* Prather, 46 Ark. 471, 479, citing text; Sacramento *v.* Crocker, 16 Cal. 119; San Jose *v.* San Jose & S. C. R. Co., 53 Cal. 476; Rome *v.* McWilliams, 52 Ga. 251; Wiley *v.* Owens, 39 Ind. 429; McGrath *v.* Newton, 29 Kan. 364; Mason *v.* Lancaster, 4 Bush (Ky.), 406 (tavern keeper); Elliott *v.* Louisville, 101 Ky. 262, 266, quoting text; Baton Rouge *v.* Spalding, 8 La. An. 87; The Germania *v.* State, 7 Md. 1 (taxation of amusements); Keller *v.* State, 11 Md. 525 (taxation by license on beer manufacturers); Simmons *v.* State, 12 Mo. 268; Sears *v.* West, 1 Murph. (N. Car.) 291 (billiard tables); Concord *v.* Patterson, 8 Jones L. (N. Car.) 182 (tax on retailers, &c.); State *v.* Schlier, 3 Heisk. (Tenn.) 281; Nashville *v.* Althrop, 5 Coldw. (Tenn.) 554; State *v.* Harrington, 68 Vt. 622, citing text (itinerant vendors); Gilkerson *v.* Frederick, 13 Gratt. (Va.) 577 (taxation of offices); Ould *v.* Richmond, 23 Gratt. (Va.) 464 (taxation of lawyers by municipal authority); Morrill *v.* State, 38 Wis. 428 (tax on peddlers).

[2] Capital City Water Co. *v.* Montgomery County Revenue Board, 117 Ala. 303; Phœnix Assur. Co. *v.* Montgomery Fire Dept., 117 Ala. 631, 646; Gaston *v.* O'Neal, 145 Ala. 484, 493; Birmingham *v.* Goldstein, 151 Ala. 473, 477; Little Rock *v.* Prather, 46 Ark. 471, 479; Fort Smith *v.* Scruggs, 70 Ark. 549, 554; People *v.* Coleman, 4 Cal. 46; High *v.* Shoemaker, 22 Cal. 363, 369; People *v.* McCreery, 34 Cal. 432, 448; *Ex parte* Hurl, 49 Cal. 557; Santa Barbara *v.* Stearns, 51 Cal. 499, 501; *Ex parte* Mirande, 73 Cal. 365, 375; Los Angeles *v.* Los Angeles Ind. Gas Co., 152 Cal. 765; Denver City R. Co. *v.* Denver, 21 Colo. 350; American Smelting & Refg. Co. *v.* People, 34

sions to be found in some States *that taxes shall be uniform* upon the same class of subjects, or upon persons and property within the jurisdiction of the body imposing the same as applying to occupation and privilege taxes.[1] Such constitutional provisions do *not preclude the classification of occupations* for purposes of taxation, and their requirements are satisfied if all the persons in a particular class of business are taxed alike or upon the same principle, although other and distinct vocations and businesses are not taxed or are taxed at a different rate.[2]

Colo. 240; Burch *v.* Savannah, 42 Ga. 596; Bohler *v.* Schneider, 49 Ga. 195; Home Ins. Co. *v.* Augusta, 50 Ga. 530; Weaver *v.* State, 89 Ga. 639, 642; State *v.* Doherty, 2 Idaho, 1105, 1110; Bright *v.* McCullough, 27 Ind. 223; State *v.* Applegarth, 81 Md. 293, 300; Union Trust Co. *v.* Wayne Probate Judge, 125 Mich. 487, 492; Clarksdale Ins. Agency *v.* Cole, 87 Miss. 637, 646; State *v.* French, 17 Mont. 54; State *v.* Camp Sing, 18 Mont. 128, 140; *Ex parte* Robinson, 12 Nev. 263; *Ex parte* Cohn, 13 Nev. 424; Johnson *v.* Loper, 46 N. J. L. 321, 325; Johnson *v.* Asbury Park, 58 N. J. L. 604; Standard Underground Cable Co. *v.* Attorney General, 46 N. J. Eq. 270; Baker *v.* Cincinnati, 11 Ohio St. 534, 540; Marmet *v.* State, 45 Ohio St. 63, 68; State *v.* Guilbert, 70 Ohio St. 229; Fleetwood *v.* Read, 21 Wash. 547; Stull *v.* De Mattos, 23 Wash. 71; *In re* Garfinkle, 37 Wash. 650. In Youngblood *v.* Sexton, 32 Mich. 406, a tax levied by State statute on *liquor dealers* for the benefit of the municipality in which the business was carried on was sustained against various constitutional objections urged against it.

Maryland. The *Constitution* of this State provides "Every person in the State, or holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property; yet fines, duties, or taxes may properly and justly be imposed, or laid with a political view for the good government and benefit of the community." A *license tax on traders* is not a direct tax on property within the meaning of the first clause of this provision, but is a tax on the business or occupation of the trader or licensee under the last clause thereof. Rohr *v.* Gray, 80 Md. 274.

Kansas. The *constitutional requirement* that "the legislature shall provide for *a uniform and equal rate of taxation*" does not apply to license taxes on employments or occupations. Newton *v.* Atchison, 31 Kan. 151, 155; Leavenworth *v.* Booth, 15 Kan. 627, 635; Ottawa County *v.* Nelson, 19 Kan. 234, 241; Francis *v.* Atchison, T. & S. F. R. Co., 19 Kan. 303, 311; *In re* Martin, 62 Kan. 638, 640.

A *constitutional provision* that taxation upon property shall be according to *value*, does *not* affect occupation or business taxes. McCaskell *v.* State, 53 Ala. 510; *Ex parte* Montgomery, 64 Ala. 463; Goldsmith *v.* Huntsville, 120 Ala. 182; Parsons *v.* People, 32 Colo. 221; Cooper *v.* District of Columbia, 11 D. C. 250; Walters *v.* Duke, 31 La. An. 668; Morehouse *v.* Brigham, 41 La. An. 665; Rohr *v.* Gray, 80 Md. 274; Kitson *v.* Ann Arbor, 26 Mich. 325; Simmons *v.* State, 12 Mo. 268.

[1] Wiggins *v.* Chicago, 68 Ill. 372, 378; St. Louis *v.* Spiegel, 75 Mo. 145; St. Louis *v.* Consolidated Coal Co., 113 Mo. 83; Kansas City *v.* Grush, 151 Mo. 128, 134; Magneau *v.* Fremont, 30 Neb. 843, 854; Pullman Palace Car Co. *v.* State, 64 Tex. 274; Hoefling *v.* San Antonio, 85 Tex. 228; *Ex parte* Jones, 38 Tex. Crim. Rep. 482; *Ex parte* Overstreet, 39 Tex. Crim. Rep. 474; Rainey *v.* State, 41 Tex. Crim. Rep. 254.

[2] Singer Mfg. Co. *v.* Wright, 33 Fed. Rep. 121, 126; Los Angeles *v.* Los Angeles Ind. Gas Co., 152 Cal. 765; Cutliff *v.* Albany, 60 Ga. 597; Savannah *v.* Weed, 84 Ga. 683; Weaver *v.* State, 89 Ga. 639; McGhee *v.* State, 92 Ga. 21, 26; Carson *v.* Forsyth, 94 Ga. 617; Singer Mfg. Co. *v.* Wright, 97 Ga. 114; Wright *v.* Southern Bell Tel. Co., 127 Ga. 227, 229; Strater Bros. Tobacco Co. *v.* Commonwealth, 117 Ky. 604; American Un. Exp. Co. *v.* St. Joseph,

The *constitutional requirement of uniformity* does not necessitate the graduation of the tax in proportion to the business transacted. The fact that small traders or dealers are taxed at the same rate as large dealers or traders does not destroy the uniformity.[1] On the

66 Mo. 675; St. Louis *v.* Sternberg, 69 Mo. 289; St. Louis *v.* Bowler, 94 Mo. 630; Magneau *v.* Fremont, 30 Neb. 843, 854; Templeton *v.* Tekamah, 32 Neb. 542; Pittsburg *v.* Coyle, 165 Pa. 61; Commonwealth *v.* Moore, 25 Gratt. (Va.) 951; Morgan *v.* Commonwealth, 98 Va. 812; Newport News & O. P. R. & E. Co. *v.* Newport News, 100 Va. 157. See also Hill *v.* Abbeville, 59 S. Car. 396.

North Carolina. The *Constitution* of this State provides "Laws shall be passed taxing by uniform rule all moneys" and other property "according to its true value. The General Assembly may also tax trades, professions, franchises, and incomes, provided that no income shall be taxed when the property from which the income is derived is taxed." The court said that the express constitutional requirement of taxation by uniform rule quoted above did not in terms apply to a tax on trades and occupations, but that a tax thereon which is not uniform, as properly understood, would be inconsistent with natural justice and invalid. Such tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed. Gatlin *v.* Tarboro, 78 N. Car. 119; Puitt *v.* Gaston County, 94 N. Car. 709; State *v.* Powell, 100 N. Car. 525; State *v.* Moore, 113 N. Car. 697; State *v.* Worth, 116 N. Car. 1007; Rosenbaum *v.* Newbern, 118 N. Car. 83.

In *Pennsylvania*, in Durach's Appeal (power to tax saloon keepers to maintain police force), 62 Pa. 491, it is said that a special tax levied upon an individual or particular individuals would infringe the implied restrictions on the power of taxation; but in the exercise of this power persons and things may be classified, and it is sufficient if it includes all of a class within the taxing district. *Per Sharswood*, J.

The requirement of the *Texas Constitution* 1876, art. viii. § 2, that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax," *applies to municipal* as well as to *State* taxes. Hoefling *v.* San Antonio, 85 Tex. 228. A tax on *palace, sleeping, and dining cars* which are not owned by the railroad over or upon which the same are operated is not equal and uniform within the requirement of the *Texas Constitution* because of the exemption of similar cars owned and operated by the railroad company. Pullman Palace Car Co. *v.* State, 64 Tex. 274.

A license fee or tax on *meat dealers* of $100 in part of a city, and of $25 in the remainder of the city, is invalid under the requirement of the *Missouri Constitution* that taxes shall be uniform upon the same class of subjects within the territorial limits of the taxing authority. St. Louis *v.* Spiegel, 75 Mo. 145. The mere fact that there is only one person or firm in the class which is subjected to the tax does not destroy the uniformity. Standard Oil Co. *v.* Fredericksburg, 105 Va. 82. Under a power *to classify businesses, trades, &c.*, for taxation, persons conducting more than one of the classified occupations may be taxed for each, unless it appears that the custom of conducting them together is so universal as to justify the conclusion that they constitute but one business. Wilder *v.* Savannah, 70 Ga. 760; Keeley *v.* Atlanta, 69 Ga. 583. A law imposing a smaller license tax on proprietors of bars or drinking saloons kept on steamboats owned and registered in the State, than on the owners of bars kept on land, does not violate the clause of the Constitution prescribing equality and uniformity of taxation. State *v.* Rolle, 30 La. An. Part II. 991; *Ex parte* Montgomery, 64 Ala. 463.

[1] Magneau *v.* Fremont, 30 Neb. 843, 854. A uniform rate of tax upon the same calling or business regardless of the amount or extent of the business is not an unreasonable discrimination, although some persons have a much larger capital and do a much larger business than others. Los Angeles *v.* Los Angeles Ind. Gas Co., 152 Cal. 765; Youngblood *v.* Sexton, 32 Mich. 406; Magneau *v.* Fremont, 30 Neb. 843. The charter of a city provided that

other hand, the uniformity is not destroyed by the fact that the is graduated according to the business done or upon some o reasonable basis.[1]

The State, or the municipality under statutory authority, r collect an *ad valorem tax upon property* used in a calling and ma *the same time impose a license tax on the pursuit* as a condition of right to carry on that pursuit, and the fact that both the prop and the business or pursuit are taxed, does not constitute dou taxation.[2]

in the imposition of license taxes on business and occupations "no discrimination shall be made between persons engaged in the same business, otherwise than by proportioning the tax upon any business to the amount of the business done." It was held that this provision did not require that the tax be graduated in all cases according to the business done, and that a uniform tax might be imposed on all persons in the same calling. Los Angeles *v.* Los Angeles Ind. Gas Co., 152 Cal. 765.

[1] Johnston *v.* Macon, 62 Ga. 645; Strater Bros. Tobacco Co. *v.* Commonwealth, 117 Ky. 604; Aurora *v.* McGannon, 138 Mo. 38, 47; Templeton *v.* Tekamah, 32 Neb. 542; Gatlin *v.* Tarboro, 78 N. Car. 119; Albertson *v.* Wallace, 81 N. Car. 479; State *v.* Powell, 100 N. Car. 525; State *v.* French, 109 N. Car. 722; Williamsport *v.* Wenner, 172 Pa. 173; Commonwealth *v.* Clark, 195 Pa. 634, aff'd *sub nom.* Clark *v.* Titusville, 184 U. S. 329; Kniseley *v.* Cotterel, 196 Pa. 614.

Under authority to collect taxes on "auctioneers, transient dealers, and peddlers," a municipal corporation may impose a tax either upon the amount of the sales of such persons, or in the form of a license or tax upon the privilege of selling. Carroll *v.* Tuscaloosa, 12 Ala. 173.

A quarterly tax imposed on all traders doing business in the town "of one dollar for every $1,000 worth of goods sold, during the preceding quarter," is uniform and constitutional. Gatlin *v.* Tarboro, 78 N. Car. 119. An annual business tax of three dollars on merchants whose stock of goods exceeds $1,000 in value and two dollars on merchants whose stock of goods is less than $1,000 in value is valid. Aurora *v.* McGannon, 138 Mo. 38, 47. A business or occupation tax may be graduated by the *numbe horses* kept for breeding purp Templeton *v.* Tekamah, 32 Neb. A tax on the *business of drayage* cording to the number of drays ployed and the capacity thereof as horse or two horse drays, is unif Johnston *v.* Macon, 62 Ga. 645. chants may be *classified as whol and retail* and a different gradu tax imposed on each class accor to the amount of the business d Commonwealth *v.* Clark, 195 Pa. aff'd *sub nom.* Clark *v.* Titusville, U. S. 329; Kniseley *v.* Cotterel, Pa. 614; Williamsport *v.* Wenner, Pa. 173.

[2] Davis *v.* Macon, 64 Ga. 128; son *v.* Forsyth, 94 Ga. 617; Lev State, 161 Ind. 251, 257; Living *v.* Paducah, 80 Ky. 656, 660; Le Louisville, 97 Ky. 394; Covingto Woods, 98 Ky. 344; Commonwe *v.* Pearl Laundry Co., 105 Ky. Fidelity & Casualty Co. *v.* Louisv 106 Ky. 207; German Washin Mut. F. Ins. Co. *v.* Louisville, 117 593, 602; American Un. Exp. C St. Joseph, 66 Mo. 675; St. Loui Green, 70 Mo. 562; s. c. 7 Mo. 468; St. Joseph *v.* Ernst, 95 Mo. 367; St. Louis *v.* Weitzel, 130 Mo. 619; Aurora *v.* McGannon, 138 38, 45; Springfield *v.* Smith, 138 645; Troy *v.* Harris, 102 Mo. App. 59; Monett *v.* Hall, 128 Mo. App. Nebraska Tel. Co. *v.* Lincoln, 82 59; Morgan *v.* Commonwealth, 98 812; Newport News & O. P. R. & Co. *v.* Newport News, 100 Va. Postal Tel. Cable Co. *v.* Norfolk, Va. 125; Norfolk *v.* Griffith-Po Co., 102 Va. 115.

"The words 'license tax' impl burden on that which is not prope but results from its enjoyment, or conduct of the business or callin *Per Pryor*, C. J., in Levi *v.* Louisv

Business or occupation taxes *may be graduated in a great variety of ways*, as by the amount or value of the stock in trade of dealers,[1] the marketable value of the product of factories, &c.,[2] or the quantity of goods manufactured or packed,[3] the amount of sales or business transacted,[4] the amount of receipts from the business,[5] the gross earnings of the business,[6] the number of persons employed in the business,[7] the number of animals kept in connection with the business,[8] and taxes so graduated are taxes on the occupation; and, although graduated according to the property used in the business or according to the business transacted, are not taxes upon property.[9]

97 Ky. 394, 406. See also Elliott *v.* Louisville, 101 Ky. 262, 267. A tax on a business may, under statutory authority, be made a *lien on the property* where the business is carried on. The owner is presumed to know the nature of the business there carried on, and to have let the property with knowledge that it might be encumbered by a tax on such business. Hodge *v.* Muscatine County, 196 U. S. 276, aff'g 121 Iowa, 482. The *constitutional requirement of uniformity* of taxation does not prevent the imposition of a license tax upon a particular business, although the property used in the business is subject to and has paid an *ad valorem* tax. *Ex parte* Mirande, 73 Cal. 365.

The legislature may authorize, and the municipality may impose, *an occupation tax both on an insurance company and on its agent*. This is not double taxation. Farmington *v.* Rutherford, 94 Mo. App. 328. A business or occupation tax may be measured, wholly or in part, *by the employment and use of vehicles* although those vehicles are already taxed *ad valorem* as property. Davis *v.* Macon, 64 Ga. 128; Livingston *v.* Paducah, 80 Ky. 656, 660; St. Louis *v.* Green, 70 Mo. 562; St. Louis *v.* Weitzel, 130 Mo. 600, 619. An occupation tax measured by a percentage of the *gross earnings of a telephone company*, whose franchise is also taxed in connection with its tangible property, according to its value as a going concern, is not double taxation of the property. Nebraska Tel. Co. *v.* Lincoln, 82 Neb. 59.

[1] Goldsmith *v.* Huntsville, 120 Ala. 182; Saks *v.* Birmingham, 120 Ala. 190; Newton *v.* Atchison, 31 Kan. 151, 159; *In re* Martin, 62 Kan. 638; Corson *v.* State, 57 Md. 251, 262.

[2] Strater Bros. Tobacco Co. *v.* Commonwealth, 117 Ky. 604.

[3] State *v.* Applegarth, 81 Md. 293, 302.

[4] Goldsmith *v.* Huntsville, 120 Ala. 182; Sacramento *v.* Crocker, 16 Cal. 119; *Ex parte* Mount, 66 Cal. 448; Joseph *v.* Milledgeville, 97 Ga. 513.

[5] Lott *v.* Ross, 38 Ala. 156; Capital City Water Co. *v.* Montgomery County Revenue Board, 117 Ala. 303; San Luis Obispo County *v.* Greenburg, 120 Cal. 300; State *v.* Philadelphia, W. & B. R. Co., 45 Md. 361; American Un. Exp. Co. *v.* St. Joseph, 66 Mo. 675, 682.

[6] Wright *v.* Southern Bell Tel. Co., 127 Ga. 227, 229.

[7] *Ex parte* Li Protti, 68 Cal. 635.

[8] Birmingham *v.* Goldstein, 151 Ala. 473 (dairy business).

[9] Goldsmith *v.* Huntsville, 120 Ala. 182; Saks *v.* Birmingham, 120 Ala. 190; Birmingham *v.* Goldstein, 151 Ala. 473; Sacramento *v.* Crocker, 16 Cal. 119; Mutual Reserve Life Fund Assoc. *v.* Augusta, 109 Ga. 73; Newton *v.* Atchison, 31 Kan. 151, 159; *In re* Martin, 62 Kan. 638; Strater Bros. Tobacco Co. *v.* Commonwealth, 117 Ky. 604; State *v.* Philadelphia, W. & B. R. Co., 45 Md. 361; Corson *v.* State, 57 Md. 251, 262; State *v.* Applegarth, 81 Md. 293, 302. A tax upon *the gross premiums of an insurance company* is a tax on the business, and is not a tax on the property of the company. Mutual Reserve Life Fund Assoc. *v.* Augusta, 109 Ga. 73; *Ex parte* Cohn, 13 Nev. 424, 427. A statute which provides that *tobacco factories* shall pay a *license tax* of one dollar on the marketable value of each one thousand dollars of product up to one hundred thousand dollars, and at the rate of fifty cents per thousand

§ 1411 (785). **Taxation of Occupations; Construction of Delegated Authority.** — The *power to tax a business or occupation* must, like all other powers of taxation, be *expressly* conferred.[1] In Virginia, it has been held that a legislative grant to a municipality of a general and

dollars thereafter, imposes a license tax and not a tax on property. Strater Bros. Tobacco Co. *v.* Commonwealth, 117 Ky. 604.

But when a *question of interstate commerce is involved* the Supreme Court of the United States has held that where the business or occupation consists in the sale of goods, a license tax required for its pursuit is in effect a tax upon the goods themselves. As to the validity of license taxes *when they affect interstate commerce*, see *ante*, §§ 1356, 1357. In Welton *v.* Missouri, 91 U. S. 275, 278, Mr. Justice *Field* said: "The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid, because enforced through the form of a personal license."

The Drummer cases. It has been repeatedly held by the Supreme Court of the United States that when a drummer goes from one State into another to sell there by sample goods *situated in the State from which he came, or elsewhere*, the State where the drummer seeks to effect such sale cannot levy, or authorize the levy of, a tax upon the drummer, or upon the sale, or upon the privilege or right to make the sale, or upon the transaction, because to do so would *be to interfere with interstate commerce.* Robbins *v.* Shelby County Taxing District, 120 U. S. 489; Corson *v.* Maryland, 120 U. S. 502; Asher *v.* Texas, 128 U. S. 129; Stockard *v.* Morgan, 185 U. S. 27; *ante*, § 1356. Index — *Interstate Commerce.*

The fact that certain property is exempt from taxation, *does not exempt the lessee* of the property from a license or occupation tax for conducting business on or with such property. Norfolk, P. & N. N. Co. *v.* Norfolk, 105 Va. 139. By the *Texas Constitution* (art. viii, § 1), it is provided that "The occupation tax levied by any county, city, or town, for any year, on persons or corporations pursuing any business, shall not exceed one half of the tax levied by the State for the same period on such profession or business." Under this constitutional provision a municipality under delegated authority can only tax such businesses or occupations as the State has taxed. Hoefling *v.* San Antonio, 85 Tex. 228. A tax of one third of one per cent on all gross sales of goods is not obnoxious to the provision of the *Georgia Constitution* that all taxes shall be uniform upon the same class of subjects within the territorial limits of the taxing power, although the statute further *permits the commutation* of the tax by the payment of a specified lump sum. Joseph *v.* Milledgeville, 97 Ga. 513. Prior to 1892, it was held that under the provisions of the *Kentucky Constitution* then in force, both real and personal property must be taxed at the same rate and in the same manner; that the legislature could not tax real property *ad valorem* and provide that the owner might *pay a license tax* in respect of his personal property *in lieu* of an *ad valorem* tax. Under such conditions, a license tax, if imposed, must have been in addition to a personal tax on the property. Levi *v.* Louisville, 97 Ky. 394. But in 1892 the Constitution (§ 181) was amended to expressly provide that a license tax might be imposed in lieu of an *ad valorem* tax on personal property. See Wiemer *v.* Louisville Sinking Fund Com'rs, 124 Ky. 377.

[1] See *ante*, § 1377. Statutory authority to a municipality to impose license taxes is to be strictly construed. Tuscaloosa *v.* Holczstein, 134 Ala. 636.

unrestricted power of taxation includes the whole power of the State over subjects of taxation and authorizes the taxation of businesses and occupations.[1] Authority in the charter of a municipal corporation to tax "all real and personal estate within the corporate limits of the city" was held, in view of the language and history of legislation in the State as to the subject-matter of taxation, not to confer upon the corporation power to tax the *income* of *particular occupations*.[2] Authority to tax all persons exercising any profession may be executed by taxing each member of a firm separately.[3] *Railroad companies* and other *public service corporations*, which have, by virtue of legislative or municipal grant, rights and privileges to use the public streets for their purposes, are subject to the exaction of *license or business taxes* on their franchises or occupa-

[1] Ould *v.* Richmond, 23 Gratt. (Va.) 464; Humphreys *v.* Norfolk, 25 Gratt. (Va.) 97; Norfolk *v.* Norfolk Landmark Pub. Co., 95 Va. 564; Newport News & O. P. R. & E. Co. *v.* Newport News, 100 Va. 157; Woodall *v.* Lynchburg, 100 Va. 318; Norfolk *v.* Griffith-Powell Co., 102 Va. 115; Norfolk & W. R. Co. *v.* Suffolk, 103 Va. 498; Standard Oil Co. *v.* Fredericksburg 105 Va. 82. A provision in the charter of a city giving it power to license, regulate, and tax certain enumerated classes of persons and business, and concluding with the words, "and all other business, trades, avocations, and professions whatever," was held *not* to confer the power to require *a license tax from lawyers*, as they were not of the same generic character or class with those specified. St. Louis *v.* Laughlin, 49 Mo. 559. Similarly a power to impose a license tax upon certain specified occupations, "and upon any other person or employment, which it (the city) may deem proper, whether such person or employment be herein specially enumerated or not," was held *not* to confer power to impose such a *tax upon a railroad*. Lynchburg *v.* Norfolk & N. W. R. Co., 80 Va. 237. *Brokers;* who may be taxed as such. Portland *v.* O'Neill, 1 Oreg. 218; Little Rock *v.* Barton, 33 Ark. 436, citing text. A power to regulate "meat stores" will *not* warrant a classification which makes the selling of *game and fish* a separate privilege. Vosse *v.* Memphis, 9 Lea (Tenn.), 294.

[2] Savannah *v.* Hartridge, 8 Ga. 23; distinguished from cases in *South Carolina*, which hold that the city of Charleston, under the power to levy taxes on "*taxable property*" may tax income. Lining *v.* Charleston, 1 McCord (S. Car.), 345. Charter of Richmond held to give authority to impose a license tax on lawyers. Ould *v.* Richmond, 23 Gratt. (Va.) 464. In Rome *v.* McWilliams, 52 Ga. 251, the principal cases in that State concerning the power to tax professions and to exact license fees are referred to, and the power upheld as one which the legislature may confer. Taxation of *incomes*, 1 Desty Taxation, 202.

In *Alabama*, it is held that "when express power to levy and collect particular taxes is conferred, the power to levy and collect other taxes is excluded. Or if particular subjects of taxation are enumerated, the corporation has not capacity to enlarge them." Baldwin *v.* Montgomery Council, 53 Ala. 437; Selma *v.* Selma Press & W. Co., 67 Ala. 430.

[3] Lanier *v.* Macon, 59 Ga. 187; Wilder *v.* Savannah, 70 Ga. 760. But in *New York* it is held that a statute enacted in the exercise of the police power which requires each member of a firm engaged in a business or occupation to be registered is unreasonable, unnecessary for the protection of the public, and unconstitutional. Schnaier *v.* Navarre Hotel & Imp. Co., 182 N. Y. 83 (plumbers); People *v.* Ringe, 197 N. Y. 143 (undertakers). Authority to a municipality "to license and tax all agents of insurance offices" confers power to compel each agent to pay a separate tax for each company represented by him. Simrall *v.* Covington, 90 Ky. 444.

tions, although they may have agreed to pay the municipality for the use of the streets.[1]

§ 1412 (791, 792). **Taxation of Vocations.** — The legislature may authorize municipal corporations to impose taxes upon persons whose *ordinary vocations are pursued within the corporate limits*, although residing beyond those limits, the same as upon residents.[2] The delegated power of taxation must be generally and impartially exercised by the municipal authorities without unreasonable or arbitrary discrimination against particular individuals.[3] In impos-

[1] Memphis Gas Light Co. *v.* Shelby County Tax Dist., 109 U. S. 398, 400; New Orleans C. & L. R. Co. *v.* New Orleans, 143 U. S. 192, aff'g 40 La. An. 587; Metropolitan St. R. Co. *v.* New York, 199 U. S. 1; St. Louis *v.* United Railways Co., 210 U. S. 266; Anniston *v.* Southern R. Co., 112 Ala. 557; San Jose *v.* San Jose & S. C. R. Co., 53 Cal. 476, 481; State *v.* Herod, 29 Iowa, 123; Wyandotte *v.* Corrigan, 35 Kan. 21; New Orleans *v.* New Orleans R. Co., 42 La. An. 4; Springfield *v.* Smith, 138 Mo. 645; Nebraska Tel. Co. *v.* Lincoln, 82 Neb. 59; Florida Cent. & P. R. Co. *v.* Columbia, 54 S. Car. 266; Newport News & O. P. R. & E. Co. *v.* Newport News, 100 Va. 157; Norfolk & W. R. Co. *v.* Suffolk, 103 Va. 498, 501; State *v.* Hilbert, 72 Wis. 184.

In Stein *v.* Mobile, 49 Ala. 362 (followed in Los Angeles *v.* Los Angeles Water Co., 61 Cal. 65, on similar facts), the city was held disabled by its contract to tax the *business* of carrying on waterworks within the city; but *quære* whether the power to tax could be surrendered, and also whether the contract was not taken subject to the taxing power of the city. *Ante*, § 1392, note. Detroit *v.* Detroit City R. Co., 76 Mich. 421.

[2] Worth *v.* Fayetteville, 1 Winst. Eq. (N. Car.) 70 [Repr. 617]. What property may be taxed under such authority. *Ib.* As to right to tax (under special charter provisions) persons residing without, but exercising a trade or calling *within*, the corporation, see also State *v.* Charleston, 2 Speers L. (S. Car.) 623; State *v.* Charleston, *Ib.* 719. What may be taxed under authority to tax "income and profits" of non-residents doing business within the corporation, see *Ib.*; Bates *v.* Mobile, 46 Ala. 158. Taxableness of goods owned elsewhere, but *sold on commission* by residents of the municipality. Cumming *v.* Savannah, R. M. Charlt. (Ga.) 26; Green *v.* Savannah, *Ib.* 368; Padelford *v.* Savannah, 14 Ga. 438, criticising Brown *v.* Maryland, 12 Wheat. (U. S.) 419; Pearce *v.* Augusta, 37 Ga. 597; Shriver *v.* Pittsburgh, 66 Pa. 446; Petersburg *v.* Cocke, 94 Va. 244; Wilmington *v.* Roby, 8 Iredell (N. Car.), 250, 254; Edenton *v.* Capeheart, 71 N. Car. 156; El Dorado County *v.* Meiss, 100 Cal. 268, 272. Statutory authority to tax occupations "within the city" does not authorize a tax upon *non-residents* who come to the city *under special employment* to transact specific business. Evers *v.* Mayfield, 120 Ky. 73, 77. A license or occupation tax upon a *single act* not amounting to a business cannot be enforced. Plymouth *v.* Cooper, 135 N. Car. 1.

[3] Vines *v.* State, 67 Ala. 73; Waters-Pierce Oil Co. *v.* Hot Springs, 85 Ark. 509; Lassen County *v.* Cone, 72 Cal. 387; Atlanta *v.* Jacobs, 125 Ga. 523; Carrollton *v.* Bazzette, 159 Ill. 284; Daniel *v.* Richmond, 78 Ky. 542; Fecheimer *v.* Louisville, 84 Ky. 306; Simrall *v.* Covington, 90 Ky. 444; Graffty *v.* Rushville, 107 Ind. 502; Bills *v.* Goshen, 117 Ind. 221, 226; Indianapolis *v.* Bieler, 138 Ind. 30; Morgan *v.* Orange, 50 N. J. L. 389; Thompson *v.* Ocean Grove, 55 N. J. L. 507; Albertson *v.* Wallace, 81 N. Car. 479; State *v.* Moore, 113 N. Car. 697; State *v.* O'Connor, 5 N. Dak. 629; Nashville *v.* Althorpe, 5 Coldw. (Tenn.) 554; Clements *v.* Casper, 4 Wyo. 494. An ordinance imposing a license tax on grocers must include all grocers. It cannot be limited to grocers who employ delivery wagons. Covington *v.* Dalheim, 126 Ky. 26.

ing these taxes, the municipality *cannot discriminate between residents and non-residents*, as by imposing a tax upon non-residents when residents pursuing the same trade or occupation are within the municipal limits exempt therefrom or are taxed at a lower rate or in a different manner.[1] Discriminations against non-residents may, according to circumstances, be void as infringing the fourth article of the Federal Constitution, the Commerce Clause, or the Fourteenth Amendment, as well as by infringing provisions of the State Constitution. The municipal authorities cannot *discriminate between residents and non-residents* by taxing the property of the latter within the corporation at a higher rate than the like property of the former, or in a different manner.[2]

§ 1413 (813). **Summary Collection may be authorized by the Legislature.** — The legislature may provide for a *summary collection* of taxes and assessments, and declare what shall make a *prima facie* case.[3] For the payment of street improvements, it was provided by statute that the city engineer should make an estimate, which, when

[1] See cases cited *supra*, §§ 1356, 1357. The objection that an occupation tax discriminates against non-residents most frequently arises in the case of citizens of other States, and in such cases the tax may be open to the objection that it *interferes with interstate commerce*. For the cases on this subject, see *ante*, §§ 1355–1363. Index — *Interstate Commerce*. A city ordinance imposing a license tax for revenue upon the business or occupation of selling goods which fixes one rate for goods in the city or in transit thereto and another and much larger rate for goods not in the city and not in transit is discriminatory, unjust, partial, in restraint of trade, and void. *Ex parte* Frank, 52 Cal. 606.

[2] State *v.* Charleston, 2 Speers L. (S. Car.) 719; Nashville *v.* Althrop, 5 Coldw. (Tenn.) 554. In this last case it was held that there could be no discrimination between merchants selling by sample and those doing business in a different manner. Statutes authorizing the "registration and taxation" of vehicles using the paved streets of a town are strictly construed; and such an act was held not to extend to non-residents. Joyce *v.* Woods, 78 Ky. 386; Bennett *v.* Birmingham Bor., 31 Pa. 15; *ante*, §§ 1166, 1407. Under the Federal Constitution, a State cannot discriminate in favor of its own citizens and against those of other States by imposing greater burdens, or taxes, or license fees upon the former than upon the latter. Ward *v.* Maryland, 12 Wall. (U. S.) 418, 430 (a leading case on this point). 1 Desty Taxation, 219–222, and cases; 1 Hare, Am. Const. Law, 251, 252, 318, 467; Gray, Lim. on Taxing Power, §§ 1108–1113, § 840 *et seq.* and cases; *supra*, §§ 1354–1356, 1364.

[3] St. Louis *v.* Cooks, 37 Mo. 44; Riley *v.* St. Joseph, 67 Mo. 491. As to power to *validate past* assessments. Lennon *v.* New York, 55 N. Y. 361, 365; Hyde, *In re*, 15 Hun (N. Y.), 477; Mead, *In re*, 74 N. Y. 216. *Ante*, §§ 129, 645, 948. As to what defects will vitiate the warrant to collect assessment, see Butler *v.* Nevin, 88 Ill. 575. *Distraint of goods* to satisfy taxes lawfully levied is one of the most ancient methods of collection known to the law. That method may be resorted to without violating any right guaranteed by the Federal Constitution. Murray's Lessee *v.* Hoboken Land & Imp. Co., 18 How. (U. S.) 272, 281; Springer *v.* United States, 102 U. S. 586; Palmer *v.* McMahon, 133 U. S. 660, 669; Scottish Union & Nat. Ins. Co. *v.* Bowland, 196 U. S. 611.

the council directed it to be paid, became an assessment upon the particular lot or property to which it was chargeable. It was further provided that if it should appear to the council by affidavit that such assessment was not paid, the council should provide for its collection by precept issued by the mayor and clerk. It was contended that this statute was unconstitutional, because it deprived a party of rights without a judicial hearing, and because it invested the council with judicial power. But the court held that inasmuch as the party had the right by appeal to transfer his cause to a judicial tribunal, the objection to the statute was not well taken, and that the issue of the precept was a ministerial and not a judicial act.[1]

§ 1414 (815). **Mode of Collection of Taxes and Assessments.** — Taxes are imposts levied for the support of the government or for some special public purpose authorized by it, and are *not debts* in the ordinary acceptance of the term.[2] The fact that a tax is not a

[1] Flournoy *v.* Jeffersonville, 17 Ind. 169; *Ib.* 175; *ante*, §§ 756, 799.

[2] In an important case in the Supreme Court of the United States Justice *Field* states with clearness the distinction between "taxes" and "debts." "*Taxes are not debts.* It was so held by this court in the case of Lane County *v.* Oregon, 7 Wall. (U. S.) 71. Debts are obligations for the payment of money founded upon contract express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum.* Nor is their nature affected by the fact that in some States . . . an action of debt may be instituted for their recovery. The form of procedure cannot change their character. Augusta *v.* North, 57 Me. 392; Camden *v.* Allen, 26 N. J. L. 398; Perry *v.* Washburn, 20 Cal. 318. Nor are they different when levied under writs of *mandamus* for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other." Meriwether *v.* Garrett, 102 U. S. 472, 513. See also to the effect that taxes are not debts. Georgia R. & B. Co. *v.* Wright, 124 Ga. 596; Camden *v.* Allen, 26 N. J. L. 398; Danforth *v.* McCook County, 11 S. Dak. 258. In Charleston *v.* Oliver, 16 S. Car. 49, it was decided that a license tax was not a "debt" within the meaning of the constitutional provision that "no person shall be imprisoned for debt except in case of fraud."

In *Pennsylvania* it is held that a *property owner has no set-off* against the claim of a city for an *assessment*, and, in a suit by the city upon such a claim, equities between the property owner and the contractor cannot be adjusted. Pittsburgh *v.* McKnight, 91 Pa. 202. See also Brientnall *v.* Philadelphia, 103 Pa. 156. As to *counterclaim*, see Philadelphia *v.* Cloud, 4 W. N. C. (Pa.) 445. To the effect that a tax is a debt and is not the subject of set-off, see Camden *v.* Allen, 26 N. J. L. 398, *per Green*, C. J. Where a city's obligations are receivable for taxes, they and the taxes may be the subject of set-off. Amy *v.* Shelby County Tax Dist., 114 U. S. 387.

Where, by a constitutional provision, *taxes may be paid in the coupons*, &c., for the payment of which they are levied, the taxpayer can exercise the privilege only before suit is brought for their collection. Bummel *v.* Houston, 68 Tex. 10. The State of *Virginia* agreed to receive coupons on State bonds in payment "after maturity for all taxes due the State." This imposes not only a moral but legal obligation. Hartman *v.* Greenhow, 102

debt has an important influence upon the remedies for the collection thereof. If the statute or charter gives to a municipal corporation *a specific and complete remedy* for the collection of taxes, as by a distress and sale of property, or by making them a lien upon real estate and providing for the sale thereof in default of payment, this will ordinarily be regarded as excluding by implication the right to resort to any other mode of enforcing a tax, and an action against the taxpayer to recover a personal judgment as for a debt will not lie.[1] But where the power to tax is plainly given, a *right*

U. S. 672; Antoni *v.* Greenhow, 107 U. S. 769; Virginia Coupon Cases, 114 U. S. 269; Royall *v.* Virginia, 116 U. S. 572; Sands *v.* Edmunds, 116 U. S. 585; Ayers, *In re*, 123 U. S. 443; McGahey *v.* Virginia, 135 U. S. 662; McCullough *v.* Virginia, 172 U. S. 102. *Contra*, Greenhow *v.* Vashon, 81 Va. 336. As to statutory provisions making municipal warrants receivable for municipal taxes and debts, see *ante*, § 683.

[1] Montezuma Val. W. S. Co. *v.* Bell, 20 Colo. 175; Finnegan *v.* Fernandina, 15 Fla. 379; Du Bignon *v.* Brunswick, 106 Ga. 317, 325; Butler *v.* Nevin, 88 Ill. 575; Marshall County *v.* Knoll, 102 Iowa, 573; Crawford County *v.* Laub, 110 Iowa, 355; Plymouth County *v.* Moore, 114 Iowa, 700; Lucas *v.* Purdy, 142 Iowa, 359, 367, Corbin *v.* Young, 24 Kan. 198; Stafford County *v.* First Nat. Bank, 48 Kan. 561; Craycraft *v.* Selvage, 10 Bush (Ky.), 696; Greer *v.* Covington, 83 Ky. 410; Baldwin *v.* Hewitt, 88 Ky. 673; Louisville Water Co. *v.* Commonwealth, 89 Ky. 244; New Orleans *v.* Davidson, 30 La. An. 541; New Orleans *v.* Hill, 30 La. An. 554; Packard *v.* Tisdale, 50 Me. 376; Pierce *v.* Boston, 3 Metc. (Mass.) 520; Staley *v.* Columbus, 36 Mich. 38; McCallum *v.* Bethany, 42 Mich. 457; Putnam *v.* Fife Lake, 45 Mich. 125; Detroit *v.* Jepp, 52 Mich. 458; Eyke *v.* Lange, 104 Mich. 26; State *v.* Piaza, 66 Miss. 426; Thibodeaux *v.* State, 69 Miss. 683; Carondelet *v.* Picot, 38 Mo. 125; Blevins *v.* Smith, 104 Mo. 583; State *v.* Snyder, 139 Mo. 549; Richards *v.* Clay County, 40 Neb. 45; German-American F. Ins. Co. *v.* Minden, 51 Neb. 870; Hibbard *v.* Clark, 56 N. H. 155; Camden *v.* Allen, 26 N. J. L. 398; Rochester *v.* Bloss, 185 N. Y. 42; Gatling *v.* Carteret County, 92 N. Car. 536; Brule County *v.* King, 11 S. Dak. 294; Hanson County *v.* Gray, 12 S. Dak. 124; Shaw *v.* Pickett, 26 Vt. 486; Pierce County *v.* Merrill, 19 Wash. 175; Cabin Creek Board of Education *v.* Old Dominion I. M. & M. Co., 18 W. Va. 441.

Further, as to *personal liability of taxpayer to an action for the taxes*, see Oakland *v.* Whipple, 39 Cal. 112; People *v.* Seymour, 16 Cal. 332; Guerin *v.* Reese, 33 Cal. 292; Litchfield *v.* Vernon, 41 N. Y. 123; St. Louis *v.* Clemens, 36 Mo. 467; St. Louis *v.* De Noue, 44 Mo. 136. As to the power to make *special assessments* for a local improvement a *personal charge or liability* of the property owner, see *post*, § 1453.

Iowa. In Dubuque *v.* Illinois Cent. R. Co., 39 Iowa, 56, 74, the text is referred to with approval and numerous cases are cited including Dollar Sav. Bank *v.* United States, 19 Wall. (U. S.) 277. *Beck*, J., says, "The cases cited, it is believed, fully recognize the rule that actions at law may be maintained to recover taxes, although special remedies be provided therefor." See also Burlington *v.* Burlington & M. R. R. Co., 41 Iowa, 134. But in Crawford County *v.* Laub, 110 Iowa, 355, where suit was brought for the "Mulct Tax," and the right to a personal judgment was denied, *Ladd*, J., who delivered the opinion of the court, declared that it had never decided whether ordinary taxes might be collected in an action at law; that only two out of four judges concurred in the earlier cases; and that the weight of authority is that the statutory remedy provided for the collection of a tax is exclusive. He added, "In providing a specific remedy for the enforcement of a tax lien, the legislative intent that another may not be resorted to is manifest." The same principle has been ap-

to collect by suit or action should not be taken to be impliedly deni unless another reasonably adequate means of collection is provide and the intention of the legislature that the special mode prescrib should be the *only* mode, appears with a reasonable certainty. the specific remedy is full and adequate, such an intent on the pa of the law-maker would be more readily deduced than it wou under other circumstances.[1]

plied and an action will not lie for general taxes. Plymouth County *v.* Moore, 114 Iowa, 700 (tax on personal property); Lucas *v.* Purdy, 142 Iowa, 359, 367 (tax on realty).

Where a county judge, empowered by law to appoint a collector of a tax levied upon a precinct to meet the interest and a reasonable amount of the principal of bonds issued in aid of a railroad, was unable to make the appointment because no person could be found willing to serve, it was held, in an action brought by the bondholders to enforce payment, that *the chancellor had no power to appoint a collector or a receiver* for the purpose, on the ground that the power to levy and collect taxes is legislative and not inherent in a court; and that if such power were exercised by a court the theory of government and the distribution of powers would be destroyed. McLean County Precinct *v.* Deposit Bank, 81 Ky. 254. See *ante*, § 1449; *post*, §§ 1547, 1548.

On the principle that where a statute creates a liability which did not before exist, and gives a special remedy to enforce it, that remedy, and not a common-law action, must be pursued, it was held that street assessments must be collected in the manner provided by the charter or constituent act of the corporation. Flournoy *v.* Jeffersonville, 17 Ind. 169. Precept must be duly signed by the proper officer. Jeffersonville *v.* Patterson, 32 Ind. 140. It was held by a divided court (ten senators to eight) that a county could not maintain a bill in equity, in the nature of a *creditor's bill*, to enforce the payment of county taxes, where the warrant for the taxes was returned no property whereon to levy. Durant *v.* Albany County, 26 Wend. (N. Y.) 66, reversing decree of chancellor and vice-chancellor. *Post*, §§ 1570–1590; *infra*, § 1421.

[1] *Priority of claim* for taxes in bankruptcy, see New Jersey *v.* Anderson, 203 U. S. 483, rev'g 137 Fed. R 858; *In re* Lange Co., 159 Fed. R 586. As to the priority of taxes a the enforcement of the same in p ceedings to sequestrate or disso *insolvent corporations*, see Central Tr Co. *v.* New York City & N. R. Co., 1 N. Y. 250; Wise *v.* Wise Co., 153 N. 507. When a court has assumed ju diction over the property of a corpo tion and has appointed a receiver, t remedy for the enforcement of t tax is by application to the co in the action in which the recei has been appointed. *In re* Tyler, 1 U. S. 164; Ledoux *v.* La Bee, 83 F Rep. 761.

Statute of limitations. The appli bility of the ordinary statute of limi tions of the State to actions or proce ings to collect taxes is the subject c diversity of opinion. Some decisi hold that such actions or proceedi are barred after the ordinary prescr tive period. See Galveston *v.* Gu anty Trust Co., 107 Fed. Rep. 3 Williams *v.* Bergin, 116 Cal. 56; D enport *v.* Chicago, R. I. & P. Co., Iowa, 633; Burlington *v.* Burling & M. R. R. Co., 41 Iowa, 134; Louis *v.* Newman, 45 Mo. 138; Jeff son *v.* Whipple, 71 Mo. 521; Mellin *v.* Houston, 68 Tex. 37, and ca cited; Glover *v.* Storrie, 18 Tex. C App. 6; German Am. Sav. Bank Spokane, 17 Wash. 315; Seattle *v.* Wolfe, 17 Wash. 349; Lewis *v.* Seat 28 Wash. 639; Young *v.* Tacoma, Wash. 153; Ballard *v.* West Co Imp. Co., 15 Wash. 572; McEwan Spokane, 16 Wash. 212; State *v.* F lard, 16 Wash. 418. Other cases h that the statute of limitations is a defence to the enforcement of ta by a municipal corporation. Walke People, 202 Ill. 34; Cody *v.* Cicero, Ill. 322; McCartney *v.* Raymond, Ill. 51; Magee *v.* Commonwealth, Pa. 358; Memphis *v.* Looney, 9 B (Tenn.) 130; Elliot *v.* Williamson, Lea (Tenn.), 38. See also Shepar

§ 1415 (816). **Same Subject. Specific Mode held exclusive.** — On the principle that *the specific statute mode of collection* must be pursued, it was held, in another case, where the legislature had provided that a tax upon free persons of color removing to a city should be collected by hiring them out, that an ordinance which authorized such persons to be imprisoned for the non-payment of the tax was void.[1] So where the organic law of a town gave it power "to levy and collect taxes," and also provided, in another section, that "if any person fail to pay any tax levied on his property, the town collector may recover the same by civil action in the name of the corporation," it was held that the payment of taxes must be enforced by suit, and that it was not competent for the corporation to pass an ordinance providing for their collection, by seizure and sale, before judgment, since the mode of collection specified in the statute excluded all other modes.[2]

§ 1416 (817). **Action held sustainable although Summary Mode of Collection is provided.** — The authorities, however, are not uniform, and in some of the States the view is taken that a tax legally levied and assessed by a municipal corporation pursuant to its charter creates a legal obligation to pay such tax, and that the city can *recover it in an action of assumpsit*, and this although there may be a summary mode of recovery provided for in the ordinance.[3] In

People, 200 Ill. 508; Osawatomie *v.* Miami County, 78 Kan. 270; State *v.* Columbia (Tenn. Ch. App.), 52 S. W. Rep. 511.

In *Washington*, the statute of limitations *begins to run*, not from the day the assessment is made due and payable and operative as a lien, but from the date of the delinquency as provided in the ordinance for the levy and collection of the assessment. Seattle *v.* O'Connell, 16 Wash. 625. The statute does not run until a valid assessment has been made. Fogg *v.* Hoquiam, 23 Wash. 340. It does not run against the right to make a reassessment while the city is trying to enforce the original assessment. Lewis *v.* Seattle, 28 Wash. 639. As to construction and applicability of a statute prescribing ten years' limitation for actions to enforce street assessments, see Seattle *v.* De Wolfe, 17 Wash. 349; Bowman *v.* Colfax, 17 Wash. 344. Action to enforce a new apportionment of a street assessment held to be barred by the statute of limitations, see Gleason *v.* Peter & B. Stone Co. (Ky.), 66 S. W. Rep. 16; Kirwin *v.* Nevin, 111 Ky. 682. Statute prescribing limitation to actions on special tax bills in *Missouri*, see Kansas City *v.* American Surety Co., 71 Mo. App. 315. A *special assessment is not a tax* within the meaning of a statute of *Texas* declaring that no delinquent taxpayer shall have the right to plead any statute of limitations by way of defence against the payment of "any taxes" due by him to the city. Galveston *v.* Guaranty Trust Co., 107 Fed. Rep. 325.

[1] Cooper *v.* Savannah, 4 Ga. 68.

[2] Alexander *v.* Helber, 35 Mo. 334; *ante*, § 601.

[3] Perry County *v.* Selma, M. & M. R. Co., 58 Ala. 546; Winter *v.* Montgomery, 79 Ala. 481; Anniston *v.* Southern R. Co., 112 Ala. 557; State *v.* Fleming, 112 Ala. 179; Dunlap *v.* Gallatin County, 15 Ill. 9; Ryan *v.* Gallatin County, 14 Ill. 83; Geneva *v.* Cole, 61 Ill. 397; State *v.* Southern Steamship Co., 13 La. An. 497; Dugan

Minnesota, where the same statute which granted to a city the power to impose a poll-tax specified a mode for collecting the tax, this express grant of a specific remedy was held to preclude by implication the right to collect by an action, and this although the statutory remedy was admitted to be inadequate and impracticable.[1]

v. Baltimore, 1 Gill & J. (Md.) 499; Baltimore *v.* Howard, 6 Har. & J. (Md.) 383; Gordon *v.* Baltimore, 5 Gill (Md.), 231, 243; Eschbach *v.* Pitts, 6 Md. 71; Jonesboro *v.* McKee, 2 Yerg. (Tenn.) 167; Henrietta *v.* Eustis, 87 Tex. 14, 17; Brummer *v.* Galveston, 97 Tex. 93; Central Hotel Co. *v.* State (Texas Civ. App.), 117 S. W. Rep. 880.

Alabama: In this State it has been held that a tax levied and assessed is a legal liability upon the taxpayer, which may be enforced at common law, although a statutory remedy is also given. Perry County *v.* Selma, M. & M. R. Co., 58 Ala. 546; Winter *v.* Montgomery, 79 Ala. 481; Anniston *v.* Southern R. Co., 112 Ala. 557. A liquor license tax is recoverable by the State in an action, although by statute the delinquent is subject to criminal prosecution for selling without a license. State *v.* Fleming, 112 Ala. 179.

In Dugan *v.* Baltimore, 1 Gill & J. (Md.) 499, *Buchanan*, C. J., delivering the opinion of the court, said: "In Baltimore *v.* Howard, 6 Har. & J. 383, it was decided by this court, in relation to the tenth section of the act of incorporation, that the giving a remedy by distress or action of debt was cumulative only, and did not take away the action arising by implication, or the legal obligations to pay a claim created by law. The tax for which this suit is brought was imposed by virtue of that act, the imposition and assessment of which created the legal obligation to pay, on which the law raised an *assumpsit*, independent of the notice required by the fifth section of the ordinance, as a foundation for a summary mode of recovery, and unaffected by the omission of the collector to do his duty, which omission, though it caused the loss of the right to collect the tax by distress and sale of the goods, left the right to recover on the original implied *assumpsit* unimpaired, — an *assumpsit* raised by the law on the imposition and assessment of the tax, and not to arise on the delivery by the collector of an account of the assessment and tax."

Mode of collection. Mix *v.* Ross, 57 Ill. 121; Bond *v.* Hiestand, 20 La. An. 139; Louisville *v.* Bank of Ky., 3 Met. (Ky.) 148; Ball *v.* Poor, 81 Ky. 26; McLean County Precinct *v.* Deposit Bank, 81 Ky. 254; New Orleans *v.* Graihle, 9 La. An. 561; Baltimore *v.* Chase, 2 Gill & J. (Md.) 376.

It was held in Dollar Savings Bank *v.* United States, 19 Wall. (U. S.) 277, that by express provision of the Internal Revenue Act taxes due thereunder may be collected in a common-law action of debt. Mr. Justice *Strong* says that such recovery might be had on general principles. He admits that where the statute creates a right and provides a particular remedy for its enforcement such remedy is generally exclusive of all common-law remedies. But he says: "The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. It applies and it is enforced when any one to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other. . . . Such principles are not, however, rules of conduct of the State." Construction of *Michigan* statute authorizing the recovery of taxes on personal property by a suit, see Chelsea *v.* Holmes, 137 Mich. 195. When a statute provides that unpaid assessments in a city shall be certified to the *county* auditor and placed on the tax list, and this has been done, the right of action for collection of the assessment is no longer in the city, but rests alone with the county treasurer. Central Ohio R. Co. *v.* Bellaire, 67 Ohio St. 297.

[1] Faribault *v.* Misener, 20 Minn. 396, where the cases are learnedly examined by *Young*, J. *Payment by instalments.* Failure to pay an instalment matures whole debt so far as

§ 1417 (818). **Where the Charter is silent as to Mode of Collection, Suit may be brought.** — If the charter gives the power to impose taxes, but is *silent respecting the method for their recovery*, it has been held that the corporation may enforce them, or provide by ordinance for their enforcement by due course of judicial proceedings. In such a case, the authority to collect by suit is clearly implied, being necessary in order to make the power to tax available.[1] The well-known rule is, that where a statute creates a right, and gives no remedy, the party may resort to the usual remedy applicable to such a case. But the power to levy and collect a tax, whether general or special, does not carry with it the authority to collect *by distress or sale of property*, or in any way more summary than by resort to legal proceedings. The principle of the common law is clear, as we have already seen,[2] that municipal corporations cannot make a by-law (unless the power be plainly and directly conferred) to enforce the payment of fines by distress, sale, or forfeiture of the goods of the party who may have omitted to discharge his legal dues; and the same doctrine extends to taxes, when they are treated as debts. Municipal power to collect by distress and sale cannot be implied because the State collects *its* taxes in this manner. It must be given, if not in express terms, yet by the clearest and most indubitable implication.[3] Therefore, the power to sell for the non-payment of taxes, general or special, cannot be inferred from an express provi-

unpaid. Marion Bond Co. *v.* Blakely, 30 Ind. App. 374.

[1] Franklin County *v.* Ottawa, 49 Kan. 747, 756; Johnston *v.* Louisville, 11 Bush (Ky.), 527, 538; Lexington *v.* Wilson, 118 Ky. 221; Amite City *v.* Clements, 24 La. An. 27; State *v.* Severance, 55 Mo. 378, 389, *per Wagner*, J.; Jefferson *v.* McCarty, 74 Mo. 55; State *v.* Irey, 42 Neb. 186, citing text; Reynolds *v.* Fisher, 43 Neb. 172. Where a tax on personal property was made a *lien* on such property, and no remedy was provided, it was held that replevin by the local authorities to recover the personal property subject to the tax lien might be maintained. Reynolds *v.* Fisher, 43 Neb. 172.

[2] *Ante*, chap. xv. on Ordinances, §§ 608–625.

[3] Bergen *v.* Clarkson, 6 N. J. L. 352; Merriam *v.* Moody, 25 Iowa, 163; Baltimore *v.* Howard, 6 Har. & J. (Md.) 383; Dugan *v.* Baltimore, 1 Gill & J. (Md.) 499; Annapolis *v.* Harwood, 32 Md. 471; Ham *v.* Miller, 20 Iowa, 450; Camden *v.* Allen, 26 N. J. L. 398; Clarke *v.* Tucket, 2 Vent. 182; New Orleans *v.* Graihle, 9 La. An. 561; Baltimore *v.* Chase, 2 Gill & J. (Md.) 376; St. Louis *v.* Russell, 9 Mo. 507; St. Louis *v.* Allen, 13 Mo. 400; McInerny *v.* Reed, 23 Iowa, 410; Haskell *v.* Burlington, 30 Iowa, 232; Dubuque *v.* Harrison, 34 Iowa, 163; Paine *v.* Spratley, 5 Kan. 525; Augusta *v.* Dunbar, 50 Ga. 387; State *v.* Irey, 42 Neb. 186, citing text. The right to impose a fine or penalty for the non-payment of a tax must be plainly conferred, or it cannot be exercised by the corporation. Municipality No. 2 *v.* Pauce, 6 La. An. 515.

Municipal corporations, when clothed by charter with the power to impose taxes, may prescribe *reasonable penalties in the nature of interest* for the non-payment of such taxes when they become due, and such penalties become a part of the debt created by the tax, and are collected in the same manner. Burlington *v.* Burlington & M. R. R. Co., 41 Iowa, 134.

sion in the charter to the effect that the collection of the taxes pro vided for therein shall be enforced in such manner as may b provided by the ordinances of the city.[1] It is well established b the decisions that, in the absence of express provision therefor, *in terest cannot be collected* upon delinquent taxes.[2]

§ 1418 (819). **Power to sell for Delinquent Taxes.** — While th power "to levy and collect taxes" will not alone confer the righ upon the municipality to collect by a *direct sale*, yet these word may give such authority in connection with other charter provision on the same subject, which unequivocally and plainly assume an recognize the existence of a power of sale.[3]

§ 1419 (820). **Same Subject.** — The principle is a familiar on that the power to sell, when given, must be strictly pursued, or th sale is void; and a party claiming title under a corporation tax sal

[1] Merriam *v.* Moody, 25 Iowa, 163; Paine *v.* Spratley, 5 Kan. 525; McInerny *v.* Reed, 23 Iowa, 410.

[2] Perry County *v.* Selma, M. & M. R. Co., 65 Ala. 391; People *v.* North Pac. Coast R. Co., 68 Cal. 551; People *v.* Central Pac. R. Co., 105 Cal. 576, 595; Sargent *v.* Tuttle, 67 Conn. 162, 167; Hartford *v.* Hills, 72 Conn. 599; Danforth *v.* Williams, 9 Mass. 324; State *v.* Baldwin, 62 Minn. 518; State *v.* New England Furn. & C. Co., 107 Minn. 52; Camden *v.* Allen, 26 N. J. L. 398; Belvidere *v.* Warren R. Co., 34 N. J. L. 193, 199; Brennert *v.* Farrier, 47 N. J. L. 75; Rochester *v.* Bloss, 185 N. Y. 42, 52; Matter of Hagemeyer, 113 N. Y. App. Div. 472, 474; Edmonson *v.* Galveston, 53 Tex. 157; Western Un. Tel. Co. *v.* State, 55 Tex. 314; Cave *v.* Houston, 65 Tex. 619, 622; Shaw *v.* Pickett, 26 Vt. 481. *Construction of statute* imposing interest, see Hartford *v.* Hills, 72 Conn. 599; Western Un. Tel. Co. *v.* State, 64 N. H. 265; Winnipiseogee Lake C. & W. Mfg. Co. *v.* Gilford, 64 N. H. 514; Lufkin *v.* Galveston, 73 Tex. 340; New Whatcom *v.* Roeder, 22 Wash. 570. In State *v.* New England Furn. & C. Co., 107 Minn. 52, it was held that although judgment had been rendered for taxes, the judgment did not bear interest under a statute providing for interest on judgments, as the tax remained a tax whether reduced to judgment or not. In Redwood County *v.* Winona & St. P. Land Co., 40 Minn. 512, 522, it was held that when an a sessment is made for omitted or "bac taxes," interest cannot be included i the assessment as the taxpayer is n in default until an assessment is mac and the tax becomes payable ther under. The court expressed the opi ion that taxes cannot, even by statut be made to bear interest until defaul

[3] St. Louis *v.* Russell, 9 Mo. 50 St. Louis *v.* Allen, 13 Mo. 400. I these cases it appeared that in the cha ter of St. Louis power was given "t levy and collect taxes," &c., and in a other portion of the charter it w provided that "the mayor and cit council shall have power, by ordinanc to direct the manner in which propert advertised for sale, or sold for taxe by authority of the corporation, ma be redeemed," and it was held that th city might sell property for the no payment of taxes. In support of th text, see also State *v.* Irey, 42 Neb. 18 citing text; Carondelet *v.* Picot, 3 Mo. 125. Compare Merriam *v.* Mood 25 Iowa, 163.

A *special assessment held to be a ta* within the meaning of a statute pr viding for the sale of lands for d linquent taxes, no other method enforcing collection being provide Yates *v.* Milwaukee, 92 Wis. 352, 35 See also Dalrymple *v.* Milwaukee, Wis. 178; Sheboygan County *v.* Sh boygan, 54 Wis. 415, 421. See *contr* Allen *v.* Galveston, 51 Tex. 302.

must, unless the rule is varied by legislative enactment, show that every prerequisite to the exercise of the power has been complied with.[1]

§ 1420 (821). **Lien of Taxes.** — It is undoubtedly a sound proposition that taxes, whether general or special, *are not liens* upon the property against which they are assessed, unless made so by the charter, or unless the corporation is authorized by the legislature to declare them to be liens.[2] The statute determines not only the ex-

[1] Pope *v.* Headen, 5 Ala. 433; Smith *v.* Cox, 115 Ala. 503; Allen *v.* Galveston, 51 Tex. 302; Underhill *v.* Smith (publication), Chip. (Vt.) 81; Bucknall *v.* Story (corporation tax-deeds as evidence of title), 36 Cal. 67; Grimm *v.* O'Connell, 54 Cal. 522; Simmons *v.* McCarthy, 118 Cal. 622; Baird *v.* Monroe, 150 Cal. 560, 564; Holroyd *v.* Pumphrey, 18 How. (U. S.) 60; Holbrook *v.* Dickinson, 46 Ill. 285; Ansley *v.* Wilson (publication), 50 Ga. 418; McPhee *v.* Venable, 77 Ga. 772; Dowell *v.* Portland, 13 Oreg. 248 (assessment made to a stranger to the title is void); State *v.* Taylor, 59 Md. 338; O'Byrne *v.* Philadelphia, 93 Pa. 225 (publication); Allentown *v.* Hower, 93 Pa. 332 (defective registration of lien); Pittsburgh *v.* Knowlson, 92 Pa. 116 (time of filing lien).

Effect of municipal tax-deed being made prima facie evidence of title. See cases *supra;* Dubois *v.* Campau, 24 Mich. 360. The *special mode* of collection of assessments prescribed by law must be pursued. Mix *v.* Ross, 57 Ill. 121. Blackwell on Tax Titles, chap. xxi. Compliance with law must appear on the face of the proceedings. Chicago *v.* Wright, 32 Ill. 192; Sharp *v.* Speir, 4 Hill (N. Y.), 76, adjudging that a power to sell for *taxes* did not authorize a sale for a mere *assessment for benefit;* s. p. Sharp *v.* Johnson, 4 Hill (N. Y.), 92. In a proceeding to set aside a sale of land for taxes, on the ground that the full amount had been tendered, the plaintiff must offer to pay the money into court or to the purchaser when relief is obtained. Lancaster *v.* Du Hadway, 97 Ind. 565.

Injunction will lie to prevent a sale of land upon a void precept. Goring *v.* McTaggart, 92 Ind. 200. In Doe *v.* Chunn, 1 Blackf. (Ind.) 336, it was held that express power to a municipal corporation to levy taxes and sell lands for the non-payment of them (the charter being silent as to conveyance to the purchaser) did not include the power to convey; but this view may, perhaps, be considered too strict to be sound. At all events, this would not be law in any but a tax-title case. See Paine *v.* Spratley, 5 Kan. 525.

"Without express power given to *a municipal corporation*, by statute to *become purchaser* at an authorized sale of lands [by it] for the non-payment of taxes, it possesses no such power, and a sale to it is void." *Dixon*, C. J., in Knox *v.* Peterson, 21 Wis. 247; Sprague *v.* Cœnen, 30 Wis. 209; s. p. Champaign *v.* Harmon, 98 Ill. 491; Logansport *v.* Humphrey, 84 Ind. 467. In *Wisconsin* towns are distinguished from municiapl corporations proper, and are not authorized to purchase and hold tax certificates. Eaton *v.* Manitowoc County, 44 Wis. 489. *Relief against illegal taxes and assessments. Post*, chap. xxxi. *Right to recovery back. Post*, chap. xxxii.

In *Nebraska*, where a tax sale only operates as an assignment of the lien of the public to the purchaser at the sale, and the owner of the property is not divested of title, it is held that the fact that part of the taxes for which land is sold is illegal, does not invalidate the sale as to the legal taxes. Hall *v.* Moore (Neb.), 92 N. W. 294.

[2] Heine *v.* Levee Com'rs, 19 Wall. (U. S.) 655; Meriwether *v.* Garrett, 102 U. S. 472; Meyer *v.* Burritt, 60 Conn. 117, 123; Jaffray *v.* Anderson, 66 Iowa, 718, citing text; Castle *v.* Anderson, 69 Iowa, 428; New England Loan & Tr. Co. *v.* Young, 81 Iowa, 732; Bibbins *v.* Clark, 90 Iowa, 230, 235; Eagle Mfg. Co. *v.* Davenport, 101 Iowa, 493, 498, citing text; Cemansky *v.* Fitch, 121 Iowa, 186; Larson *v.*

istence of the lien, but also the property which is subject to it, th duration of the lien, and its priority with reference to other lien and claims against the property.[1]

Hamilton County, 123 Iowa, 485, 486; Dunham *v.* Lowell, 200 Mass. 468; State *v.* Bellin, 79 Minn. 131, 134; Kansas City *v.* Payne, 71 Mo. 159; Jefferson *v.* Whipple, 71 Mo. 521; Everett *v.* Marston, 186 Mo. 587, 599; Cadmus *v.* Fagan, 47 N. J. L. 549, 552; Linn *v.* O'Neil, 55 N. J. L. 58; Philadelphia *v.* Greble, 38 Pa. 339; Howell *v.* Philadelphia, 38 Pa. 471; Allegheny City's Appeal, 41 Pa. 60; Lofink *v.* Allegheny, 5 Weekly Notes Cases (Pa.), 8; Quimby *v.* Wood, 19 R. I. 571, 579, citing text; Miller *v.* Anderson, 1 S. Dak. 539, 545; El Paso *v.* Mundy, 85 Tex. 316; Phelan *v.* Smith, 22 Wash. 397; Knowles *v.* Temple, 49 Wash. 595, 596.

In Heine *v.* Levee Com'rs, 19 Wall. (U. S.) 655, *supra*, Mr. Justice *Miller*, delivering the opinion of the court, said· "It is said in argument that plaintiffs have a lien upon the taxabl property of the district for the pay ment of these bonds, and that equit always enforces liens where no othe mode of enforcing them exist Whether this be the true doctrine of court of equity to the full extent her claimed we need not decide. Nor nee we decide whether taxes once lawfull levied are, until paid, a lien on th property against which they are as sessed, though it is laid down in th very careful work of Judge Dillo [citing text] that taxes are not lien upon the property against which the are assessed, unless made so by th charter, or unless the corporation i authorized by the legislature to de clare them to be liens."

Authority to a city "to provide, b ordinance or otherwise, for the *prom* collection of taxes due to the city, an

[1] Speaking of taxes on real estate, in Meyer *v.* Burritt, 60 Conn. 117, 123, *Torrance*, J., says: "The liens sought to be enforced here exist solely by virtue of the statute. It is the statute that determines what property shall be subject to them, when they shall commence, how long they shall endure, how they shall be enforced, over what other claims they shall have precedence, and what amount of the tax shall be secured by them. They are the *creatures of the positive statute*, and by that must their nature and qualities be tested." In *Arkansas*, a statute was construed to make the assessment liens relate back and apply from the date of the ordinance providing therefor. Sanders *v.* Brown, 65 Ark. 498. The time when the lien attaches must be ascertained from the statute. Eagle Mfg. Co. *v.* Davenport, 101 Iowa, 493.

Under a statute providing that nothing in the act should be construed to affect the lien of State taxes which have been or may be levied upon the property under the general laws of the State, the *lien of a special assessment is subordinate* to the lien of the State for all taxes levied under the general laws of the State without reference to the time when the State lien accrued. White *v.* Knowlton, 84 Minn. 141. Lien when given held t be of equal rank with lien for Stat taxes. Justice *v.* Logansport, 101 In 326. The lien for the *last improveme* held under statute to have priorit over other improvement liens prev ously created. Burke *v.* Lukens, 1 Ind. App. 648. In *Kentucky* an a sessment lien upon abutting propert is superior to a mortgage lien, th mortgagee taking his mortgage sub ject to the power of the city to requir the lots to bear their proportion of th expense of construcing the streets o which they front. Dressman *v.* Farm ers' & Traders' Nat. Bank, 100 Ky 571. This is also the rule as to asses ments for the construction of a sewe Dressman *v.* Semonin, 104 Ky. 69 When taxes are a lien on a parcel c ground, and separate parts thereof a sold to different purchasers, the la part sold is primarily liable for th payment of all the taxes. Merchant Nat. Bank *v.* McWilliams, 107 G 532. A complaint for foreclosure the lien of a street assessment whic shows on its face that the lien has e pired by the lapse of the time fixed b the statute does not state a sufficie cause of action. Williamson *v.* Joyc 140 Cal. 669.

§ 1421 (822). **Same Subject. Mode of enforcing Lien.** — Where the charter of a city conferred upon it the power "to levy and collect" a special tax for local improvements, and declared such tax to be "*a lien*" upon the real estate upon which it should be assessed, and no mode of collection was prescribed, and no power to collect by sale existed, the court was of opinion that the lien might be *enforced in equity*, and the power "to collect" be exercised by the corporation by a suit in its name; but it was held that suit could not be maintained in the name of an assignee of the corporation.[1] The

to that end the city shall have power to sell *real* as well as personal property," authorizes it to pass an ordinance declaring taxes to be a lien on realty. Eschbach *v.* Pitts, 6 Md. 71, charter of Baltimore. See Dallam *v.* Oliver, 3 Gill (Md.), 445. A city can *create a lien* for improving a street only when it has exercised its powers legally, and made the improvement in accordance with the law. Herschberger *v.* Pittsburgh, 115 Pa. 78. Statute construed as conferring, by necessary implication, a *lien* for the cost of *street sprinkling*. Palmer *v.* Nolting, 13 Ind. App. 581. Though a personal action may lie against the owner to recover the amount of paving tax, yet this does not affect the specific liability of the property on which the tax is a lien, or which may be sold to pay it. Eschbach *v.* Pitts, 6 Md. 71. See, as to liens, Mix *v.* Ross, 57 Ill. 121; Higgins *v.* Chicago, 18 Ill. 276; Burlington *v.* Quick, 47 Iowa, 222.

"The notion of a *proceeding in rem* is at the bottom of the usual tax on land, even where, as in *Massachusetts*, there is a personal liability superadded. This is shown by the doctrine that a valid tax sale cuts off all titles and starts a new one." *Per* Mr. Justice *Holmes* in Paddell *v.* New York City, 211 U. S. 446, 451, aff'g 187 N. Y. 552. In *Washington*, proceedings for the assessment and collection of taxes upon real property are *in rem*. The *necessity for and sufficiency of notice* and the regularity and validity of proceedings to enforce payment must be determined with reference to the nature of the proceeding. Ontario Land Co. *v.* Yordy, 212 U. S. 152; Woodward *v.* Taylor, 33 Wash. 1; Williams *v.* Pittock, 35 Wash. 271; Morrison *v.* Shipman, 37 Wash. 171; Spokane Falls & N. R. Co. *v.* Abitz, 38 Wash. 8; Allen *v.* Peterson, 38 Wash. 599; Rowland *v.* Eskeland, 40 Wash. 253; Shipley *v.* Gaffner, 48 Wash. 169, 171. See also Carson *v.* Titlow, 38 Wash. 196. A person purchasing real property *after* the improvement has been completed, must, if he would protect himself, make inquiry whether an assessment has been levied therefor. A subsequent assessment against the lands is not affected by the fact that he purchased without knowledge of the fact that the assessment had not been imposed. The doctrine of *bona fide* purchasers for value has no application to liability for assessments. Seattle *v.* Kelleher, 195 U. S. 351.

The *water rents in favor of a city* owning water-works were by the charter declared "*to be a lien* upon the house and lot in the same way and shall be collected *like other taxes*." Construing this statute, water rents are not regarded as taxes or an assessment for benefits, and the obligation of the consumer rests upon an implied contract to pay for water used. But though resting on contract it is competent for the legislature to declare that the lien of such water rent shall have priority over mortgages made after such legislative act, although the water was introduced on the mortgaged lot after the giving of the mortgage. Such an act and such effect thereof does not deprive the mortgagee of his property without due process of law. Provident Inst. for Sav. *v.* Jersey City, 113 U. S. 506.

Assessments for the improvement of a street are sustained by courts because of the benefits to the particular property, and executions issued therefor do not run generally against the other property of the owner not situated upon the street and not specifically assessed. Brumby *v.* Harris, 107 Ga. 257.

[1] McInerny *v.* Reed, 23 Iowa, 410;

right of the owner to redeem from sales for municipal taxes and assessments, as well as from sales under the general tax laws, is favorably regarded by the courts; and statutes giving or extending this right are liberally construed. And it is held by the Supreme Court of Pennsylvania that the right to redeem is, until the sale is fully consummated by deeds, wholly within legislative control, and that the redemption time may be enlarged after the sale is made and before the purchaser has obtained his deed.[1]

Lima *v.* L. Cem. Assoc., 42 Ohio St. 128. In New York *v.* Colgate, 12 N. Y. 140, the lien of the city was created by statute, and the cumulative right to enforce it as a *mortgage* given, and the lien, it was held, was not discharged by a defective sale *in pais*. See also Norwich *v.* Hubbard, 22 Conn. 587; Himmelmann *v.* Spanagel, 39 Cal. 389. Though a lien be given, the remedy at law is not necessarily excluded. New Haven *v.* Fair Haven & W. R. Co., 38 Conn. 422; *ante*, § 1414; Heine *v.* Levee Com'rs, 19 Wall. (U. S.) 655.

Where the taxes had not been assessed, and where there was no statute declaring them a lien, it was held that a bondholder had no remedy in equity to compel the assessment and collection of the tax. See chapter on *Mandamus, post.* As to enforcement of lien in *California*, see Hancock *v.* Bowman, 49 Cal. 413. A contractor, who, as the agent of the city, and by its authority, does paving under a contract with lot-owners, will be *subrogated* to the rights of the city as to liens on the adjoining property, and may prosecute a suit in the name of the city for his use against the delinquent property. Philadelphia *v.* Wistar, 35 Pa. 427. But in Griffing *v.* Pintard, 29 Miss. 173, it was held that the doctrine of subrogation had no application to the rights and remedies of the State or city against delinquent taxpayers.

Suits for local assessments may be brought in the *name* of the corporation, although the charter directs that the board of trustees shall do the work and recover; the trustees are but the agents of the corporation. Palmyra *v.* Morton, 25 Mo. 593; Northern Liberties *v.* St. John's Church, 13 Pa. 104.

As to *mode of collecting assessments* for local improvements, and when considered a *personal charge* as well *as a lien* on the property benefited, see Bennett *v.* Buffalo, 17 N. Y. 383; New York *v.* Colgate, 12 N. Y. 140 (assessment for widening street); Salter *v.* Reed, 15 Pa. 260; Philadelphia *v.* Cook, 30 Pa. 56, 63; Guerin *v.* Reese, 33 Cal. 292; Des Moines *v.* Cassady, 21 Iowa, 570; Gaffney *v.* Gough, 36 Cal. 104; Britton *v.* Philadelphia, 32 Pa. 387; Mix *v.* Ross, 57 Ill. 121; Jones *v.* Schulmeyer (date when lien given by statute attaches), 39 Ind. 119; *supra*, § 1414, note.

Where a city charter provides for a sale for delinquent taxes and assessments, and that if the property be not redeemed within a year, the comptroller shall execute deeds to the purchaser, and himself bid in for city lots on which no bids are received and execute deeds thereto, title to property so bid off for the city vests in it and the city's lien for an assessment on such property merges in the title acquired by it. Schneider *v.* Detroit, 135 Mich. 570. See also Gray *v.* Detroit, 113 Mich. 657.

[1] Gault's Appeal, 34 Pa. 95. See Adams *v.* Beale, 19 Iowa, 61; Bryant *v.* Russell, 127 Mo. 422.

In *Wisconsin* a provision in a city charter that no costs shall be recovered against the city in any action brought to set aside a tax sale or to prevent the collection of the tax was held unconstitutional. Durkee *v.* Janesville, 28 Wis. 464. And so a statute requiring payment of the redemption money and interest, before being allowed to question the validity of a tax-deed, was held unconstitutional by the Supreme Court of *Illinois.* Reed *v.* Tyler, 56 Ill. 288. Under the charter of New York City declaring assessments for certain local improvements to be a lien upon the property benefited, such lien does not exist until the amount thereof is ascertained, and the city cannot create such a lien upon property owned by itself when

the local improvement was constructed and the expense thereof paid by it. Dowdney *v.* New York, 54 N. Y. 186; Mandel *v.* Weschler, 128 N. Y. App. Div. 505, 508; Harper *v.* Dowdney, 113 N. Y. 644; Lathers *v.* Keogh, 109 N. Y. 583; Hastings *v.* Twenty Third Ward Land Co., 46 N. Y. App. Div. 609. See also De Peyster *v.* Murphy, 66 N. Y. 622. Assessment must be made before lien can be enforced. Laakmann *v.* Pritchard, 160 Ind. 24. *Foreclosure* of lien for assessment on *failure to pay instalment.* See Marion Bond Co. *v.* Blakely, 30 Ind. App. 374.

Publication of notice of *expiration of time for redemption* from special assessment held void. Bergen *v.* Anderson, 62 Minn. 232. New notice may be given after expiry of redemption period. Flanagan *v.* St. Paul, 65 Minn. 347. Where the statute provides for time to redeem, it is error to order a deed at once. Martin's Ex'r *v.* Slaughter (Ky.), 50 S. W. Rep. 27.

In Lasbury *v.* McCague, 56 Neb. 220, *Norval*, J., said: "The general rule in this State is, and we have so declared, that when it is sought to foreclose a lien against real estate for the non-payment of special taxes or assessments, there is no presumption that the statute relating to their levy and assessment has been complied with, but the burden is upon the person asserting the lien to establish its validity. Smith *v.* Omaha, 49 Neb. 883; Leavitt *v.* Bell, 55 Neb. 57; Equitable Trust Co. *v.* O'Brien, 55 Neb. 735. The same rule does not obtain where, in a case like the present, the property owner comes into a court of equity, asking that certain special taxes be declared invalid, and not a lien upon the premises which they were assessed, since he predicates his right to affirmative relief on the ground that the taxes are void, and the burden rests upon him to establish their invalidity. Before he can have the title to his lots quieted, he must be able to show that the special taxes constituted no lien upon the property." An irregular division of an assessment into unequal instalments contrary to the provisions of the statute is not sufficient ground for a refusal of judgment of sale where the objector does not show damage from the unequal division. Glover *v.* People, 194 Ill. 22.

In Emery *v.* Boston Terminal Co. 178 Mass. 172, 184, *Holmes*, C. J., said *arguendo*, "The prevailing opinion seems to be that a tax title is a new title and not merely the sum of all old titles." Citing Hefner *v.* Northwestern L. Ins. Co., 123 U. S. 747, 751; Brewer *v.* District of Columbia, 5 Mackey (D. C.) 274, 278; McQuity *v.* Doudna, 101 Iowa, 144, 146; Textor *v.* Shipley, 86 Md. 424, 438.

CHAPTER XXVIII

SPECIAL ASSESSMENTS

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§ 1430. **Special Assessment; Distinguishing Characteristics.** — In the preceding chapter we have discussed more immediately that branch of the taxing power of the State which is exercised in the im-

position of *general taxes* for the support of the government, general and local, and have only incidentally referred to the taxing power as exercised in the imposition of *special assessments for local improvements.*[1] But although taxation to create revenues to meet the general expenses of the government or municipality, and special assessments to pay for local improvements have a common origin in the taxing power of the State, many features exist which distinguish such special assessments from taxes generally so called. Like general taxes, special assessments are enforced proportional contributions, but instead of being imposed at regularly recurring periods to provide a continuous revenue, special assessments are levied only occasionally as required; they are imposed, not upon the general body of the citizens, but upon a limited class of persons who are interested in a local improvement, and who are assumed to be benefited by the improvement to the extent of the assessment; they are imposed and collected as an equivalent, actual or presumed, for the benefit and to pay for the cost of the improvement. Special assessments proceed upon the theory that when a local improvement enhances the value of neighboring property, it is reasonable and competent for the legislature to provide that such property should pay for the improvement. In a general levy of taxes the contribution is exacted in return for the general benefits of government; in special assessments the contribution is exacted because the property of the taxpayer is considered by the legislature to be benefited over and beyond the general benefit to the community.[2] But there is, as we think, no *general principle of con-*

[1] *That such special assessments are an exercise of the taxing power* is now generally recognized and established. Whatever doubt may at one time have existed has long since been removed. To the effect that special assessments are an exercise of the taxing power, see Bridgeport *v.* New York & N. H. R. Co., 36 Conn. 255; New London *v.* Miller, 60 Conn. 112, 115; Sargent *v.* Tuttle, 67 Conn. 162; Crichfield *v.* Bermudez Pav. Co., 174 Ill. 466, 477; Yeomans *v.* Riddle, 84 Iowa, 147, 160; Chicago, R. I. & P. R. Co. *v.* Ottumwa, 112 Iowa, 300, 305; Hackworth *v.* Ottumwa, 114 Iowa, 467, 470; Wilson *v.* Auburn, 27 Neb. 435, 440; Boston Seaman's Friend Soc. *v.* Boston, 116 Mass. 181; Independence *v.* Gates, 110 Mo. 374; Heman Const. Co. *v.* Wabash R. Co., 206 Mo. 172, 179; McCutcheon *v.* Pacific R. Co., 72 Mo. App. 271, 275; Excelsior Springs *v.* Ettenson, 120 Mo. App. 215, 223; State *v.* Newark, 27 N. J. L. 185, 193; State *v.* Newark, 37 N. J. L. 415; People *v.* Brooklyn, 4 N. Y. 419, a leading case; *In re* Van Antwerp, 56 N. Y. 261; Winona & St. P. R. Co. *v.* Watertown, 1 S. Dak. 46, 51; Violett *v.* Alexandria, 92 Va. 561; Dalrymple *v.* Milwaukee, 53 Wis. 178, 186.

[2] "It is a local assessment imposed occasionally, as required, upon a limited class of persons interested in a local improvement; who are assumed to be benefited by the improvement to the extent of the assessment; and it is imposed and collected as an equivalent for that benefit, and to pay for the improvement." *Per Butler*, J., in Bridgeport *v.* New York & N. H. R. Co., 36 Conn. 255, 262. See also

stitutional law that necessarily limits the legislative power to make special assessments for local improvements to the exact amount of pecuniary benefit in dollars and cents which the particular property assessed derives from the improvements. Special limitations to this effect have been embodied in the Constitutions of several States, and some courts have so held even where no such special provisions exist in the Constitution of the State, but perhaps without due consideration of the legitimate scope of the taxing power when not specially restricted. The subject of how far special *pecuniary* benefits are the *constitutional* basis of local assessments will be found copiously illustrated in the course of the present chapter.

§ 1431 (752). **Local Assessments for Local Improvements upon Persons and Property benefited.** — The *expense of making local improvements*, such as grading and paving or otherwise improving streets and sidewalks, constructing drains, sewers, and the like, is very generally met, in whole or in part, *by local assessments* au-

Gould *v.* Baltimore, 59 Md. 378, 380.

"Taxes are the regular, uniform, and equal contributions which all citizens are required to make for the support of the government. An assessment for benefits may lack each of these qualities and yet be valid. It is a local assessment, imposed occasionally, and upon a limited class of persons interested in a local improvement, and is uniform only in that it is supposed to give an added value to the property of each person assessed to the full amount of the assessment." *Per Andrews*, C. J., in New London *v.* Miller, 60 Conn. 112, 116. "Such assessments are enforced proportional contributions of a somewhat special kind, made *in invitum*, by virtue of legislative authority conferred upon the municipality for that purpose, upon such terms and conditions as the legislature within constitutional limits sees fit to impose." *Per Torrance*, J., in Sargent *v.* Tuttle, 67 Conn. 162, 166. "The essentially characteristic feature of a local assessment is that it is levied on particularized property, and not on property generally." *Per Provosty*, J., in Griggsry Const. Co. *v.* Freeman, 108 La. 435, 437.

In Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 198, Mr. Justice *Brewer*, after discussing the nature of general taxes in the language quoted above (*ante*, § 1351), said: "On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for the improvement." In Wright *v.* Boston, 9 Cush. (Mass.) 233, 241, *Shaw*, C. J., said: "When certain persons are so placed as to have a common interest among themselves, but in common with the rest of the community, laws may justly be made, providing that, under suitable and equitable regulations, those common interests shall be so managed, that those who enjoy the benefits shall equally bear the burden." "The popular, as well as legal, signification of this term had always indicated those special and local impositions upon the property in the immediate vicinity of the improved street which were necessary to pay for the improvement, and laid with reference to the special benefits which such property derived from the expenditure of the money." *Per Ranney*, C. J., in Hill *v.* Higdon, 5 Ohio St. 243. In McGonigle *v.* Allegheny, 44 Pa. 118, 121, the court said: "All these municipal taxes for improvement of streets, rest, for their final reason, upon the enhancement of private properties."

thorized to be made upon persons or property benefited, or deemed to be benefited.[1] Legislation of this character, both in respect to

[1] Sinton *v.* Ashbury, 41 Cal. 525; Nichols *v.* Bridgeport, 23 Conn. 189; Weed *v.* Boston, 172 Mass. 28, 32, citing text; Nugent *v.* Jackson, 72 Miss. 1040, 1056, citing text; Busbee *v.* Wake County, 93 N. Car. 143; Galveston *v.* Heard, 54 Tex. 420; Sands *v.* Richmond, 31 Gratt. (Va.) 571, citing text; Violett *v.* Alexandria, 92 Va. 561; Wilson *v.* Philippi, 39 W. Va. 75, 84, quoting text; Parkersburg *v.* Tavenner, 42 W. Va. 486, 490, citing text.

The Constitution confers upon Congress the authority to exercise exclusive legislation over the *District of Columbia*, and it is competent for *Congress* to authorize the city of Washington to assess the expense of making local improvements in or upon streets on the abutters, and the tax for such improvements need not be a general one on the city. Willard *v.* Presbury, 14 Wall. (U. S.) 676; Mattingly *v.* District of Columbia, 97 U. S. 687; Gibbons *v.* District of Columbia, 116 U. S. 404; Bauman *v.* Ross, 167 U. S. 548; Parsons *v.* District of Columbia, 170 U. S. 45, 52; Martin *v.* District of Columbia, 205 U. S. 135. So, with respect to the establishment of a *public park* within the district. Shoemaker *v.* United States, 147 U. S. 282. In Philadelphia *v.* Tryon, 35 Pa. 401, 404, Mr. Justice *Woodward* thus vindicates the *justice* of such assessments: "Local impositions for grading, paving, sewerage, and the like," he says, "have been many times sustained by this court, and are, in the long run, perfectly fair, for they enter into and enhance the value of the property assessed. The public, it is true, are benefited, but so is the individual; and as an owner of urban property, he is further benefited when, in due time, the same tax falls on his neighbor."

In holding that the legislature may constitutionally confer upon municipal corporations the power to improve streets at the expense of the adjoining proprietors, the Supreme Court of *Missouri* says: "The subject has been thoroughly discussed, and every principle bearing on it severely analyzed, in almost every State of the Union where the power has been exercised; and it is now as firmly established as any other doctrine of American law." *Per Richardson*, J., in Palmyra *v.* Morton, 25 Mo. 593. See also in the same State, Egyptian Levee Co. *v.* Hardin, 27 Mo. 495; St. Joseph *v.* O'Donoghue, 31 Mo. 345; Lockwood *v.* St. Louis, 24 Mo. 20; reaffirmed, St. Louis *v.* Clemens, 36 Mo. 467; Eyerman *v.* Blaksley, 78 Mo. 145. See State *v.* Leffingwell, 54 Mo. 458; *ante*, § 1034, note; and see authorities cited *infra*.

In *Kentucky*, local improvements at the expense of the abutters or property benefited were first decided to be constitutional in the case of Lexington *v.* McQuillan's Heirs, 9 Dana (Ky.), 513, in which the subject is discussed with great fulness and ability by *Robertson*, C. J. See also Louisville *v.* Hyatt, 2 B. Mon. (Ky.) 177; Preston *v.* Roberts, 12 Bush (Ky.), 570; Nevin *v.* Roach, 86 Ky. 492; Gleason *v.* Barnett, 106 Ky. 125; Gosnell *v.* Louisville, 104 Ky. 201; Barfield *v.* Gleason, 111 Ky. 491, 510. In the case of Howell *v.* Bristol, 8 Bush (Ky.), 493, it appeared that by the charter of Covington the city council were authorized to improve streets with Nicholson pavement or otherwise, "whenever the owners of the larger part of the front feet of ground" on the proposed improvement shall petition therefor, and not otherwise. This applied to every street in the city except a portion of Madison Street, which was the leading thoroughfare of the place; and as to a designated portion of this street the charter provided that it might be paved, by the vote of all the members of the council elect and in office, at the expense of the adjoining owners, *without any petition therefor*. This portion of Madison Street was paved, under an ordinance unanimously adopted as required by the charter, *without any petition from the owners*, and, it seems, against their remonstrance; and, the city seeking to enforce payment for the pavement, the question of the validity of the charter distinctly arose. The Court of Appeals held that under the decisions in the McQuillan and Hyatt cases the charter was clearly constitutional except as to Madison Street; and as to that the court held that this provision of the

its justice and its constitutional validity, has been extensively discussed by the judicial tribunals of nearly every State in the Union.

charter was destructive of that uniformity and approximate equality which those cases held to be essential to the validity of such taxation or assessments. See also as to repairing and reconstructing street with Nicholson pavement, Broadway Bapt. Ch. *v.* McAtee, 8 Bush (Ky.), 508; distinguished from Hammett *v.* Philadelphia, 65 Pa. 146; also Covington *v.* Boyle, 6 Bush (Ky.), 204; Bradley *v.* McAtee, 7 Bush (Ky.), 667. See also Caldwell *v.* Rupert, 10 Bush (Ky.), 179. Abutting lot-owners cannot be compelled to pay for *part* of the work called for by an ordinance authorizing the improvement of a street, even when allowance is made for the value of the work not done. Henderson *v.* Lambert, 14 Bush (Ky.), 24. As to uniformity of local assessments in *Kentucky* for improving streets, see Preston *v.* Roberts, 12 Bush (Ky.), 570; Loeser *v.* Redd, 14 Bush (Ky.), 18.

In *Maryland*, the Court of Appeals has declared the constitutionality of laws which impose all of the expenses or damages caused by opening a street upon those immediately benefited, instead of the community at large. Alexander *v.* Baltimore, 5 Gill (Md.), 383; followed, Moale *v.* Baltimore, 5 Md. 314. This last case expressly approves People *v.* Brooklyn, 4 N. Y. 419. See also Howard *v.* First Indep. Church, 18 Md. 451.

The Constitution of *Minnesota* authorizes, through legislative provision, assessments by municipal corporations for local improvements upon property to be benefited thereby, without regard to a cash valuation, and "in such manner as the legislature may prescribe." The rule in that State, as stated by *Vanderburgh*, J., seems to be that "if the special benefits to property so locally affected are equal to the cost of the work, then an amount not exceeding the whole cost may be assessed upon such property; but if the expense thereof exceed such benefits, then the city at large should in any event bear a portion of the burden." State *v.* Ramsey Co. Dist. Ct., 33 Minn. 295. By the Constitution of *Minnesota* only "muncipal corporations" may be authorized to levy assessments for local improvements. It has been construed not to prevent a levy in behalf of a municipal corporation by its authorized agents, — as a board of park commissioners. State *v.* Hennepin County Dist. Court, 33 Minn. 235.

In *Mississippi*, it is also held that there is nothing in the Constitution of the State which deprives the legislature of the power to impose a tax on a local district for the construction of local public improvements; and that municipal corporations may be constitutionally authorized to assess taxes upon lots for the purpose of making improvements upon the streets in front thereof. Williams *v.* Cammack, 27 Miss. 209, 224 (levee tax); following People *v.* Brooklyn, 4 N. Y. 419; s. p. Alcorn *v.* Horner (levee tax), 38 Miss. 652; Smith *v.* Aberdeen, 25 Miss. 458. The objection that such a tax is not *equal and uniform*, the court considered not to be well taken.

In *Nebraska*, the provision of the Constitution that "the legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by taxation of property benefited," merely prescribes the rule of apportionment of such special taxes, and does not prohibit the legislature from conferring the power to make local improvements by special assessments or taxation upon property benefited upon other municipal corporations than those designated. [Criticising 81 Ill. 53.] State *v.* Dodge County, 8 Neb. 129; Hanscom *v.* Omaha, 11 Neb. 37.

Ohio. As to *local assessments*. Creighton *v.* Scott, 14 Ohio St. 438; Scoville *v.* Cleveland, 1 Ohio St. 126; Cleveland *v.* Wick, 18 Ohio St. 303. In a later case the doctrine in *Ohio* is thus declared: —

A corporation, to pay for a local public improvement, may by assessment take from an individual whose lands are subject to assessment and specially benefited by the improvement, such a portion of the costs thereof as is the equivalent, but not in excess, of the special benefits conferred thereby. The whole amount of the assessment must be apportioned amongst the several lots and parcels of land specially benefited in the proportion that the

The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local im-

special benefit to each lot or parcel bears to the whole special benefits conferred by the improvement. If the opening of a street rendered it practicable to open another contemplated street which could not have been opened before, and this fact of itself specially benefits lots adjacent to the new street, such special benefits may properly be considered in estimating the special benefits conferred by the opening of the new street. The right that gives to municipal corporations the privilege of resorting to this mode of taxation is not, like the right of general taxation in the State, founded on necessity: on the contrary, the right of a municipal corporation to assess private property to pay for a local public improvement is not founded on necessity, but on a principle of justice, by which the public may take from an individual whose lands, owing to their proximity to it, are specially benefited by the improvement, such a portion of the cost thereof as is equivalent to, but not in excess of, the special benefits conferred by the improvement; and this principle of justice in itself impliedly furnishes the measure of, and limits the extent of the right. Chamberlain *v.* Cleveland, 34 Ohio St. 551; Hill *v.* Higdon, 5 Ohio St. 243; Meissner *v.* Toledo, 31 Ohio St. 387; Tide Water Co. *v.* Coster, 18 N. J. Eq. 518; Hammett *v.* Philadelphia, 65 Pa. 146; Thomas *v.* Gain, 35 Mich. 156; Nichols *v.* Bridgeport, 23 Conn. 189; Flatbush Av., *In re*, 1 Barb. (N. Y.) 286; Fourth Av., *In re*, 4 Wend. (N. Y.) 452; Albany Street, *In re*, 11 Wend. (N. Y.) 148; William, &c. Streets, *In re*, 19 Wend. (N. Y.) 678; Emerson *v.* Saltmarsh, 7 A. & E. 266; Dore *v.* Gray, 2 D. & E. T. R. 358; Stafford *v.* Hamston, 2 B. & B. 691; Brooks *v.* Baltimore, 48 Md. 265. *Non-abutting lots and lands* are not subject to assessment for the cost of a street improvement, unless the same be designated and the amount to be assessed thereon fixed by the board of improvements or city council. Kelly *v.* Cleveland, 34 Ohio St. 468.

Rhode Island. In the Matter of Dorrance Street, 4 R. I. 230, it was held by the Supreme Court that "An Act of the General Assembly, 'in relation to the laying out, enlarging, straightening, or otherwise altering streets in the city of Providence,' which allows not to exceed half the expense of the improvement, when, in the discretion of the city council it is made in pursuance of the provisions of the Act, to be assessed upon the adjacent proprietors benefited thereby, is constitutionally valid. It does not transgress the limit of 'just compensation' imposed by art. i. § 16, of the Constitution, as a restriction upon the public right of eminent domain, nor does it conflict with art i. § 2, of the Constitution, which requires, that 'the burdens of the State ought to be fairly distributed among its citizens.'"

South Carolina. In this State, the power of the legislature to authorize special assessments in respect of benefits, actual or presumed, from a public improvement is denied. In State *v.* Charleston, 12 Rich. Law (S. Car.) 702, 732, a statute authorizing the city of Charleston to impose a special assessment on abutting lands for the expense of widening a street was held to be unconstitutional. *Dunkin*, Chancellor, denied the legislative power to impose any such assessment, saying: "All the persons or property within a State, district, city or other fraction of territory having a local sovereignty for the purpose of taxation, should, as a general rule, constitute the basis for taxation. If the tax be upon real estate, the value of the real estate should be the measure of taxation. As has been elsewhere said, the general rule knows nothing about partial assessment, for benefits, or the selection of a portion of a class. Existence of persons, or the possession of property, and not the supposed benefit, are the guide. When each is taxed according to the value of his property, both equality and certainty may be attained to a reasonable extent, but what may be beneficial or otherwise is a matter of opinion, or fancy, or vague conjecture." In Mauldin *v.* Greenville, 42 S. Car. 293, it was held that the maintenance, repair, and improvement of the roadway of a street are a part of the public duty to construct and maintain highways, should be met by general taxation, and cannot

provements is a branch of the taxing power, or included within it[1] and the many cases which have been decided fully establish the general proposition that a statute authorizing the municipal authorities to open or establish streets,[2] or to make local improvements of the character above mentioned and to assess the expense upon the property which, in the opinion of the designated tribunal or officers, shall be specially benefited by such street or improvement in proportion to the amount of such benefit, or upon the abutters in proportion to benefits or frontage or superficial contents, is, in the absence of some special constitutional restriction, a valid exercise of the power of taxation.[3] Whether the expense of making such im-

be assessed against property specially benefited; but the court, yielding to long custom and early decisions, held that the sidewalks might be constructed and maintained at the expense of abutters. It reconsidered its decision as to sidewalks in the later case of Mauldin *v.* Greenville, 53 S. Car. 285, and held that sidewalks are only a part of the street; that the duty to construct and maintain them rests on the public in common with the remainder of the street; and that the expense of maintaining them cannot be imposed on the abutter, either wholly or in part. In Stehmeyer *v.* Charleston, 53 S. Car. 259, the court held that a city could not, under the Constitution, *impose a tax for water works* on lots abutting on streets where water mains were laid. *Pope*, J., said: "The friends of these special assessment taxes bottom their adhesion to such an illogical distinction in the matter of taxation on the special benefits accruing to these lot owners by reason of such an improvement of the property affected. The courts of this State have repudiated any such doctrine." But a statute which authorizes a city to require the filling of low lots when declared to be injurious to public health, and to do so in the event of failure of owner to fill them on request and recover the cost from owner, is an exercise of the police power, is not the levy of a tax or assessment, and is constitutional. Charleston *v.* Werner, 38 S. Car. 488.

Power of local taxation for local purposes sustained, and the cases decided in *Virginia* on the subject, collected and referred to. Gilkerson *v.* Frederick Jus., 13 Gratt. (Va.) 577. See also Sands *v.* Richmond, 31 Gratt. (Va.) 571.

Parliament has the power, and for a long time has exercised it, of assessing property for benefits conferred. Viner's Abr. "Sewers," Comyn's Dig. "Sewers." Bedford Union Poor Guard. *v.* Bedford Imp. Comm'rs, 7 Exch. 777. The legislature may authorize the expense of *constructing sewers* to be assessed upon the adjoining property. Stroud *v.* Philadelphia, 61 Pa. 255; Mauch Chunk *v.* Shortz, 61 Pa. 399. The power to assess the lot-owner for the expense must be given by statute. *Ib.*; *post*, §§ 1458-1463.

The cost of improving property owned by a city for special purposes, — as for market-places, engine-houses, station-houses, city-hall, etc., — cannot be assessed upon adjoining lot-owners. Fort Wayne *v.* Shoaff, 106 Ind. 66. A statute authorizing the assessment of land not bordering upon a street to be improved, but within fifty feet of it, held constitutional. Ray *v.* Jeffersonville, 90 Ind. 567. Acts intended to equalize assessments should be construed so as to carry out their spirit. Parmelee *v.* Youngstown, 43 Ohio St. 162.

[1] French *v.* Barber Asphalt Pav. Co. 181 U. S. 324, 343, quoting text.

[2] As to apportioning *the damages* for opening streets *among the lots or property benefited*, see chapter on Eminent Domain, *ante*, § 1052, and authorities there cited. "Owner," who is. Newark *v.* State, 34 N. J. L. 523; Morange *v.* Mix, 44 N. Y. 315.

[3] Barfield *v.* Gleason, 111 Ky. 491, 509, quoting text. Quoted with approval in Farrar *v.* St. Louis, 80 Mo. 379, wherein the *Missouri* cases are ably reviewed by *Norton*, J. Whiting *v.* Quackenbush, 54 Cal. 306; Baltimore *v.* Johns Hopkins Hospital, 56 Md. 1; Jaeger *v.* Burr, 36 Ohio St. 164

provements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency, unless there is some special restraining constitutional provision upon the subject.[1] Whatever limitation there is

[1] Parsons *v.* District of Columbia, 170 U. S. 45, 56, quoting text; French *v.* Barber Asphalt Pav. Co., 181 U. S. 324, 344, quoting text; Montgomery *v.* Moore, 140 Ala. 638, 646, quoting text; White *v.* People, 94 Ill. 604, citing text; Barfield *v.* Gleason, 111 Ky. 491, 509, quoting text; McMillan *v.* Butte, 30 Mont. 220, 226, quoting text; Wilson *v.* Philippi, 39 W. Va. 75, 84, quoting text; Dickson *v.* Racine, 61 Wis. 545, citing text. See also Centre Street, *In re* Vacation, 115 Pa. 247; Norfolk *v.* Ellis, 26 Gratt. (Va.) 224. There has been much controversy upon the point whether it is more just that the adjacent property should bear the whole expense of sidewalks or other local improvement, or that it should be borne by the corporation at large. See, for example, opinion of *Paine*, J. (Weeks *v.* Milwaukee, 10 Wis. 242), attacking, and of *Beck*, J., defending local assessments upon the abutters. Warren *v.* Henly, 31 Iowa, 31. See also Philadelphia *v.* Tryon, 35 Pa. 401; Lexington *v.* McQuillan's Heirs, 9 Dana (Ky.), 513; Craycraft *v.* Selvage, 10 Bush (Ky.), 696; Howell *v.* Bristol, 8 Bush (Ky.), 493, holding portion of the amended charter of Covington void; People *v.* Brooklyn, 4 N. Y. 419. The author sums up the general result of the cases, *infra*, § 1443, and notes.

In *Louisiana*, the equitable, and, it seems to the author, just rule is adopted of compelling the owner of property to pay a portion (one-third) of the cost of improvements in front of it, and the residue to be paid by the municipality. In reference to this subject, *Slidell*, C. J., remarked: "I must repeat my conviction that the system of paying for local improvements wholly out of the general treasury is inequitable, and will result in great extravagance, abuse, and injustice. I think the system of making particular localities, which are specially benefited, bear a special portion of the burden is safer, and more just to the citizens at large, by whose united contributions the city treasury is supplied. What is taken out of the treasury is out of the pockets of all the proprietors." Municipality No. 2 *v.* Dunn, 10 La. An. 57. See Municipality No. 2 *v.* White, 9 La. An. 446, 447; *infra*, §§ 1443, 1458. But what is intrinsically equitable or just does not necessarily limit the extent of *legislative power*.

Where the board of public works added fifty per cent to the estimated cost of work to be done in front of each lot, and adopted the amount so determined as the measure of such benefits, irrespective of the actual benefits, and the lots were differently affected by the improvement, there being a total failure to exercise the judgment of the board in determining the actual benefits, the assessment was void. Watkins *v.* Zwietusch, 47 Wis. 513; Johnson *v.* Milwaukee, 40 Wis. 315; Watkins *v.* Milwaukee, 52 Wis. 98; s. c. 55 Wis. 335; Zwietusch *v.* Milwaukee, 55 Wis. 369. Construction of words "adjacent" and "adjoining." "Adjoining" means touching or contiguous, as distinguished from lying near or adjacent. Ward, *In re*, 52 N. Y. 395, *per Andrews*, J. O'Reilley *v.* Kingston, 114 N. Y. 439.

The legislature may adopt and sanction a local improvement which it could previously authorize, and may authorize an assessment for an improvement after the improvement is made. A local improvement act which directs commissioners to fix a district of assessment which should include all the land which in their judgment should be benefited, and then that other commissioners should assess such lands within the district as in *their* judgment were benefited, is not invalid by reason of not requiring the assessment of all

upon the legislative power of taxation (which includes the power of apportioning taxation) must be found in the nature of the power, and in express constitutional provisions.[1]

the land within such district. The validity of an assessment on lots benefited by a local improvement is not affected by the fact that the assessment is greater than the tax valuation of the lots. Sackett, etc. Streets, *In re*, 74 N. Y. 95. Where a statute authorized a city to impose a sewer assessment on all property in the district "contiguous or approximate" to the street in which the sewer was laid, and an assessment was imposed upon property which was admitted not to be contiguous, the court construed the word "approximate" as qualified by the nature of the improvement, and held that the property was not liable when it had no access to the sewer through any street, alley, or other public way, and could only reach it through the property of other individuals. Monk *v.* Ballard, 42 Wash. 35.

[1] People *v.* Brooklyn, 4 N. Y. 419, which is the leading case on this subject. See chapter on Eminent Domain, § 1052. Speaking of the Constitution of New York, in this respect, Mr. Justice *Ruggles*, in the case just cited, says: "It is not ordained [by the Constitution] that taxation shall be general, so as to embrace all persons or *all* taxable property within the State, or *within any district* or territorial division of the State; nor that it shall or shall not be numerically equal, as in the case of a capitation tax; nor that it must be in the ratio of the value of each man's land, or of his goods, or of both combined; nor that a tax 'must be co-extensive with the district, or upon all the property in a district which has the character of, and is known to the law as, a local sovereignty.' Nor has the Constitution ordained or forbidden that a tax shall be apportioned according to the benefit which each tax payer is supposed to receive from the object on which the tax is expended. In all of these particulars, the power of taxation [in this State] is unrestrained." 4 N. Y. 419, 427. The case of People *v.* Brooklyn was recognized and followed in Brewster *v.* Syracuse, 19 N. Y. 116, 118; Guilford *v.* Chenango Co. Sup., 13 N. Y. 143; Sun Mut. Ins. Co. *v.* New York, 8 N. Y. 241, 251; Litchfield *v.* Vernon, 41 N. Y. 123; Howell *v.* Buffalo, 37 N. Y. 267. May be assessed against owner. Chapman *v.* Brooklyn, 40 N. Y. 372. The expense of a local assessment for sidewalks should be apportioned between the tenant for life and the remainderman. Peck *v.* Sherwood, 56 N. Y. 614; *post*, §§ 1432, 1443.

Not only can the legislature authorize, but it may, in the absence of any special restriction upon its power in this respect, *compel* a municipal corporation to *lay out and improve highways or streets* within its limits, without its consent or a vote of its citizens; and for this purpose it may provide for raising the money by a sale of the bonds of the municipality, due at a future period, and to be paid by *taxation;* and if the local authorities refuse to issue the bonds, the duty may be enforced by *mandamus*. People *v.* Flagg, 46 N. Y. 401. See also *ante*, § 115 *et seq.*, and cases cited; *post*, § 1487, note. Also Tide-water Co. *v.* Coster, 18 N. J. Eq. 518. See *post*, § 1447, and note, and extract from opinion of *Wagner*, J., there given; State *v.* Leffingwell, 54 Mo. 458. Compare Lafayette *v.* Fowler 34 Ind. 140; Williams *v.* Detroit, 2 Mich. 560; Hoyt *v.* East Saginaw, 19 Mich. 39; Municipality No. 2 *v.* Dunn, 10 La. An. 57, cited *infra;* Broadway Bapt. Ch. *v.* McAtee, 8 Bush (Ky.), 508, 512; *post*, § 1433.

The legislature may, in *Massachusetts*, authorize the cost of opening, widening, and grading streets to be assessed upon the estates that will abut on the street afterwards. Dorgan *v.* Boston, 12 Allen (Mass.), 223; Harvard College *v.* Boston, 104 Mass. 470; Boston Seamen's Fr. Soc. *v.* Boston, 116 Mass. 181; and see Meriden *v.* Camp, 46 Conn. 284.

As to power to *pave street occupied by a plank-road company* under legislative authority, and assess the amount upon the abutters. Bagg *v.* Detroit, 5 Mich. 336. *Turnpike road.* State *v.* New Brunswick, 30 N. J. L. 395 (a grading and paving assessment). A city whose charter authorizes it to repair its streets and sidewalks, and make assessments therefor, may repair a sidewalk on land owned by a *turnpike*

§ 1432 (754). **Same Subject; People v. Brooklyn; Davidson v. New Orleans. The Fourteenth Amendment.** — Whether the Constitutions of the various States *do contain provisions which prohibit the legislature* from assessing the expense of local improvements upon the property in the vicinity, has given rise to numerous decisions. In the leading case it was held, upon great consideration, in an opinion the reasoning and conclusion in which have been almost everywhere adopted, and which we regard as historically and legally sound, that the usual and ordinary legislation of this character did not contravene the constitutional provision that "no person shall be deprived of life, liberty, or *property*, without due process of law; nor shall *private property* be taken for public use without just compensation." [1]

It is conclusively settled by the decisions of the Supreme Court

road company, within the city limits, and assess the expense upon the owners of the lands abutting thereon. Elmendorf *v.* Albany, 17 Hun (N. Y.), 81.

[1] People *v.* Brooklyn, 4 N. Y. 419 (1851). Decisions from the several States, cited *ante*, § 1052; *post*, §§ 1435, 1443. In the United States Supreme Court the question of due process of law was considered, in a case where an assessment of real estate in the city of *New Orleans* for draining the swamps of that city was resisted, on the ground that the proceeding deprived the owner of his property without due process of law. Davidson *v.* New Orleans, 96 U. S. 97, referred to more fully *infra*. The origin and history of this provision of the Constitution, as found in Magna Charta, and in the Fifth and Fourteenth Amendments of the Constitution of the United States, were examined and commented on. The difficulty and the danger of attempting an authoritative definition of what it is for a State to deprive a person of life, liberty, or property without due process of law, within the meaning of the Fourteenth Amendment, were suggested, and the better mode held to be to arrive at a sound definition by the enunciation of the principles which govern each case as it arises. It had already been decided by that court that due process of law does not require that the assertion of the rights of the public against the individual, or the imposition of burdens upon his property for the public use, should in all cases be done by a resort to the courts of justice. Murray *v.* Hoboken Land & Impr. Co., 18 How. (U. S.) 272, the opinion of Justice *Curtis* in this case is one of the great judgments of the court; Kennard *v.* Morgan, 92 U. S. 480. In the Davidson case the Supreme Court held that when such a burden, or the fixing of a tax or assessment is by the statute of the State required to be submitted to a court of justice before it becomes effectual, with notice to the owners and the right on their part to appear and contest the assessment, this is due process of law within the meaning of the Constitution. Neither the corporate agency by which the work is done, the excessive price allowed for the work by statute, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, is a matter in which the Federal Constitution controls the State authorities. Davidson *v.* New Orleans, 96 U. S. 97 (1877). See also Spencer *v.* Merchant, 125 U. S. 345 (1887); more fully, *ante*, § 1365; Kelly *v.* Pittsburgh, 104 U. S. 78.

That historically the words "Due Process of Law" have no connection with taxation, is shown in an article of great research and learning written by Mr. *Harry Hubbard*, and published (May and June, 1900), in the "Harvard Law Review," who supports his conclusions by an extended reference to the decisions of the State and Federal Courts.

of the United States that *the Fourteenth Amendment* to the Federal Constitution does *not* require that assessments for local improvements shall be levied *according to benefits or not in excess of benefits.* The case of Davidson *v.* New Orleans, 96 U. S. 97, is the leading one on this subject, and its doctrines have been repeatedly reaffirmed by the Supreme Court, and they stand as the no longer questioned law of the court down to this present.[1]

[1] Davidson *v.* New Orleans, 96 U. S. 97 (1877). As pointed out by Mr. Hubbard ("Harvard Law Review" May and June, 1900), this case required a construction of the Fourteenth Amendment on the precise question of the validity of local assessments made without inquiry as to benefits and in excess of benefits. In this case the estate of John Davidson was assessed for draining certain swamp lands in the State of Louisiana. The assessment was levied according to the *superficial area or square feet of land within the drainage section*, that is to say, each square foot in the drainage district paid as much as any other square foot. There was no inquiry in regard to benefits, and the assessment was not levied according to benefits. The rule of apportionment adopted necessarily excluded the consideration of benefits. Not only so, but in the record on which that case was heard before the Supreme Court of the United States it was stipulated among other things that *no drainage was done on plaintiff's land;* that a portion of plaintiff's land *did not need draining*, having already been drained, and having paid the expense thereof; and that the whole assessment on the plaintiff's land amounted to about $50,000, of which $45,000 was assessed against one tract *worth only from one-fourth to one-half that amount.* This stipulation, which the author has verified, appears in the printed record on file in the office of the clerk of the Supreme Court at Washington. The question was thus clearly presented to the Supreme Court of the United States whether the Fourteenth Amendment prohibited such an assessment. If ever there was a case of an assessment being a hardship upon a person, it would certainly seem that this case of Davidson was one. The Supreme Court, however, after stating among other things that "there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment," said (p. 104): "As contributing to some extent to this mode of determining *what class of cases do not fall within its provisions*, we lay down the following proposition as applicable to the case before us: Whenever by the laws of a State, or by State authority, a tax assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

"It may violate some provision of the State constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard."

That the court meant to decide and did decide in this case of Davidson *v.* New Orleans that the Fourteenth Amendment does not require that taxes and assessments be levied according to benefits or not in excess of benefits, is also evident from what the court says (p. 106): "It is also said that part of the property of the plaintiff which was assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within the bounds."

In answer to the objection that some of Davidson's property had already been assessed for a similar improvement, the court said (p. 106): "It is said that the plaintiff's proper-

§ 1433 (755, 756, 757, 758, 759). Special Assessments; Constitutional Requirements; Uniformity and Equality; Taxation in Propor-

had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this, or which forbids unequal taxation by the States."

That the foregoing statement of the decision in Davidson *v.* New Orleans is correct, and according to the understanding of the members of the Supreme Court, is evident from what they state in regard to this case in their decisions. For example, Mr. Justice Gray, giving the opinion of the court in the case of Spencer *v.* Merchant (125 U. S. 345) (on writ of error to the Supreme Court of New York), says (p. 356): "In Davidson *v.* New Orleans (96 U. S. 97) it was held that if the work was one which the State had the authority to do and to pay for by assessments on the property benefited, objections that the sum raised was exorbitant and that part of the property assessed was not benefited, presented no question under the Fourteenth Amendment to the Constitution upon which this court could review the decision of the State court (96 U. S. 100, 106)."

So, also, Mr. Chief Justice *Fuller*, giving the opinion of the court in the case of Walston *v.* Nevin (128 U. S. 578) (on writ of error to the Court of Appeals of Kentucky), referring to the case of Davidson *v.* New Orleans, says (p. 582): "And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, *nor that the assessment is unequal as regards the benefits conferred*, nor that personal *judgments are rendered for the amount assessed*, are matters in which the State authorities are controlled by the Federal Constitution. So the determination of the taxing district and *the manner of the apportionment* are all within the legislative power (Spencer *v.* Merchant, 125 U. S. 345; Stanley *v.* Albany County, 121 U. S. 535, 550; Mobile County *v.* Kimball, 102 U. S. 691; Hagar *v.* Reclamation District No. 108, 111 U. S. 701; United States *v.* Memphis, 97 U. S. 284; Laramie County *v.* Albany County, 92 U. S. 307). And whenever the law operates alike on all persons and property similarly situated, equal protection cannot be said to be denied (Wurts *v.* Hoagland, 114 U. S. 606; Richmond, F. & P. R. Co. *v.* Richmond, 96 U. S. 521, 529)."

In Fallbrook Irrigation District *v.* Bradley (164 U. S. 112), involving *the validity of the irrigation statutes in California*, an *ad valorem* assessment upon all the land within the irrigation district was held to be not contrary to the Fourteenth Amendment, although it was objected (p. 156): "That the basis of assessment for the cost of construction is not in accordance with and in proportion to the benefits conferred by the improvement. And, finally, that land which cannot in fact be benefited may yet under the act be placed in one of the irrigation districts and assessed upon its value to pay the cost of construction of works which benefit others at his expense."

In the argument of this case it was shown and urged upon the court that in the organization of these irrigation districts towns and villages were frequently included. In one instance the *owner of a brick building, which was included in a district, objected that his brick building not only would not be benefited by irrigation, but on the contrary would be much injured by it.* The Supreme Court however held that these irrigation statutes and the *ad valorem* assessment levied under them did not violate the Fourteenth Amendment. The court said (p. 175): "It is insisted that the basis of the assessment upon the lands benefited for the cost of the construction of the works is not in accordance with and in proportion to the benefits conferred by the improvement, and therefore there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law. Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both

tion to Value. — The constitutional requirement which is foun in many States in slightly varying language, that *taxation sha be "equal and uniform"* throughout the State or within the terr torial limits of the taxing power, and the correlative constitution provisions which are also found that *all property shall be "taxed i proportion to its value"* are construed, with almost general uniform ity, as affected and controlled by the distinction which is recognize to exist between general taxation and special assessments founde upon benefits, and are held to refer to general taxes to defray th ordinary expenses of the State and its subordinate local govern ments, and to have no application to special assessments for loca improvements.[1] But although the constitutional requirement o

having their source in the sovereign power of taxation."

The court, also, after citing Davidson *v.* New Orleans (96 U. S. 97), and Walston *v.* Nevin (128 U. S. 578), as showing that such assessment did not violate the Fourteenth Amendment, says (p. 178): "There are some States where assessments under such circumstances as here exist, and made upon an *ad valorem* basis, have been held invalid, as an infringement of some provision of the State Constitution, or in violation of the act under which they were levied. Counsel have cited several such in the briefs herein filed. We do not discover, and our attention has not been called to, any case in this court where such an assessment has been held to violate any provision of the Federal Constitution. If it do not, this court can grant no relief."

As to the *scope of the Fourteenth Amendment*, the court in later decisions states as follows: In Hibben *v.* Smith, 191 U. S. 310, 325, Mr. Justice *Peckham* said: "The Fourteenth Amendment, it has been held, legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty and property as is offered by the Fifth Amendment against similar legislation by Congress." So also in the case of Tonawanda *v.* Lyon, 181 U. S. 389, 391, Mr. Justice *Shiras* said. "The purpose of that amendment is to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty, and property, as is afforded by the Fifth Amendment against similar legislation by Congress." In French *v.* Barber Asphalt Pav. Co., 181 U. S. 324, 329, the court, Mr. Jus tice *Shiras*, said: "However, we shal not attempt to define what it is for State to deprive a person of life, liberty or property without due process of law in terms which would cover every exer cise of power thus forbidden to th State, and exclude those which are not but shall proceed, in the present case on the assumption that the legal impor of the phrase, 'due process of law' is th same in both amendments. Certainly *it cannot be supposed that, by the Fou teenth Amendment, it was intended t impose on the States, when exercisin their powers of taxation, any more rigi or stricter curb than that imposed on th Federal Government, in a similar exe cise of power, by the Fifth Amendment.* See late important case of King West Virginia, 216 U. S. 92, and case cited as to the effect of the Fourteent Amendment upon the taxing power c the States.

[1] Ford *v.* Delta & P. L. Co., 16 U. S. 662; Birmingham *v.* Klein, 8 Ala. 461; Burnett *v.* Sacramento, 1 Cal. 76, 83; Hart *v.* Gaven, 12 Cal. 47 Creighton *v.* Manson, 27 Cal. 61 Emery *v.* San Francisco Gas Co., 2 Cal. 345; Chambers *v.* Satterlee, 4 Cal. 497; Denver *v.* Knowles, 17 Col 204; Edgerton *v.* Green Cove Spring 19 Fla. 140; Edwards *v.* Ocala, 58 Fl 217, 50 So. Rep. 421; Hayden *v.* Atlant 70 Ga. 817; First Methodist E. Churc *v.* Atlanta, 76 Ga. 181; Speer *v.* Athen 85 Ga. 49; Reinken *v.* Fuehring, 130 In 382; Hines *v.* Leavenworth, 3 Kan. 18 Ottawa County *v.* Nelson, 19 Kan. 23 240; Tull *v.* Royston, 30 Kan. 617, 61 Todd *v.* Atchison, 9 Kan. App. 25 Holzhauer *v.* Newport, 94 Ky. 396, 40 Gosnell *v.* Louisville, 104 Ky. 20

equality and uniformity is generally held to have no application to special assessments, the fact that the levy of a special assessment is

Municipality No. 2 *v.* Dunn, 10 La. An. 57; New Orleans *v.* Elliott, 10 La. An. 59; Yeatman *v.* Crandell, 11 La. An. 229; Matter of New Orleans Draining Co., 11 La. An. 338, 372; Wallace *v.* Shelton, 14 La. An. 498; State *v.* New Orleans, 15 La. An. 354; Matter of New Orleans, 20 La. An. 497, 499; Charnock *v.* Fordoche & G. T. Special Levee Dist. Co., 38 La. An. 323; Excelsior Planting & Mfg. Co. *v.* Green, 39 La. An. 455, 460; Barber Asphalt Pav. Co. *v.* Gogreve, 41 La. An. 251; Hill *v.* Fontenot, 46 La. An. 1563, 1566; Fayssoux *v.* Denis, 48 La. An. 850, 851; Shreveport *v.* Prescott, 51 La. An. 1895; Missouri, K. & T. Trust Co. *v.* Smart, 51 La. An. 416, 424; Rosetta Gravel P. & Imp. Co. *v.* Jollissaint, 51 La. An. 804, 808; Auburn *v.* Paul, 84 Me. 212; Motz *v.* Detroit, 18 Mich. 495; Lake Shore & M. S. R. Co. *v.* Grand Rapids, 102 Mich. 374; Daily *v.* Swope, 47 Miss. 367; Macon *v.* Patty, 57 Miss. 378, 385; Garrett *v.* St. Louis, 25 Mo. 505; Egyptian Levee Co *v.* Hardin, 27 Mo. 495; Farrar *v.* St. Louis, 80 Mo. 379, 390; St. Joseph *v.* Owen, 110 Mo. 445, 455; Morrison *v.* Morey, 146 Mo. 543, 564; Kansas City *v.* Bacon, 147 Mo. 259, 282; Thornton *v.* Clinton, 148 Mo. 648, 663; Meier *v.* St. Louis, 180 Mo. 391, 408; Heman Const. Co. *v.* Wabash R. Co., 206 Mo. 172, 179; Fruin-Bambrick Const. Co. *v.* St. Louis Shovel Co., 211 Mo. 524, 532; Alfalfa Irrig. Dist. *v.* Collins, 46 Neb. 411; Cain *v.* Davie County, 86 N. Car. 8; Shuford *v.* Lincoln County, 86 N. Car. 552; Busbee *v.* Wake County, 93 N. Car. 143; Raleigh *v.* Peace, 110 N. Car. 32, 38; Harper *v.* New Hanover County, 133 N. Car. 106; Rolph *v.* Fargo, 7 N. Dak. 640, 653; Jones *v.* Holzapfel, 11 Okla. 405; King *v.* Portland, 2 Oreg. 146; Cook *v.* Portland, 20 Oreg. 580, 589; Ladd *v.* Gambell, 35 Oreg. 393, 397; Kadderly *v.* Portland, 44 Oreg. 118, 157; Beaumont *v.* Wilkes-Barre, 142 Pa. 198; Erie *v.* Griswold, 184 Pa. 435; Anderson *v.* Lower Merion, 217 Pa. 369, 383; Arnold *v.* Knoxville, 115 Tenn. 195, (overruling McBean *v.* Chandler, 9 Heisk. (Tenn.) 349); Roundtree *v.* Galveston 42 Tex. 613; Taylor *v.* Boyd, 63 Tex. 533; Texas Transportation Co. *v.* Boyd, 67 Tex. 153; Gilkerson *v.* Justices of Frederick, 13 Gratt. (Va.) 577; Norfolk *v.* Ellis, 26 Gratt. (Va.) 224; Richmond & A. R. Co. *v.* Lynchburg, 81 Va. 473; Davis *v.* Lynchburg, 84 Va. 861; Violett *v.* Alexandria, 92 Va. 561, 576; Parkersburg *v.* Tavenner, 42 W. Va. 486, 490; Weeks *v.* Milwaukee, 10 Wis. 242.

The provision of the Constitution of *Kansas* under the title "Finance and Taxation" that "the legislature shall provide for a uniform and equal rate of *assessment* and taxation," was construed by the court as having reference to the assessment of taxes for general purposes and as having no application to special assessments against the property benefited by a local improvement. See *Kansas* cases cited *supra*.

By the Constitution of *Arkansas*, art. xix. § 27, assessments on real property for local improvements in towns and cities are required to be "*ad valorem* and uniform." This provision permits the assessment to be made either according to the value of the property itself or according to the value of the benefit to the property. Kirst *v.* Street Imp. Dist. No. 120, 86 Ark. 1. But assessments must be *ad valorem* and cannot be according to frontage. Both vacant and occupied lots similarly situated must be subjected to it. Monticello *v.* Banks, 48 Ark. 251, following Peay *v.* Little Rock, 32 Ark. 31. See further as to the provisions of the *Arkansas* Constitution, *ante* § 1366.

Illinois. In Chicago *v.* Larned, 34 Ill. 203, the constitutionality in this State of a charter provision authorizing an assessment by frontage came before the court, and the court declared that the principles of uniformity and equality of taxation applied to local as well as to general taxes, to special assessments as well as to taxes, and that a special assessment for street paving on the basis of frontage was invalid as being neither equal nor uniform. The court held that such assessments could only be made by assessing to each lot the special benefits it derived from the improvement. See also to the same effect, Ottawa *v.* Spencer, 40 Ill. 211; St. John *v.* East St. Louis, 50 Ill. 92. But the *Constitution of 1870*, art. ix, § 9, authorizes the legislature to confer power upon cities, towns, and villages

an exercise of the taxing power requires that the basis of apportio ment upon the property subjected to assessment shall be uniform

"to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise." By virtue of this provision assessments by frontage are now constitutional. See *post*, § 1438, where the provisions of the Constitution of *Illinois* are fully discussed.

Colorado. In Palmer *v*. Way, 6 Colo. 106, it was held that the constitutional provision requiring *equality and uniformity in taxation* was applicable to special assessments and precluded an assessment according to benefits. See, to the same effect, Wilson *v*. Chilcott, 12 Colo. 600; *In re* House Resolutions, 15 Colo. 598. But these cases were overruled in Denver *v*. Knowles, 17 Colo. 204.

Tennessee. The Supreme Court of this State approved the principles laid down in the case of Chicago v. Larned, 34 Ill. 203, cited *supra*, and held that local assessments were included in the provisions of the Constitution requiring all property to be taxed according to its value, and therefore that it was beyond the power of the legislature to authorize a municipality to pave its streets and charge the cost thereof on the adjoining lots in proportion to their respective fronts. M Bean *v*. Chandler, 9 Heisk. (Tenn.) 3 Two previous cases where sidew assessments were sustained were d tinguished on the ground that th involved the exercise of the pol power. See Franklin *v*. Maberry, Humph. (Tenn.) 368; Washington Nashville, 1 Swan (Tenn.), 177. I in Arnold *v*. Knoxville, 115 Tenn. 1 the court *reviewed its previous de ions, and overruling them*, held tha statute which provides for the creat of improvement districts by a mun pality within its corporate limits a for special assessments upon the p perty lying therein, is valid and c stitutional, the constitutional requi ment (art. ii. § 28) that all prope be taxed according to value equally a uniformly throughout the State a (art. ii. § 29) that the legislature m authorize the several counties, &c. impose taxes for their respective p poses and according to value upon t principles established in regard State legislation, being applicable on to taxes property so called and havi no application to special assessmen for local purposes.

California. In People *v*. McCree

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[1] See Detroit *v*. Daly, 68 Mich. 503; State *v*. Ramsey County Dist. Ct., 33 Minn. 295, 306; Noonan *v*. Stillwater, 33 Minn. 198. See *post*, § 1442. In People *v*. Lynch, 51 Cal. 15, it was held that in assessments for local improvements, the apportionment must be uniform, and if it is not made so, the legislature cannot validate it.

The *Illinois* Constitution of 1870 (art. ix. § 9) having authorized the legislature to confer upon municipalities the power to make local improvements by special assessments, or by special taxation of contiguous property, the Supreme Court of Illinois has held that under the system so authorized, some property cannot be assessed for an improvement on the basis of the benefit received by it, whilst other property is assessed for the same improvement in proportion to frontage. Kuehner *v*. Freeport, 143 Ill. 92. See also Ware *v*. Jerseyville, 158 Ill. 234; Davis *v*. Litchfield, 145 Ill. 313. See *post*, § 1439.

A legislative enactment in *Kentuc* incorporated a small suburban comm nity in the vicinity of a city, call "The District of Highlands," a authorized its trustees "to grade a pave, or macadamize with rock gravel, any public road passing throu or into said district, within the lim thereof; and, with the assent of tw thirds of the owners of the real esta through which any such road may pa to levy special taxes on such real tate, to pay for such grading a paving or macadamizing." It w held that the act was constitutio and that a levy of a tax, upon petit of the requisite number of landown on the land abutting the roads improv rated by the number of acres of e owner's tract, approached equality nearly as specific taxation might expected to do, and hence could be adjudged unconstitutional for just inequality. Malchus *v*. Highla Dist., 4 Bush (Ky.), 547.

Upon similar principles, constitutional provisions which place a limit upon municipal "taxation" have no application to and do not affect the power of the municipality to make improvements by special assessment.[1]

§ 1434. **Creation of Taxing Districts; New Jersey.** — Although the great weight of authority and the almost uniform course of decision is to the effect that in the absence of any constitutional restriction or limitation upon the legislative power, *the legislature may create a taxing district without regard to any existing political or municipal division of the State,* and may impose upon the taxing district so created the cost of a public improvement or expenditure,

34 Cal. 432, it was held that the power of the legislature over the whole subject of taxation, including the property to be charged, the amount of the tax, the mode of levying, assessing, and collecting it, &c., is as ample as over any other matter that is a proper subject of legislative action. The provisions of § 13, art. xi. of the Constitution are limitations, and not grants of power; but as limitations they are, according to their terms, mandatory upon the legislature. And it is also held: first, by the words "all property in this State" is meant all private property, or all property other than that belonging to the United States or this State, or that which is public property; second, that the words "taxation shall be equal and uniform throughout the State" relate to taxation of property, and that the legislature has no power to exempt any private property in this State from taxation; and third, that the rate of taxation on property for State purposes shall be uniform throughout the State. People *v.* Coleman, 4 Cal. 46, and High *v.* Shoemaker, 22 Cal. 363, so far as in conflict herewith, are overruled. Doyle *v.* Austin, 47 Cal. 353, 360. In People *v.* Lynch, 51 Cal. 15, it was held that in assessments for local improvements the apportionment must be uniform, and if it is not, and is not made so, the legislature cannot validate it. A charge imposed on *all* the property, personal as well as real, of a designated district *to construct levees* therein is a *tax* and not an *assessment*, and is not invalid on the ground that it is not equal and uniform. People *v.* Whyler, 41 Cal. 351; Desty, Taxation, 176, 177.

If a street is opened in a city, and to pay for the land taken, and the damages to improvements thereon or adjacent thereto, and injured thereby, and all other expenses, bonds are issued; and to pay the same and the interest thereon, an annual percentage is directed to be levied on the lots benefited thereby, which percentage is upon the enhanced value of the lots, as fixed by a board of public works, this imposition is an assessment, and not a tax. In such case the *interest* to accrue on the bonds, and the *discount* suffered in converting them into cash, are incidental expenses, and the property benefited is only charged with the *cost* of the improvement. Doyle *v.* Austin, 47 Cal. 353. See and compare Kohler *v.* Guttenberg, 38 N. J. L. 419; Baker *v.* Elizabeth, 37 N. J. L. 142.

[1] Birmingham *v.* Klein, 89 Ala. 461; Barber Asphalt Pav. Co. *v.* Gogreve, 41 La. An. 251, 263, 264; Munson *v.* Atchafalaya Basin Levee Dist., 43 La. An. 15, 26; Farrar *v.* St. Louis, 80 Mo. 379; Lamar Water & E. L. Co. *v.* Lamar, 128 Mo. 188, 218; Kansas City *v.* Bacon, 147 Mo. 259; Austin *v.* Nalle, 102 Tex. 536. The provision of the Constitution of *Texas* that the legislature shall not levy taxes "except to raise revenue for the economical administration of the government in which may be included the following purposes" (enumerating them), does not affect or limit the power of the legislature to authorize municipalities to make street improvements by special assessment. Storrie *v.* Houston City St. R. Co., 92 Tex. 129; Storrie *v.* Woessner (Tex. Civ. App.), 47 S. W. Rep. 837; aff'd (Tex.) 51 S. W. Rep. 1132.

this view has not been acquiesced in by the courts of New Jersey. In that State it is held that although the cost of a public improvement may be imposed on particular property to the extent to which such property is specially benefited, any special burden beyond that special benefit is illegal, and is a taking of property for public use without compensation.[1] From the rule thus adopted by the courts

[1] Tidewater Co. *v.* Coster, 18 N. J. Eq. 518; aff'g 18 N. J. Eq. 55; Sigler *v.* Fuller, 34 N. J. L. 227, 229; Morris & E. R. Co. *v.* Jersey City, 36 N. J. L. 56; Hoboken Land & Imp. Co. *v.* Hoboken, 36 N. J. L. 540; Passaic *v.* Delaware, L. & W. R. Co., 37 N. J. L. 538; New Brunswick Rubber Co. *v.* New Brunswick St. Com'rs, 38 N. J. L. 190; Peckham *v.* Newark, 43 N. J. L. 576, 578; Kean *v.* Driggs Drainage Co., 45 N. J. L. 91; New York & G. L. R. Co. *v.* Kearney, 55 N. J. L. 463; Meredith *v.* Perth Amboy, 63 N. J. L. 520; Borton *v.* Camden, 65 N. J. L. 511; Van Wagoner *v.* Paterson, 67 N. J. L. 455, 459; Doughten *v.* Camden, 72 N. J. L. 451, 454. See also Butler *v.* Keyport, 64 N. J. L. 181. In Tidewater Co. *v.* Coster, 18 N. J. Eq. 518, aff'g 18 N. J. Eq. 55, a corporation was by statute authorized *to reclaim certain marsh lands*, and the statute imposed *the whole expense* thereof upon the owners of the lands reclaimed. The court held that the cost of a public improvement might be imposed upon particular property only to the extent to which such property was specially benefited; that any other special burden beyond that measure was illegal; and that as the entire cost of the improvement in question was imposed on the lands improved, whether benefited to that extent or not, the statute was unconstitutional.

The principles of this decision were applied in Agens *v.* Newark, 37 N. J. L. 415, 421, rev'g 35 N. J. L. 168, referred to *post*, § 1435. In that case a statute authorized the assessment of two-thirds of the expense of paving the roadbed of a city street upon the property abutting on the street and the remaining one-third thereof on the public at large. It was held that as the statute subjected the property to liability for two-thirds of the expense without regard to the question whether it was benefited to that extent, the act was unconstitutional. In this case, *Beasley*, C. J., explained the doctrine of the Court of Errors and Appeals as follows: "There is nothing in the Constitution of this State that requires that all property in the State, or in any particular subdivision of the State, must be embraced in the operation of every law levying a tax. That the effect of such laws may not extend beyond certain prescribed limits, is perfectly indisputable. It is upon this principle that taxes raised in counties, townships, and cities are vindicated. But while it is thus clear that the burthen of a particular tax may be placed on any political district to whose benefit such tax is to enure, it seems to me it is equally clear that, when such burthen is sought to be imposed on particular lands, not in themselves constituting a political subdivision of the State, we at once approach the line which is the boundary between acts of taxation and acts of confiscation. I think it impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation is not a limited right. . . . It follows, then, that these local assessments are justifiable on the ground above, that the locality is especially to be benefited by the outlay of the money to be raised. Unless this is the case no reason can be assigned why the tax is not general. An assessment laid on property along a city street for an improvement made in another street in a distant part of the same city would be universally condemned, both on moral and legal grounds. And yet there is no difference between such an extortion and the requisition upon a landowner to pay for a public improvement over and above the exceptive benefit received by him. It is true that the power of taxing is one of the high and indispensable prerogatives of the government, and it can be only in cases free from all doubt that its exercise can be declared by the courts to be illegal. But such a case, if it can ever arise, is certainly presented when property is specified, out of which public improvement is to be paid for

it resulted that if all the property subject to special assessment was not benefited in the aggregate to the extent of the total cost of the improvement, the surplus over the aggregate of the special benefits, of necessity had to be defrayed from some other source, which was naturally by general taxation. In determining in what manner the power of general taxation for this surplus might be exercised, the court resorted to the general principle that the political or municipal entity as an entirety should be taxed for that purpose, and that the legislature had no power to impose a general tax upon any territory less than a recognized political or municipal division of the State. Thus taxes for State purposes must be imposed upon the State at large; similarly, taxes for county purposes must be imposed upon the entire county, and so on for the lesser divisions of the State.[1]

in excess of the value specially imparted to it by such improvement. As to such excess I cannot distinguish an act exacting its payment from the exercise of the power of eminent domain. In case of taxation the citizen pays his quota of the common burthen; when his land is sequestered for the public use he contributes more than such quota, and this is the distinction between the effect of the exercise of the taxing power and that of eminent domain. When, then, the overplus beyond benefits from these local improvements is laid upon a few landowners, such citizens, with respect to such overplus, are required to defray more than their share of the public outlay, and the coercive act is not within the proper scope of the power to tax."

In Bogert *v.* Elizabeth, 27 N. J. Eq. 568, 569, which involved the validity of a provision in the charter of a city directing the *whole cost of special improvements* to be put on the property on the line of the street opposite such improvements, the assessments to be made in a just and equitable manner by the common city council, the court said: "The sum of the expense is ordered to be put on certain designated property, without regard to the proportion of benefit it has received from the improvement. The direction is perfectly clear; the entire burthen is to be borne by the land along the line of the improvement, and the ratio of distribution among the respective lots is left to the judgment of the common council. Such power, according to legal rules now at rest in this State cannot be executed. The whole clause is nugatory and void, and all proceedings under it are not mere irregularities but are nullities."

[1] In Baldwin *v.* Fuller, 39 N. J. L. 576, 583, aff'd 40 N. J. L. 615, a statute authorized the formation of *lamp districts* for lighting purposes in towns of Essex County, and directed that the expense of the lamps and of their maintenance should be collected, *one-half from all the property* in the district, and *one-half from the lands abutting* on the lighted road in proportion to frontage. It was held that the statute was unconstitutional. *Van Syckel*, J., who delivered the opinion of the Supreme Court, after referring to the cases laying down the rule that no property can be subjected to special assessment for an improvement in excess of the benefit derived from the improvement by the particular property, pointed out that natural equity required that State taxes should be assessed upon all the property within the State and so on as to county, town, and municipal taxes. He added, "I think the true rule deducible from sound reason is that legitimate taxation is limited to the imposing of burdens, like those in question, *so far as they are for the public benefit*, upon the persons or property within the political district possessing powers of local government, so that the exactions are distributed over the entire territory upon the rule of uniformity." The Court of Errors and Appeals affirmed the decision of the Supreme Court without opinion.

It has also been held that the delegation of the power of genera taxation must be to a political district of the State organized for and exercising functions of local government.[1]

Following from these principles, it is now declared to be th settled rule in New Jersey that the legislature can delegate the tax ing power as distinguished from the power to levy a special assess ment only to political districts of the State, *i. e.*, to counties, towns cities, and other municipal corporations having a recognized an definite existence for local government purposes under the polic of the State, to be exercised within their respective limits, and tha

[1] In Lydecker *v.* Englewood Drainage Com'rs., 41 N. J. L. 154, 156, a statute designated a portion of the township of Englewood as the "sewerage, drainage, and water district of the township of Englewood," dividing it into three sections. It constituted a board of seven commissioners, two to be residents and freeholders in each section, and one to be a resident freeholder in the township of Englewood, who were to be elected by the male and female resident landowners within the district. This board was to prepare plans and estimates for sewers, and upon approval of the plans and of the issuing of bonds by a vote of the freeholders of the district, to build the sewers and issue the bonds therefor. These bonds were to be a charge upon all the real estate in the district, and were to be met by a tax upon such real estate. It was held that the statute was unconstitutional, as the body to which it delegated the power of taxation was not a political district of the State organized for and exercising functions of local government. *Dixon*, J., said: "The political divisions of the State are those which are formed for the more effectual or convenient exercise of police power within the particular localities. Originally, counties and townships, in which a uniform State policy is observable, composed this class almost or quite exclusively. Then, as population became denser in certain places, and there was added to this common design a special necessity for local government different from that proper to more rural districts, villages, towns, and cities were constituted, and as these were separated by their charters of incorporation from the townships of which they had before been part, and absorbed their functions, they also became political divisions. In these institutions therefore mus be discovered the essential characte istics of their class, and they will b such common and prominent feature as have coexisted with these organi zations throughout their history, an are not possessed by other bodies c legislative creation which stand outsid of the same category. These di tinctive marks are, I think, that the embrace a certain territory and it inhabitants, organized for the publi advantage, and not in the interest c particular individuals or classes; tha their chief design is the exercise c governmental functions, and that t the electors residing within each is, t some extent, committed the power c local government, to be wielded, eithe mediately or immediately, within thei territory, for the peculiar benefit c the people there residing. Bodie so constituted are not merely creature of the State, but parts of it, exertin the powers with which they are veste for the promotion of these leadin purposes which they were intende to accomplish and according to th spirit which actuates our republica system." But the legislature may without regard to special benefit create a taxing district for speci purposes out of part of an existin political district, provided such part i made a political district with appr priate powers of local governmen McLaughlin *v.* Newark, 57 N. J. I 298; Street Lighting Dist. No. 1 Drummond, 63 N. J. L. 493. A improvement commission created b the legislature, with power to levy tax within certain limits, is held to b a political corporation, and the ta levied by it not void because mad upon territory less than a politic district. State *v.* Hackensack Imp Com., 45 N. J. L. 113.

the legislature may not create a taxing district which is not coterminous with a political district.[1]

[1] Lydecker *v.* Englewood Drainage Com'rs, 41 N. J. L. 154; Society for Establishing Manufactures *v.* Paterson, 42 N. J. L. 615, 618; Vreeland *v.* Jersey City, 43 N. J. L. 135, 137; Morgan *v.* Elizabeth, 44 N. J. L. 571; Kean *v.* Driggs Drainage Co., 45 N. J. L. 91; Auryansen *v.* Hackensack Imp. Com'n, 45 N. J. L. 113; Taylor *v.* Smith, 50 N. J. L. 101; Peck *v.* Raritan, 52 N. J. L. 319; Carter *v.* Wade, 59 N. J. L. 119; Howell *v.* Millville, 60 N. J. L. 95, 97; Smith *v.* Howell, 60 N. J. L. 384; Van Cleve *v.* Passaic Valley Sewerage Com'n, 71 N. J. L. 574, rev'g 71 N. J. L. 183.

The legislature cannot authorize the common council of a city to establish a *taxing district* within the city *narrower in extent than the city limits.* Hence, it was held that a statute which authorized the city council to establish within the city a lamp district upon which might be assessed taxes for lighting streets, improving parks, constructing cross-walks, the support of the police and fire departments, and for water supply purposes, was unconstitutional. Morgan *v.* Elizabeth, 44 N. J. L. 571.

Passiac Valley Sewerage Case. In the important case of Van Cleve *v.* Passaic Valley Sewerage Com'n, 71 N. J. L. 574, rev'g 71 N. J. L. 183, the Court of Errors and Appeals held that the fact that the taxing area is smaller in extent than the political district is not controlling. The principle upon which the decisions of the New Jersey courts are based requires that *the district to be taxed shall be coterminous with a district to which some right of local self-government is given*, and therefore is equally applicable to a case in which the grant of governmental power does not extend over the whole of the area covered by the delegated power of taxation. In that case, a statute for the creation of a sewerage district for the relief of the Passaic River from pollution from sewage, which provided for the appointment of commissioners by the governor, defined their powers and duties, and provided for the raising and expenditure of the necessary money, was held to be unconstitutional. The sewerage district comprised parts of four counties and the whole or parts of many municipalities. Within the district, in addition to ordinary pollution inevitably incident to the existence of a dense population located upon territory naturally draining into the river, the cities of Paterson, Passaic, Orange, East Orange, and Newark maintained systems of municipal sewers which discharged their outflow into the river. The other municipalities within the district contributed pollution in the same manner to an extent approximately proportionate to their population. The fiscal scheme of the act was that the expense of the construction of the sewerage system should be charged upon "all persons and property in the municipalities or taxing districts *lying in whole or in part* within said sewerage district." The sewerage commissioners were required each year to ascertain the money necessary to be raised for the payment of the interest upon bonds issued for the estimated cost of the work and other indebtedness, and for sinking fund charges, and to apportion the same among the respective municipalities and taxing districts *lying in whole or in part* within the sewerage district in such proportion as the taxable ratables within so much of said municipality or taxing district as is embraced within the sewerage district, bears to the total amount of taxable ratables within the whole sewerage district. They were also required to ascertain the amount necessary to be raised for operating, maintaining, and repairing the works and plants for each current fiscal year, and to apportion the money so estimated to be necessary among the several municipalities or taxing districts lying in whole or in part within the sewerage district, according to the amount of sewage by them respectively delivered or discharged into any sewers or other receptacles provided or constructed for the reception thereof by the commissioners. The commissioners were required each year to cause a tax to be levied and assessed upon all persons and property within each of the municipalities and taxing districts lying in whole or in part within the sewerage district, to certify to the tax assessor, taxing board, or taxing officer of each munici-

§ 1435 (760 *a*). **Same Subject. In New Jersey; Change of Judicial Decision and its Effect; Agens' Case and the Doctrine it established.** — The *course of decision in New Jersey,* showing the practical workings of the doctrine that the cost of local improvements may be wholly assessed upon the abutting property, and the effect of judicial decisions afterwards made that this could not be constitutionally done, is full of interest and instruction. By the terms of many of the municipal charters of that State, local improvements were to be paid for by assessing the cost in full on the lands fronting on the streets improved. This method of providing for the cost of local improvements had been practised in former years, and sustained, or assumed by the courts of the State, in a number of cases, to be correct.[1] Under this accepted doctrine some of the cities

pality or taxing district lying within the sewerage district the amount of tax required to be levied, assessed, and raised in each of the respective municipalities and taxing districts, and the assessors, taxing boards, and taxing officers were required to assess these sums upon all the persons and property within the respective municipalities or taxing districts liable to be assessed for State or county taxes, and the tax was to be collected by the same officers at the same time and in the same manner and with the same effect as State and county taxes were required to be levied, assessed, and collected. It was made the duty of the disbursing officer of each municipality or taxing district, out of the first moneys collected and not required by law to be paid to the county collector for State or county purposes, to pay to the treasurer of the sewerage commissioners the moneys directed by the commissioners to be assessed, levied, and collected in such municipality or sewerage district. The act, therefore, authorized the imposition of a tax for the purification of a sewerage district established by the legislature upon an area greater in extent than such district. Moreover, neither the taxing area nor the sewerage district were political divisions of the State. The prior decisions of the State having established two propositions touching the delegation of the power of general taxation, viz., (1) that the legislature can delegate the taxing power only to political districts of the State to be exercised within their respective limits; and (2), that some power of local self-government is essential to every political district, the Court of Errors and Appeals held that as the act authorized the imposition of a tax for the purification of a sewerage district established by the legislature upon an area greater in extent than such district, and as neither such taxation area nor such sewerage district were political subdivisions of the State, the statute was unconstitutional.

The *New Jersey* decisions limiting, as above shown, the taxing powers of the legislature, including local assessments, are not in line with the general course of judicial decisions on the same subjects in other States as to the plenary scope of legislative authority (in the absence of special constitutional restriction,) to ascertain the public burdens and who and what shall bear these burdens. On the whole the general view elsewhere taken is consistent with sound legal principles and in its practical workings has much to recommend it.

[1] Paxson *v.* Sweet, 16 N. J. Eq. 196; Paterson *v.* Soc. for Encouraging Useful Manuf., 24 N. J. L. 385; Martin *v.* Carron, 26 N. J. L. 228; State *v.* Newark, 27 N. J. L. 185, 193; State *v.* New Brunswick, 30 N. J. L. 395; State *v.* Elizabeth, 30 N. J. L. 365; Jersey City *v.* Howeth, 30 N. J. L. 521, 529; State *v.* Fuller, 34 N. J. L. 227; Agens *v.* Newark, 35 N. J. L. 168; Pudney *v.* Passaic, 37 N. J. L. 65, 68; State *v.* Elizabeth, 40 N. J. L. 274; *supra,* § 1354, note. It ought, however, to be remarked that the question as to the validity of that method of making assessments for local improvements had

of New Jersey were stimulated to make extravagant and wholly unnecessary improvements, assessing the entire cost thereof on the lands abutting on the streets improved; issuing their own bonds to pay the cost, and looking to local assessments on the property improved for reimbursement.[1] Litigation and consequent delay ensued; and meanwhile the market values of such property so declined that in many instances it was not worth, or would not sell for, more than a fraction of the assessment. The validity of assessing the whole cost of local improvements upon the adjoining property was under these circumstances vigorously assailed, and the subject then underwent, perhaps for the first time in the State, the most thorough consideration. The result was that the Court of Errors and Appeals, in 1875, held that an assessment of the cost of a local improvement, or of two-thirds of the cost, could not be made, arbitrarily, on the land fronting on the street improved; that an assessment, to be valid, must be laid proportionately according to the benefits conferred, and not in excess thereof; and hence that assessments of the entire cost of improvements made upon adjoining land "by the lineal foot" or otherwise, without regard to the particular benefit each lot received, were unconstitutional and void.[2]

never been presented to the courts of the State with much emphasis for decision. In 1866 a forcible attack was made upon the method of assessing the entire cost of local improvements on neighboring property in Massachusetts; but the court traced the practice back to the year 1658, and declined to disturb a long-settled custom, although it might be shown to be defective as a theory. Dorgan *v.* Boston, 94 Mass. 223. Three years later the subject was discussed at great length in New York, but the Court of Appeals decided to adhere to the customary method, for the same reason. Litchfield *v.* Vernon, 41 N. Y. 123.

[1] This was notably the case with the city of Elizabeth, which, shortly after its revised charter was granted in 1863 (P. L. N. J., 1863, c. 109), commenced to make extensive local improvements, some of which were needed, but many of which were merely aids to real estate speculations. Miles of wooden pavements were laid across the meadows and through the woods adjoining the built-up portion of the city; city bonds, amounting to several millions of dollars, were issued and sold to obtain ready money to pay for the work, in anticipation of the collection of the assessments. The entire cost of the improvements was assessed on the land fronting on the improved streets.

[2] Agens *v.* Newark, 37 N. J. L. 415. This is known as the "*Agens case*," and arose under the charter of Newark, which provided for assessing two-thirds of the cost of local improvements on adjoining land, — the remainder to be paid by the city at large. The charter of Elizabeth required the *entire cost* to be assessed on the land "on a street or section of a street improved." The judges themselves fully admit that Agens' Case changed the decisions (see 40 N. J. L. 278, 279). It is a curious fact that the Agens Case was argued in the Court of Errors before only a bare quorum, three Supreme Court judges and five "lay judges," two of whom, however, were members of the bar. Two Supreme Court judges and the five "lay judges" voted to reverse the Supreme Court, and one Supreme Court judge dissented. 37 N. J. L. 415, 426. This decision, it may perhaps be safely said, has always been regarded by nearly all the Supreme Court judges as unwise, even although sound in principle. It

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was a reversal of Judges *Depue, Van Syckel,* and *Woodhull.* 35 N. J. L. 168. ("Agens" is erroneously called "Agurs" in that report.) Following the "Agens Case" the Court of Errors, in 1876, in the case of Bogert *v.* Elizabeth, 27 N. J. Eq. 568, held that the method of making assessments prescribed in the charter of Elizabeth was absolutely void from beginning to end. See Borton *v.* Camden, 65 N. J. L. 511.

The result of the delay, accumulation of costs and interest, depreciation of the market values of property, the clouding of titles, and of these decisions, was greatly to embarrass some municipalities, and wholly to disable others to pay their debts. In this last category fell the city of Elizabeth. After the decision in the Agens Case the legislature passed several acts for relaying the assessments in a constitutional manner, but by the time this could be done the market value of the delinquent land had almost disappeared, and the remedy was ineffectual. Resort to general taxation was therefore necessary. By 1879 it would have required annual taxation at the rate of six per cent to meet the city's obligations for interest and current expenses. Of course no such burden could be borne. The result was that the legislature attempted to relieve the municipality (see act 1878, P. L. N. J. p. 182), by changing the method of enforcing judgments against the city; which was sustained in Gabler *v.* Elizabeth, 42 N. J. L. 79.

Act of 1880. In view of the insolvent condition of the cities of Elizabeth and Rahway, a supplement to the act to regulate proceedings upon application for writs of *mandamus,* was passed in the year 1880. By that supplement the Supreme Court was directed, whenever application was made for a writ of *mandamus* to compel a municipality to pay a judgment, to take testimony in order to ascertain and determine: (1) The total indebtedness of such municipal corporation, the time when payable, and the rate of interest payable thereon; (2) the real value for purposes of taxation of the taxable property within such corporation; (3) the amount required to be raised within such corporation for necessary expenses for municipal and other purposes during the current year; and (4) the highest rate of taxation capable of being imposed on such corporation without injury to the interests of the creditors of the corporation whose claims were not yet due. P. L. N. J. 1880, p. 102; Sup. to Rev. Stats. 442. The second section of the act declared, that it should not be lawful to require any municipal corporation by *mandamus* to raise for such judgment, in any one year, more than such sum as, in addition to the amount found to be required for necessary expenses as aforesaid, will be raised in such municipal corporation by imposing the highest rate of taxation as determined in the manner aforesaid, and any sum ordered to be raised by taxation was required to be included in the next annual tax levy for such municipal corporation. Provision was also made for distributing the fund raised under the act, and consolidating applications for writs of *mandamus.* This supplement to the *mandamus* act of 1880 *was held to be invalid as to creditors whose debts had been contracted prior to its passage.* Munday *v.* Rahway, 43 N. J. L. 338.

In 1883, all efforts to adjust the debt of Elizabeth having failed, an attempt was made to enforce payment of the judgments against the city, amounting to about $2,000,000, by compelling the board of assessment to levy a special tax for that purpose, under the act of 1878, mentioned above. Thereupon the members of the board resigned. In this emergency, which had to be met and dealt with, the legislature, in 1884, doubtless at the instance of the city, passed two acts, which, as they are novel in their provisions and as the principal act was, at least at first, sustained by the highest courts of the State, we have thought it worth while to state the substance of them with some fulness.

New Jersey Insolvent Municipalities Relief Acts. One of these acts gave the county board of assessors power, in case of vacancy in the office of assessor or board of assessors in any township or city, to appoint a committee of three to levy the State, State school, and county taxes therein. P. L. N. J. 1884, p. 72; Sup. to Rev. 985. The

treatise was published, the Supreme Court of the United States has specifically considered the question whether an assessment imposed

other act was entitled "An Act to provide for and secure the raising of revenue for the execution of the public duties of maintaining public schools, preventing the destruction of property by fire, preserving the public health, supporting the poor, maintaining police, and keeping the highways and streets in a safe condition for public use, within the limits of incorporated cities, towns, and municipalities in cases where the local or municipal authorities or officers fail to provide for the performance of such duties." In this latter act it was provided that wherever in any city, town, or municipality the local boards or officers authorized by law to assess and levy the taxes mentioned in the title to the act should not be in existence and qualified to act, at the time when by law assessments or valuations of taxable property may be commenced in any year, or whenever such local boards or officers should, for any cause whatever, neglect or fail to commence the assessment or valuation of property for the purpose of taxation for the space of ten days after the time fixed by law when taxes become a lien upon land in such municipality, or should neglect or fail to levy the taxes specified in said act at the time required by law, it should be the duty of the governor to cause a notice to be given to the mayor of such municipality, or to the president or chairman of the legislative or governing body, if there was no mayor, calling attention to the fact that the local authorities, boards, or officers authorized to levy such taxes are not in existence and qualified to act, or that they have neglected to commence the assessment or valuation of property, or that they have neglected or failed to levy said taxes; which notice should further state that unless proceedings be duly taken to make the assessment or valuation within ten days after the giving of the notice, the governor would appoint commissioners of taxation under the act to make the assessment and levy of taxes as therein provided. If the governor, at the expiration of ten days from the service of such notice, should be satisfied that the vacancy still existed, or that the local boards or officers had not commenced the assessment of valuations of property for taxation, or that said taxes had not been levied at the time required by law, it should thereupon become his duty to appoint and commission three freeholders, residents of such municipality, to be known as Commissioners of Taxation, whose duty it should be, "under the authority of said Act, to levy taxes for such sums as they should deem expedient for the following, and no other purposes: 1. For the support of public schools and the repair of school-houses. 2. For protecting property within such city, town, or municipality from fire. 3. For the protection and maintenance of the public health within such city, town, or municipality. 4. For the maintenance and support of the poor. 5. For the support and maintenance of a police force within such city, town, or municipality. 6. For keeping the highways and streets within the limits of such city, town, or municipality in a safe condition for public use. 7. For the expenses of assessing and collecting the taxes levied under this act, and in addition thereto a sum to meet deficiencies not exceeding ten per cent of the sums required to be raised for the above stated purposes." The statute further provided that "all taxes levied in pursuance of this act shall be applied solely to the purposes for which they were levied; and it shall be unlawful to appropriate or use, or direct or order their appropriation or use, for any other purpose or purposes whatever." And it was further provided that the taxes levied by the commissioners should be collected, paid over, distributed, appropriated, and apportioned *pro rata* among the objects therein named, and expended by the same officers or bodies, and in the same manner, as if they had been levied by the boards or officers whose duty it was under existing laws to levy the same; and it was further provided that the commissioners and all officers, boards, or bodies who should be concerned in the collection, holding, disbursing, paying over, and expending or directing the expenditure of the taxes or the proceeds of the taxes levied in pursuance of the act, should be for all purposes of the act, and as respects said taxes and their proceeds, the officers of the

according to the front foot rule, without a hearing as to the be
to the particular property, violates the provisions of the Fourte
Amendment to the Constitution of the United States against
rivation of property without due process of law. Although pre
decisions of the Supreme Court had sustained assessments upo
basis, yet prior to the case of Norwood *v.* Baker,[1] there ha
been any expression of opinion or express ruling on the qu
whether a special assessment for an improvement can be im
otherwise than upon a determination that the particular pro

State, and any official bonds given, or to be given by them, should enure to the benefit of the State as well as to any person or corporation interested therein.

Under this statute and the other statutes for levying State and county taxes, the city of Elizabeth was practically enabled to obtain money for all necessary purposes, without at the same time being required to assess and levy any taxes to pay any of its outstanding obligations. No litigation arose over the validity of the act providing for levying State and county taxes, *but creditors of the city assailed the other statute from two directions.* One obtained a writ of *certiorari*, charging that the act was not a general law such as the Constitution requires; another applied for a writ of *mandamus* to compel the commissioners to levy a tax to pay his judgment, in addition to the taxes specified in the act. The Supreme Court, however, held, in the case of Reid *v.* Wiley, 46 N. J. L. 473, that the act was a general law and constitutional; and in the case of Thompson *v.* Wiley, 46 N. J. L. 476, the same court held that the commissioners had no power to levy taxes to pay debts of the city. The decisions of the Supreme Court in these cases were afterwards unanimously sustained by the Court of Errors, for the reasons given by the Supreme Court. The decision of the Court of Errors was not reported. But in 1897 the Court of Errors and Appeals held that the second of these statutes violated the fundamental principle that the legislature could only delegate the power of taxation to representatives of the people elected by them to exercise municipal powers and that the statute was unconstitutional and void. Bernards *v.* Allen, 61 N. J. L. 228; s. c. 57 N. J. L. 303.

Concurrently, however, wit
passage of the statutes to prot
city from its creditors, *other ac*
passed providing for the com
and adjustment of the debt.
year 1881 (P. L. N. J. p. 127
Act in relation to encumbered
was passed, which recited that
cities of the State were encu
with debt to an extent in excess
ability to pay the interest t
and providing for a declarat
insolvency to be made by the
ing body of the city, and autho
settlement to be made by agre
Some creditors of Elizabeth ex
their willingness to reduce the
of, and adjust, their claims; but
declined to do so. The city, h
promulgated a plan of settleme
issued adjustment bonds to be
refunding the debt. In order t
money to pay interest on the new
issued to assenting creditors,
was passed in the year 1885
N. J. p. 75) making it the duty
boards or officers having power
sess and levy taxes for State and
purposes in any city, to levy
ditional tax therein for the
of securing the payment of
terest and principal on all bonds
and that might be issued, un
Act which provided for making
ment of the debt of encumbered
such additional tax to be appl
the city officers exclusively fo
purposes. In this way the new
of the assenting creditors we
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were left without any practical
of enforcing their claims agai
city.

As to rights of creditors, se
chaps. iv., ix., xix.; *post*,
xxix.

[1] 172 U. S. 269, decided in

is specially benefited, and that the assessment does not exceed the special benefit thereto, without violating the provisions of the Fourteenth Amendment. In that case, special and peculiar circumstances existed which rendered the application of the front foot rule unjust and inequitable and resulted in taking from a single property owner, without compensation, not only the lands necessary for the improvement, but also in imposing upon him the costs and expenses of the condemnation proceeding. The plaintiff owned a plot of land three hundred feet in width situated between two parallel streets and fronting upon one of them. A strip of land fifty feet in width and three hundred feet in length through the centre of plaintiff's lands was taken by the village for the purpose of continuing a street. The municipal authorities were authorized by statute to assess the cost either in proportion to the benefits which might result from the improvement, or according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement. The ordinance authorizing the improvement provided that the cost and the expense of the condemnation of the property, including the compensation paid to the owners, the cost of the condemnation proceedings, advertising, &c., and the interest on bonds issued, if any, should be assessed "per front foot upon the property bounding and abutting upon that part of" the street as condemned and appropriated by the ordinance. The result was that the plaintiff's property was not only taken, but the plaintiff was compelled to pay the entire cost of the land so taken and all the costs and expenses connected with the proceedings. It is apparent upon these facts that, under the particular circumstances, the method followed amounted to an arbitrary exaction upon the plaintiff that in effect confiscated his property without compensation, and that therefore by reason of the method followed and independent of any question whether the property was benefited by the improvement, there was a clear deprivation of property without just compensation in violation of the Fourteenth Amendment.[1] But the court did not merely dispose of the case

[1] The court in Norwood *v.* Baker, 172 U. S. 269, 281, recognized the fact that the method followed by the municipality amounted to practical confiscation. Mr. Justice *Harlan* said: "It will not escape observation that if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property, without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost without compensation in respect of the land taken by the street; for, by opening the street at his own cost, he might save at least the expense attending formal proceedings of condemnation. It cannot be

upon the facts, but referred to and discussed the decisions which declare that the fundamental basis of all special assessments is benefit

that any such result is consistent with the principles upon which rests the power to make special assessments upon property in order to meet the expense of public improvements in the vicinity of such property." But these remarks appear to have been only incidental to the other reasons advanced by the court as ground for holding that the assessment and the ordinance imposing it violated the Fourteenth Amendment.

It is of interest to note that in Norwood *v.* Baker, 172 U. S. 269, the municipality was an Ohio village, and the assessment was imposed under a statute of that State. By the *Constitution* of that State, the rule is that "where private property shall be taken for public use, a compensation therefor shall first be made in money; . . . and such compensation shall be assessed by a jury without deduction for benefits to any property of the owner." Ohio Const. 1851, art. i. § 19. Subsequently to the decision in Norwood *v.* Baker, *supra*, the Supreme Court of Ohio considered the applicability of this provision in Cincinnati L. & N. R. Co. *v.* Cincinnati, 62 Ohio St. 465, a case where one dollar had been awarded to a railroad company as compensation for land taken, and over five hundred dollars were assessed upon the company's remaining lands for the compensation so awarded, and for damages and costs. The court made a distinction between the appropriation of lands and improvements to the surface of the lands appropriated after they had been taken for public use. It refused to give effect to the contention that if an owner has received payment of compensation for lands taken from him, he stands on an equality with the rest of the community, and may be specially assessed for the compensation for the lands so taken in the same manner as the rest of the community for any special benefit accruing to his remaining lands by the improvement. It held that such an assessment would be taking back from him without consideration the compensation guaranteed to him by the Constitution which had been paid to him upon a judgment rendered in his favor by a court of competent jurisdiction; and that the costs and expenses incurred in the proceedings stood upon the same basis and could not be charged back to him by assessment. The case of Cleveland *v.* Wick, 18 Ohio St. 303, so far as inconsistent, was overruled. In Dayton *v.* Bauman, 66 Ohio St. 379, no property of the defendant was taken, but an assessment was made on his lots to pay compensation damages and costs awarded to others for lands taken. The court held that this could not be done; that the principle is not that those only whose property has been taken are free from assessment, but that no assessment can be made to raise money to pay for property taken by the public for public use; that such moneys must be paid by general taxation or out of the public treasury. But the court also held that this rule did not apply to the cost of sewers, the surface improvement of streets, &c., where there was no taking of lands by the public for public use, provided, always, that the assessment did not exceed the special benefit conferred by the improvement.

In *Illinois*, under circumstances substantially similar to the facts in Norwood *v.* Baker, *supra*, the courts have given relief to the property owner by holding that the ordinance providing for the improvement and for the assessment of a special tax upon the property abutting was arbitrary, oppressive, and unjust, and therefore must be set aside under the general rule that such ordinances cannot be sustained. Thus, in Bloomington *v.* Chicago & A. R. Co., 134 Ill. 451, the city council ordered a street which was crossed by an overhead railroad bridge to be widened at the crossing, and a new bridge built "under the rails" of the railroad and directed that the cost be defrayed by a special tax on "abutting property." The result was that the entire cost of widening the street and of rebuilding the bridge was assessed against the railroad property as the only abutting property. It was held that under the circumstances the ordinance was oppressive and unreasonable and must be set aside. In Bloomington *v.* Latham, 142 Ill. 462, an alley was

to the property assessed, and that no assessment can be imposed otherwise than on the basis and within the limits of such benefit.[1] Upon the authority or principles of these decisions, the court declared that the exaction from the owner of private property of the cost of a public improvement, in substantial excess of the benefits accruing to him, is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation in violation of the Fourteenth Amendment. The court said that it applied the rule to "substantial excess," because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, should not be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment. It said that the statute authorizing the municipality to make the improvement empowered a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement without taking special benefit into account, and that the municipality manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement whether such property was benefited or not to the extent of such cost.[2]

directed to be opened which took part of only two lots. By ordinance, a special tax was directed to be assessed by frontage on the remainder of these lots to provide both for the compensation for the land taken and for the damages to the lands not taken. The court held that this ordinance was an arbitrary exercise of the taxing power that would in effect take property without just compensation, and being unreasonable and oppressive was void. See also Chicago & N. W. R. Co. *v.* Elmhurst, 165 Ill. 148; Job *v.* Alton, 189 Ill. 256; Berdel *v.* Chicago, 217 Ill. 429; Harris *v.* People, 218 Ill. 439.

In *Virginia*, where a strip ten feet in width was taken off the front of a lot to widen a street and the owner was awarded $1,200 for compensation for the part taken and for damages to the residue over and above the peculiar benefits to the residue from the work to be constructed, and was then assessed $1,500 for the cost of lands taken, &c., it was held that the assessment was void, and that the city had no power to impose the assessment under the circumstances. *Richardson*, J., questioned the power of the legislature to authorize the imposition of any special assessment under the provisions of the Virginia Constitution requiring taxation to be equal and uniform and in proportion to value, but the court conceded that it was not necessary to decide that question. Norfolk *v.* Chamberlain, 89 Va. 196. In Violett *v.* Alexandria, 92 Va. 561, 576, the court expressly held that the power to impose special assessments was not affected by these constitutional requirements, and treated the case of Norfolk *v.* Chamberlain, *supra*, as decided upon its own facts.

[1] Citing Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 202; Thomas *v.* Gain, 35 Mich. 156, 162; Macon *v.* Patty, 57 Miss. 378, 386; McCormack *v.* Patchin, 53 Mo. 33, 36; Zoeller *v.* Kellogg, 4 Mo. App. 163; State *v.* Hoboken, 36 N. J. L. 291, 293; State *v.* Newark, 37 N. J. L. 415, 416, 420, 423; Bogert *v.* Elizabeth, 27 N. J. Eq. 568, 569; Matter of Canal Street, 11 Wend. (N. Y.) 155, 156; Hammett *v.* Philadelphia, 65 Pa. St. 146, 151, 153; Barnes *v.* Dyer, 56 Vt. 469, 471.

[2] In Norwood *v.* Baker, 172 U. S. 269, 279, Mr. Justice *Harlan*, who delivered

The general view of the effect of this decision was that it modified the previous rulings of the Supreme Court sustaining the power of the legislature, or of a municipality under delegated authority, to create a local taxing district for local improvement purposes, and to impose the entire cost of the improvement upon the district upon such reasonable method of distribution or apportionment as the legislative authorities might prescribe, although the benefits to the property within the district might not equal the cost of the improvement, and that the decision held that, under the provision of the Fourteenth Amendment, each parcel of property could b assessed only to the extent that it actually received special benefits that property owners affected by an improvement within a taxin district are entitled to a hearing on the question of special benefit and, as a necessary result, that so far as the cost of the improvement exceeded the special benefits resulting to the several parce of property in the taxing district, such excess must be borne by th general treasury of the municipality.[1] That this was a natural in

the opinion of the court, said: "The guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received." Justices *Brewer*, *Gray*, and *Shiras* dissented from the decision of the court, and in his dissenting opinion, Mr. Justice *Brewer* assigned the following reasons for the dissent: (1) The taking of land for a highway or other public use is a public in provement, the cost of which und the Constitution of Ohio may be charg against the property benefited, Clev land *v.* Wick, 18 Ohio St. 303; (equally true is this under the Co stitution of the United States, Sho maker *v.* United States, 147 U. S. 28 302; Bauman *v.* Ross, 167 U. S. 54 (3) the cost of this improvement w settled in judicial proceedings which the defendant in error was party, and having received the amou of the award she is estopped to de that the cost was properly ascertaine (4) a public improvement having be made, it is beyond question a leg lative function (and a common coun duly authorized as in this case h legislative powers) to determine t area benefited by such improvemen and the legislative determination conclusive, Spencer *v.* Merchant, 1 N. Y. 585; s. c. 125 U. S. 345, 355.

[1] Interpreting the decision of t Supreme Court of the United Stat in Norwood *v.* Baker, *supra*, the S preme Court of Indiana, in Adams Shelbyville, 154 Ind. 467, 468, laid dow the following principles as governi the power to impose special asse ments: (1) The legislature may creat or authorize a municipality to creat a local taxing district for local in provement purposes which includ part only of the property within t

terpretation of the effect of the opinion and reasoning of the Supreme Court is shown by subsequent decisions of the Federal and State courts rendered before further examination and reconsideration of the question by the Supreme Court.[1]

These questions subsequently came before the Supreme Court of the United States for review upon appeal or writ of error under a variety of circumstances in a series of cases which either held that an assessment in proportion to frontage was unconstitutional under the Fourteenth Amendment, or distinguished Norwood *v.* Baker, and held that, on the contrary, the assessments did not violate that constitutional provision. In these cases the property owners contended that, under Norwood *v.* Baker, the cost of a local improvement could not be assessed on abutting property in proportion to frontage, unless the law authorizing the assessment also made provision for a hearing upon notice of the question whether the property was specially benefited and whether the special benefits equalled the assessment. In finally passing upon the validity of front foot

municipality; (2) The legislature may declare conclusively that only the property within the taxing district shall be specially assessed on account of local improvement within that district; (3) Each parcel of contributing property may be assessed only to the extent that it actually receives special benefits; (4) The taxing district, as a whole, may be assessed only to the extent of the sum of special benefits actually received by the several parcels or contributing property; (5) The improvement, so far as its cost exceeds the special benefits resulting to the several parcels of property in the taxing district, is a benefit to the municipality at large, and such excess must be borne by the general treasury; (6) Property owners affected by an improvement within a taxing district are entitled to a hearing on the question of special benefits.

[1] In the *Federal Circuit Courts* it was held, following Norwood *v.* Baker, *supra*, that assessments for opening and widening a street, for paving and grading, and for sidewalks, imposed by the front foot of abutting property were to be regarded as made without regard to the question of benefits to the property assessed and without a hearing thereon, and were therefore prohibited by the Fourteenth Amendment. Loeb *v.* Columbia Township, 91 Fed. Rep. 37; Fay *v.* Springfield, 94 Fed Rep. 409; Charles *v.* Marion, 98 Fed. Rep. 166; s. c. 100 Fed. Rep. 538; Lyon *v.* Tonawanda, 98 Fed. Rep. 361, rev'd 181 U. S. 389; Cowley *v.* Spokane, 99 Fed. Rep. 840; Bidwell *v.* Huff, 103 Fed. Rep. 357, 362; Zehnder *v.* Barber Asphalt Pav. Co., 106 Fed. Rep. 103.

In the *State Courts*, the decision of the Supreme Court in Norwood *v.* Baker, *supra*, was accepted and applied in many jurisdictions under the provisions of the State Constitutions against the deprivation of property without just compensation, as well as under the Fourteenth Amendment, and it is to be observed of these decisions that, having accepted the opinions expressed by the Supreme Court of the United States in that case and applied them, in many instances overruling or modifying the previous course of decision in the States, the courts of several jurisdictions appear to have adopted the principles of that decision as a correct interpretation of the law and to have refused to modify the rule so adopted, notwithstanding the fact that Norwood *v.* Baker has, by subsequent decisions of the Supreme Court, been so qualified and limited that it is now to be regarded as resting only upon its own peculiar facts.

assessments under the Fourteenth Amendment, the Supreme Court, in its opinion, without holding that under all the circumstances the legal import of the phrase "due process of law" is the same both in the Fifth and in the Fourteenth Amendments to the United States Constitution, held it could not be supposed that by the Fourteenth Amendment it was intended to impose on the States, when exercising the power of taxation, any more rigid or stricter curb than that imposed by the Fifth Amendment on the Federal Government in a similar exercise of the power.[1] It reviewed its previous decisions as to the scope and effect of the phrase "due process of law,"[2] declared that the necessary legal import of Norwood *v.* Baker, *supra* was not to overrule its previous decisions, that that decision did not establish the principle that the cost of a local improvement cannot be assessed against abutting property according to frontage unless the law under which the improvement is made provides for a preliminary hearing as to the benefits to be derived by the property to be assessed that the assessment in Norwood *v.* Baker, *under the circumstances of that case*, appeared to a majority of the court to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power; that the Federal courts ought not to interfere, under the provisions of the Fourteenth Amendment, when what is complained of is the enforcement of the settled laws of the State, applicable to all persons in like circumstances and conditions, but only when there is some abuse of the law amounting to confiscation of property or deprivation of personal rights, and the court therefore held that assessments for paving streets according to the frontage of the abutting property without any hearing as to benefits are not unconstitutional under the Fourteenth Amendment.[3]

[1] In holding that the restrictions imposed by the Fourteenth Amendment upon the States when exercising their powers of taxation were not greater than those imposed on the Federal Government in the exercise of that power by the Fifth Amendment, the court, although it did not expressly so hold, in effect ruled that the question had already been decided in the cases of Mattingly *v.* District of Columbia, 99 U. S. 687, 692; Bauman *v.* Ross, 167 U. S. 548; and Parsons *v.* District of Columbia, 170 U. S. 45, in which it had already declared that assessments in proportion to frontage without any hearing as to the benefits actually conferred upon the property were valid.

[2] Among the decisions cited and examined by the court in French *v.* Barber Asphalt Pav. Co., 181 U. S. 324, in its review of the question are the following: Murray's Lessee *v.* Hoboken Land & Imp. Co., 18 How. (U. S.) 272; Walker *v.* Sauvinet, 92 U. S. 90; McMillen *v.* Anderson, 95 U. S. 37; Davidson *v.* New Orleans, 97 U. S. 97; Mattingly *v.* District of Columbia, 99 U. S. 687; Missouri *v.* Lewis, 101 U. S. 22; Springer *v.* United States, 102 U. S. 586; Kelly *v.* Pittsburgh, 104 U. S. 78; Spencer *v.* Merchant, 125 U. S. 345; Paulsen *v.* Portland, 149 U. S. 30; Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112; Bauman *v.* Ross, 167 U. S. 548; Parsons *v.* District of Columbia, 170 U. S. 45.

[3] French *v.* Barber Asphalt Pav. Co., 181 U. S. 324.

The following cases involving th

These latter decisions of the Supreme Court have been steadily adhered to by it, and it has, in a number of the cases, refused to hold that special assessments violated the Fourteenth Amendment to the Federal Constitution, although levied upon abutting property according to the front foot or according to the area of the property assessed, or imposed upon a limited district, and although the assessment upon the property was not based upon or limited to the benefits specially accruing to it from the improvement. In these cases the court has declared that, when the assessment is levied according to principles which have long been recognized as fair and reasonable, it could not undertake to hold that the assessing authorities might not have been warranted in determining that they had done substantial justice.[1]

same question were decided simultaneously with French *v.* Barber Asphalt Paving Co., *supra:* Wight *v.* Davidson, 181 U. S. 371, 384; rev'g 16 App. D. C. 371; Tonawanda *v.* Lyon, 181 U. S. 389, rev'g 98 Fed. Rep. 361 (assessment for grading and paving street according to frontage); Webster *v.* Fargo, 181 U. S. 394, aff'g 9 N. Dak. 208 (assessment for grading and paving street); Cass Farm Co. *v.* Detroit, 181 U. S. 396, aff'g 124 Mich. 433 (assessment for paving street); Detroit *v.* Parker, 181 U. S. 399, rev'g 103 Fed. Rep. 357 (assessment for paving street); Wormley *v.* District of Columbia, 181 U. S. 402; Shumate *v.* Heman, 181 U. S. 402, aff'g s. c. *sub nom.* Heman *v.* Allen, 156 Mo. 534 (sewer assessment); Farrell *v.* West Chicago Park Com'rs, 181 U. S. 404, aff'g 182 Ill. 250 (street improvement assessment). See also to the same effect, Zehnder *v.* Barber Asphalt Paving Co., 108 Fed. Rep. 570, rev'g 106 Fed. Rep. 103; Minnesota & M. Land & Imp. Co. *v.* Billings, 111 Fed. Rep. 972; Brown *v.* Drain, 112 Fed. Rep. 582 (California "Vrooman" Act); Boise City *v.* Wilson, 113 Fed. Rep. 1016. But compare White *v.* Tacoma, 109 Fed. Rep. 32, where the court distinguished French *v.* Barber Asphalt Pav. Co., *supra,* considered the question of benefit to the property assessed, and held that, as none existed, an assessment by the front foot could not be sustained.

In Loeb *v.* Columbia Township, 179 U. S. 472, rev'g 91 Fed. Rep. 37, the action was upon bonds issued by the township for the purpose of raising money to meet the cost of widening and extending a certain avenue within its limits. Authority was given by statute to the trustees of the township to issue bonds for the improvement and to assess the cost of the improvement upon abutting lots according to the front foot. The court below held that this method of assessment was invalid under the principles laid down in Norwood *v.* Baker, 172 U. S. 269, but the Supreme Court expressed the opinion that it erred in so holding, as the authority to issue the bonds could be sufficiently sustained without relying upon the statutory direction to levy the assessment according to the front foot.

[1] In Hibben *v.* Smith, 191 U. S. 310, 325, in discussing the circumstances under which a Federal court is justified in interfering with the assessment of a tax, Mr. Justice *Peckham* said, "The Fourteenth Amendment, it has been held, legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary State legislation, affecting life, liberty, and property, as is offered by the Fifth Amendment against general legislation by Congress; but that the Federal courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a State applicable to all persons in like circumstances and conditions, and that the Federal courts should not interfere unless there is some abuse of law amounting to confiscation of property or a deprivation of personal rights, such as existed in the case of Norwood *v.* Baker, 172 U. S. 269."

In Seattle *v.* Kelleher, 195 U. S. 351,

As a *result of the decisions of the United States Supreme Court*, it may be regarded as definitely settled that the legislature of a State

the United States Circuit Court held an assessment against the plaintiff's land to be void under the Fourteenth Amendment and enjoined the city from enforcing it. But this decision was reversed by the Supreme Court. The facts were that the assessment (which was a reassessment after a former assessment had been held to be invalid), was levied, pursuant to statute, according to the front foot, with different percentages for four parallel subdivisions at successive distances from the street up to one hundred and twenty feet. This territory was formed under the statute into an improvement district. The particular improvement involved the grading of the street with extensive cuts and fills and also the planking of the street for some distance, but the planking stopped about one thousand feet before reaching the plaintiff's lands. The assessment was attacked upon the ground that the inclusion of the planking in the sum of which the plaintiff was to pay a share was manifestly unfair in the particular case. The Supreme Court admitted that taken by itself this looked like an unwarrantable attempt to make one man pay for another man's convenience, but it expressed the opinion that the improvement might be regarded as one, that there were many cuts and fills made in grading the road, that so far as appeared the heaviest work might have been done on the plaintiff's land, which seemed to have been the summit of an ascent, and that an improvement of one sort might have been the greatest there, while that of a different kind, needed where the travel was, was at the other end of the street. The extension of the street helped to bring the plaintiff's lands into the market, and was more likely to benefit him than those who were lower down, and the court therefore held that it could not invalidate the assessment on the ground that it was so manifestly unfair as to amount to a deprivation of property without due process of law.

In Louisville & N. R. Co. *v.* Barber Asphalt Pav. Co., 197 U. S. 430, a proceeding was brought to enforce a lien upon a lot adjoining a part of Frankfort Avenue, Louisville, for grading, paving, and curbing with asphalt the carriage way of that part of the avenue. The defendant railroad company pleaded that its only interest in the lot was a right of way for its main roadbed, and that neither the right of way nor the lot would or could get any benefit from the improvement, but on the contrary would rather be hurt by the increase of travel close to its tracks. On this ground it set up that any special assessment would deny to it the equal protection of the laws contrary to the Fourteenth Amendment. The statute provided that the improvement should be made at the exclusive cost of the adjoining owners, to be equally apportioned according to the number of feet owned by them. The Supreme Court of the United States held that the legislature was warranted in adopting the presumption that, apart from the specific use to which the particular land was devoted, land in a good-sized city generally will get a benefit from having the streets about it paved, and that this benefit will be more than the cost; and that the legislature might go a step further, and say that on the question of benefit or no benefit the land shall be considered simply in its general relationship and apart from its particular use. Answering the contention of the railroad company that the land could not possibly be benefited by the improvement and that therefore the assessment violated the Fourteenth Amendment, Mr. Justice *Holmes* said "There is a look of logic when it is said that special assessments are founded on special benefits and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land, indeed, whether it is a benefit at all, is a matter of forecast and estimate. In its general aspects it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district, the municipality, and to disguise rather than to answer the theoretic doubt.

may create, or authorize the creation of, special taxing districts and charge the cost of a local improvement, in whole or in part,

It is dangerous to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the Constitution. Particularly, as was intimated in Spencer *v.* Merchant, 125 U. S. 345, it is important for the court to avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that Amendment was adopted and which it is safe to say that no one then supposed would be disturbed. It now is established beyond permissible controversy that laws like the one before us are not contrary to the Constitution of the United States. Walston *v.* Nevin, 128 U. S. 578; French *v.* Barber Asphalt Paving Co., 181 U. S. 324; Webster *v.* Fargo, 181 U. S. 394; Cass Farm Co. *v.* Detroit, 181 U. S. 396; Detroit *v.* Parker, 181 U. S. 399; Chadwick *v.* Kelley, 187 U. S. 540, 543, 544; Schaefer *v.* Werling, 188 U. S. 516; Seattle *v.* Kelleher, 195 U. S. 351, 358. A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the Act it would be surprising if the corresponding fact should invalidate an assessment. Upholding the Act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And this has been the implication of the cases. Davidson *v.* New Orleans, 96 U. S. 97, 106; Mattingly *v.* District of Columbia, 97 U. S. 687, 692; Parsons *v.* District of Columbia, 170 U. S. 45, 52, 55; Detroit *v.* Parker, 181 U. S. 399, 400; Chadwick *v.* Kelley, 187 U. S. 540, 544."

In Martin *v.* District of Columbia, 205 U. S. 135, rev'g 26 App. D. C. 140, 146, an Act of Congress directed that the cost of opening minor streets running through a square should be apportioned upon each lot or part of a lot in such square according as each lot or part of a lot in such square might be benefited. The court sustained the validity of the statute in creating a limited assessment district, although it recognized that by reason of the limited area it might well happen that the assessment upon certain lots might exceed the benefit conferred. It pointed out that the chance of the cost being greater than the benefit was slight and the excess, if any, would be small. Mr. Justice *Holmes*, who delivered the opinion of the court, remarked that "Constitutional rights, like others, are matter of degree." He also said that it might well be that a form of assessment that would be valid for paving would not be valid for the more serious expense involved in the taking of land. Such a distinction, he said, was relied on in French *v.* Barber Asphalt Pav. Co., 181 U. S. 324, 344, to reconcile the decision in that case with Norwood *v.* Baker, 172 U. S. 269. In sustaining the statute, however, the court held that the language of the statute permitted, if it did not require, the interpretation that in any event the apportionment was to be limited to the benefit, and as it appeared that the jury in assessing the charges did not so limit them, the assessment was quashed and the case remanded.

In Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 203, 204, a case involving the validity of a general tax upon property, Mr. Justice *Brown*, who delivered the opinion of the court, pointed out that a general tax cannot be dissected to show that as to certain constituent parts the taxpayer received no benefits, and "Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot." But he also remarked that "Subject to these individual exceptions, the rule is that in classifying property for taxation some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference," citing Norwood *v.* Baker, 172 U. S. 269.

upon the property in such districts or according to valuation or superficial area, or frontage, without violating the Fourteenth Amendment to the Federal Constitution;[1] and that the whole expense of paving or improving a street or highway may be assessed by a municipality pursuant to statutory authority upon the lands abutting upon the street or highway so improved in proportion to the feet frontage of such lands without providing for a judicial inquiry into the value of such lands and the benefits actually to accrue to them by the proposed improvement.[2]

§ 1437. **Special Assessments; Front Foot Rule; Validity under State Law.** — As a general rule it is only when a tax or special assessment is challenged as violating some provision of the *Federal Constitution* that the Supreme Court of the United States has or will exercise jurisdiction to determine its validity. The validity of a tax or special assessment *under the Constitution and laws of the State is a matter of local law*, and the determination of the State courts that the imposition of a tax or special assessment does not violate any provision of the Constitution of the State is not open to review by the Federal courts and will be accepted as controlling.[3] Therefore, although a special assessment by the front foot or in proportion to area may not contravene any provisions of the *Federal* Constitution and the Federal courts may not have jurisdiction or power to determine that the tax is invalid, yet it does not necessarily follow that such a tax is valid under the Constitution of the State. As a result of the important decision in Norwood *v.* Baker,[4] the fundamental basis of special assessments and their validity when imposed according to frontage or area has undergone reconsideration and re-examination by different State courts, and, in some instances at least, the principles and rules previously adopted have been changed and modified in material particulars. In many of the States the power of the legislature to create a special taxing district, to determine that the property within the district is specially benefited, and to impose an assessment for the cost of a local improvement *according to frontage or area without notice or a hearing* on that question, is fully recognized.[5] In these States, as a general

[1] *Per* Mr. Justice *Shiras* in Webster *v.* Fargo, 181 U. S. 394, 395.

[2] *Per* Mr. Justice *Shiras*, in Tonawanda *v.* Lyon, 181 U. S. 389, 391.

[3] Osborne *v.* Florida, 164 U. S. 650; Schaefer *v.* Werling, 188 U. S. 516, 518; Armour Packing Co. *v.* Lacy, 200 U. S. 226, 234. See also Forsyth *v.* Hammond, 166 U. S. 506, 518.

[4] Norwood *v.* Baker, 172 U. S. 269.

[5] *California.* In Hadley *v.* Dague, 130 Cal. 207, the court refused to follow the decision of the Supreme Court of the United States in Norwood *v.* Baker

rule, the views adopted are in substantial harmony with the final determination of the Supreme Court of the United States as to the

172 U. S. 269, in an action upon an assessment for improving an existing street which was directed by statute to be assessed as an entirety upon the lots and lands fronting on the improvement and to be apportioned according to frontage. The court pointed out that in Norwood *v.* Baker the assessment related to opening a new street and did not include any of the expense of improving an existing street, and held that the statute then before it was a legislative declaration that the property within the district improved would receive a benefit from the improvement in proportion to its frontage upon the work, and in the absence of any facts showing that a particular assessment so based is unjust and not according to benefits, the statute in its application thereto cannot be deemed unconstitutional. *Harrison*, J., said: "The mode in which the expense of local improvement shall be borne as well as the district which is to bear such expense and the manner in which the expense is to be distributed is a legislative question. The principle upon which the expense is charged on the property in that district is that that property has received a peculiar benefit. But as was said by Mr. Justice *Temple* in Lent *v.* Tillson, 72 Cal. 428, 'The benefit is not the source of the power.' Nor does the validity of the assessment depend upon ability to show that the property assessed was specifically benefited by the amount of the assessment or received that particular amount of benefit. Courts will uphold an assessment made upon such legislative authority even though the benefits are not s own to be identical with the burden." See also to the same effect, Banaz *v.* Smith, 133 Cal. 102; San Francisco Pav. Co. *v.* Bates, 134 Cal. 39; Belser *v.* Allman, 134 Cal. 399; Chapman *v.* Ames, 135 Cal. 246; German Sav. Soc. *v.* Ramish, 138 Cal. 120, 125. In Duncan *v.* Ramish, 142 Cal. 686, it was held that the validity of a street assessment according to frontage cannot be collaterally attacked in an action to enjoin a sale of the lands by evidence that the share of the cost of the improvement apportioned and assessed to plaintiff's lots exceeded the benefits thereto arising from the improvement. The absence of benefit to the lot owner cannot be a judicial question, unless the court can plainly see that there could be no benefit, and so clearly that it does not admit of dispute by evidence. Otherwise the legislative decision is final. If the property owner has the right to be heard before the city council upon the question of benefits by filing a petition of remonstrance, the decision of the council, as the legislative body, is final. See also Brown *v.* Drain, 112 Fed. Rep. 582; O'Dea *v.* Mitchell, 144 Cal. 374.

Colorado. A sewer assessment in proportion to area held to be valid. Hildreth *v.* Longmont, 47 Colo. 79; 105 Pac. Rep. 107.

Iowa. Prior to the decision of Norwood *v.* Baker, *supra*, assessments in proportion to frontage had many times been sustained. Warren *v.* Henly, 31 Iowa, 31, 43 (paving); Burlington *v.* Quick, 47 Iowa, 222 (grading, curbing, and macadamizing); Amery *v.* Keokuk, 72 Iowa, 701 (macadamizing); Ford *v.* North Des Moines, 80 Iowa, 626 (paving); Farwell *v.* Des Moines Brick Mfg. Co., 97 Iowa, 286; Dewey *v.* Des Moines, 101 Iowa, 416; Allen *v.* Davenport, 107 Iowa, 90 (paving). An assessment in proportion to area is valid. Andre *v.* Burlington, 141 Iowa, 65; 117 N. W. Rep. 1082. In Dewey *v.* Des Moines, 101 Iowa, 416, 423, a paving assessment case, *Kinne*, C. J., said: "We do not consider it necessary to enter into an elaborate discussion of the question as to whether or not a special assessment must be based, in part even, upon the idea of a benefit to be actually received by the abutting property. It is sufficient to say that it has been repeatedly held by this court that such improvement of streets is a public object which will support such an assessment, regardless of the fact of whether or not it is a benefit to the abutting property. We regard the law upon this question as settled in this State." Citing Warren *v.* Henly, 31 Iowa, 31; Morrison *v.* Hershire, 32 Iowa, 271; Gatch *v.* Des Moines, 63 Iowa, 718; Muscatine *v.* Chicago, R. I. & P. R. Co., 88 Iowa, 291. See to the same effect, Allen *v.* Davenport, 107 Iowa, 90, 103. Following the decision of French *v.* Barber Asphalt Pav. Co., 181 U. S. 324, it has been held

validity of assessments by the front foot under the Fourteenth Amendment to the Federal Constitution, and the corresponding

that the creation of a taxing district and the determination of the manner of the assessment is a legislative question, and that therefore assessments by frontage are valid. Hackworth *v.* Ottumwa, 114 Iowa, 467 (paving assessment); Ft. Dodge Elect. L. & P. Co. *v.* Ft. Dodge, 115 Iowa, 568, 580; Minneapolis & St. L. R. Co. *v.* Lindquist, 119 Iowa, 144 (sewer assessment). See also Oliver *v.* Monona County, 117 Iowa, 43. But in Iowa Pipe & Tile Co. *v.* Callanan, 125 Iowa, 358, a sewer assessment by frontage upon a narrow strip of land having a frontage of one hundred feet and a depth of only eight feet was held to be invalid as so manifestly unequal and unjust as to be within the principles of Norwood *v.* Baker, *supra*.

Kansas. It is within the power of the legislature to create a taxing district and charge the cost of a local improvement, *e. g.* a sewer, upon the property in the district either according to frontage or superficial area or valuation. Kansas City *v.* Gibson, 66 Kan. 501. See also Gilmore *v.* Hentig, 33 Kan. 156; Mason *v.* Spencer, 35 Kan. 512; Moore *v.* Paola, 63 Kan. 867. Assessment for sprinkling in proportion to frontage held to be valid. Union Pac. R. Co. *v.* Abilene, 78 Kan. 820.

Kentucky. A street grading assessment *according to the area* of the assessed property will not be held to be an arbitrary and unconstitutional taking of the property merely because the benefits are not commensurate with the cost, the legislature having a large discretion in defining the property to be specially benefited. The fact that a statute makes no provision *for a preliminary hearing* as to the extent of special benefits to each piece of property resulting from the improvement of a street does not render the statute invalid. Barfield *v.* Gleason, 111 Ky. 491. See also as to validity of assessments by area, Preston *v.* Roberts, 12 Bush (Ky.), 570; Nevin *v.* Roach, 86 Ky. 492; Louisville *v.* Bitzer, 115 Ky 359, 364. But these assessments cannot be imposed under such conditions as to amount to spoliation. Preston *v.* Rudd, 84 Ky. 150; Barfield *v.* Gleason, 111 Ky. 491. In Louisville *v.* Bitzer, 115 Ky. 359, an assessment by area exceeded on the facts the value of the property assessed, and the court held this to be spoliation and invalid. *Hobson*, J., said: "The method of assessment by the foot has been followed so long and has been so often approved by this court, that it no longer remains in open question. Preston *v.* Roberts, 12 Bush (Ky.), 570; Nevin *v.* Roach, 86 Ky. 492. The rule, also, is that while these assessments rest upon the basis of benefits or presumed benefits to the property assessed, it is not essential to their validity that actual enhancement in value or other benefits to each owner should be shown; the judgment of the city council being conclusive as to the propriety of the improvement. Pearson *v.* Zable, 78 Ky. 170, 174; Ludlow *v.* Cincinnati S. R. Co., 78 Ky. 357; Preston *v.* Rudd, 84 Ky. 150; West Covington *v.* Schultz, 16 Ky. Law Rep. 831; 30 S. W. Rep. 410, 660; Allen *v.* Woods, 20 Ky. Law Rep. 59, 45 S. W. Rep. 106; Bullitt *v.* Selvage, 20 Ky. Law Rep. 599, 47 S. W. Rep. 255. On the other hand it is held that when, owing to extraordinary facts, the presumption on which the rule rests does not apply, and to force the owner to make the improvement is *to confiscate his property without compensation*, this is spoliation and will not be enforced. Covington *v.* Southgate, 15 B. Mon. (Ky.) 491; Louisville *v.* Louisville Rolling Mill Co., 3 Bush (Ky.), 416; Broadway Baptist Church *v.* McAtee, 8 Bush (Ky.), 508; Preston *v.* Rudd, 84 Ky. 150; Frantz *v.* Jacob, 88 Ky. 525, 532; James *v.* Louisville, 19 Ky. Law. Rep. 447, 40 S. W. Rep. 912. In other words, the judgment of the legislative municipal authorities is held conclusive in all cases of doubt as to these matters; but where the total value of the property taxed after the improvement is made less or no more than the cost of the improvement, there is no room for difference of opinion, — that to enforce the lien is to take from the owner his property without compensation. . . . No department of the government can take the property of the citizen for public purposes without just compensation, and when the entire property is taken to pay for a public improvement there is no room for a presumption as to the benefits received, but a case of

provision of the State Constitutions is given a construction in harmony with the views of the Supreme Court as to the proper construction to be placed upon the Fourteenth Amendment.

spoliation is shown." See, also, as to what constitutes spoliation, Henning *v.* Stengel, 112 Ky. 906; Pfaffinger *v.* Kremer, 115 Ky. 498, 503; Figg *v.* Louisville & N. R. Co., 116 Ky. 135, 142.

In *Kentucky, special assessments* are frequently, if not generally, imposed *in proportion to the area* of abutting property. As to the principles governing the apportionment of these assessments under the statutes of this State, see Beck *v.* Obst, 12 Bush (Ky.), 268; Schmelz *v.* Giles, 12 Bush (Ky.), 491; Stengel *v.* Preston, 89 Ky. 616; Cooper *v.* Nevin, 90 Ky. 85; Washle *v.* Nehan, 97 Ky. 351; Dumesnil *v.* Shanks, 97 Ky. 354, 30 S. W. Rep. 654; Dumesnil *v.* Gleason, 99 Ky. 652, 37 S. W. Rep. 69; Meyer *v.* Covington, 103 Ky. 546; Fidelity Trust & S. V. Co. *v.* Voris, 110 Ky. 315; Scheafer *v.* Selvage (Ky.), 41 S. W. Rep. 569.

Louisiana. In Moody *v.* Spotorno, 112 La. 1008, the court said in answer to the objection that the improvement in fact conferred no benefit upon the property and that the amount demanded exceeded the value of the property, that the court was now thoroughly committed to the doctrine that the question of benefit *vel non* to particular property included within a local assessment district because of its being similarly situated with all the other property of the district with reference to the work of the public improvement for the cost of which the assessment is levied, is a legislative and not a judicial question. See also Kelley *v.* Chadwick, 104 La. 719, aff'd 187 U. S. 540; Burguieres Co. *v.* Sanders, 111 La. 109.

Mississippi. A municipality may, under statutory authority, assess the cost of a *sidewalk* upon abutting property *according to frontage.* Macon *v.* Patty, 57 Miss. 378; Nugent *v.* Jackson, 72 Miss. 1040; Wilzinski *v.* Greenville, 85 Miss. 393, 399 (following French *v.* Barber Asphalt Pav. Co., 181 U. S. 324). A similar assessment for *paving* a street is valid. Edwards House Co. *v.* Jackson, 91 Miss. 429.

Missouri. The legislature may create a special taxing district and charge the cost of an improvement in whole or in part upon the property in such district according to *valuation or superficial area or frontage.* The legislative determination that the property is benefited and as to the mode of apportionment is conclusive. St. Joseph *v.* Anthony, 30 Mo. 537; Neenan *v.* Smith, 50 Mo. 525; Kiley *v.* Cranor, 51 Mo. 541; St. Louis *v.* Allen, 53 Mo. 44; Farrar *v.* St. Louis, 80 Mo. 379; Rutherford *v.* Hamilton, 97 Mo. 543; Johnson *v.* Duer, 115 Mo. 366; Moberly *v.* Hagan, 131 Mo. 19; Heman *v.* Allen, 156 Mo. 534, aff'd *sub nom.* Shumate *v.* Allen, 181 U. S. 402; Kansas City *v.* Bacon, 157 Mo. 450, 471; Barber Asphalt Pav. Co. *v.* French, 158 Mo. 534, aff'd 181 U. S. 324; Prior *v.* Buehler & C. Const. Co., 170 Mo. 439; Heman *v.* Gilliam, 171 Mo. 258, 264; St. Charles *v.* Deemar, 174 Mo. 122, 124; Meier *v.* St. Louis, 180 Mo. 391, 408; Barber Asphalt Pav. Co. *v.* Munn, 185 Mo. 552, 563; Barber Asphalt Pav. Co. *v.* Peck, 186 Mo. 506, 516; Hund *v.* Rackliffe, 192 Mo. 312, 321; Heman Const. Co. *v.* Wabash R. Co., 206 Mo. 172, 179; Fruin-Bambrick Const. Co. *v.* St. Louis Shovel Co., 211 Mo. 524, 531, 532. Where the charge is to be "in proportion to frontage," the amount of the whole work is to be ascertained and each lot charged in the proportion its frontage bears to that of all the lots. Neenan *v.* Smith, 50 Mo. 525; s. c. again, 60 Mo. 292; St. Louis *v.* Clemens, 49 Mo. 552.

Montana. The legislature may provide by statute that when a street pavement is made, the city council may direct by ordinance that the expense shall be paid by the entire district *according to area.* In the absence of proof that the burden imposed on the property is entirely out of proportion to the benefit, the property owner cannot assert that his property is taken without compensation. McMillan *v.* Butte, 30 Mont. 220.

New York. The legislature may create a taxing district and may direct that the *whole expense* of an improvement be assessed upon the property within such district. Spencer *v.* Merchant, 100 N. Y. 585, aff'd 125 U. S. 345; People *v.* Buffalo, 147 N. Y. 675, 679; Smith *v.* Buffalo, 159 N. Y. 427,

But these views are not uniformly accepted, and in some States assessments imposed solely in proportion to frontage or

431. The determination of the legislature that the property within the district is benefited is final and conclusive. Spencer *v.* Merchant, 100 N. Y. 585, aff'd 125 U. S. 345. The property owner has no right to a hearing at any time as to the justice or propriety of the principle upon which the assessment is to be apportioned, and the legislature may distribute the cost of the improvement according to *frontage without such hearing.* Matter of Cruger, 84 N. Y. 619; O'Reilley *v.* Kingston, 114 N. Y. 439, 448; People *v.* Pitt, 169 N. Y. 521, aff'g 64 N. Y. App. Div. 316; People *v.* Desmond, 186 N. Y. 232, 236; Ithaca *v.* Babcock, 72 N. Y. App. Div. 260; Donovan *v.* Oswego, 90 N. Y. App. Div. 397; New York Cent. & H. R. R. Co. *v.* Rochester, 129 N. Y. App. Div. 805, 811. Compare Conde *v.* Schenectady, 164 N. Y. 258, rev'g 29 N. Y. App. Div. 604; Matter of Munn, 165 N. Y. 149, 155, rev'g 49 N. Y. App. Div. 232; Nehasane Park Assoc. *v.* Lloyd, 167 N. Y. 431, aff'g 45 N. Y. App. Div. 631.

An assessment for a local improvement apportioned among the owners of abutting real estate according to frontage is held to be valid, and an assessment on that basis against lots, some of which were vacant and others occupied by buildings, was sustained, since under the charter it was the duty of the assessors to determine the benefits, in doing which they acted judicially; and their judgment as to the amount of benefit was held not to be judicially reviewable unless it appeared (which in the case before the court it did not) that they acted upon some erroneous principle in making the assessment. O'Reilley *v.* Kingston, 114 N. Y. 439.

North Carolina. Prior to Norwood *v.* Baker, 172 U. S. 269, it was held that the legislature might create, or authorize the creation of, a taxing district, and direct that the cost of an improvement be assessed upon the property therein *according to frontage.* Raleigh *v.* Peace, 110 N. Car. 32; Hilliard *v.* Asheville, 118 N. Car. 845. But it was held in a later case that assessments by frontage can only be sustained on the theory of special benefits conferred and when they bear some reasonable relation to the burdens imposed. The front foot rule is accepted as a legislative declaration that it shall be considered, and is, a fair and reasonable method of making the assessment and establishing approximate equality in the distribution of the burdens. But assessments in proportion to frontage are subject to scrutiny by the court to determine whether there is such a marked disproportion between the burden imposed and the benefit conferred as to make it clearly manifest that the burdens have not been fairly and equitably apportioned. Kinston *v.* Wooten, 150 N. Car. 295.

North Dakota. The legislative power to create a taxing district and to impose the cost of the assessment upon property therein *according to frontage* is fully recognized. Rolph *v.* Fargo, 7 N. Dak. 640; Roberts *v.* First Nat. Bank, 8 N. Dak. 504; Webster *v.* Fargo, 9 N. Dak. 208, aff'd 181 U. S. 394. The court has expressed the opinion that the assessment need not be supported by benefits, and that it is valid even if there be no benefits. Rolph *v.* Fargo, 7 N. Dak. 640.

Oklahoma. It has been held that the legislature may authorize a city to impose a sewer assessment upon lots in the sewer district in proportion to area and without regard to improvements, and that as the apportionment of the cost according to area is a mere matter of calculation which cannot be affected by a hearing, the fact that the property owner has no notice or hearing otherwise than by the publication of the ordinance creating the district, publication of the advertisement for bids, and publication of the ordinance levying and assessing the tax, does not affect the validity of the assessment. Perry *v.* Davis, 1[illegible] Okla. 427.

Oregon. The formation of a taxing district is within the discretion of the legislature and the property owner has no right to a hearing thereon or as to the manner of apportionment. Hence an assessment *in proportion to frontage* will be sustained, if it does not plainly appear to be arbitrary, unjust, and inequitable. Individual cases working hardship to property owners are not sufficient ground for setting aside the

area either violate express constitutional provisions or are inconsistent with the fundamental and constitutional characteristics

assessment. King *v.* Portland, 38 Oreg. 402, 418, aff'd 184 U. S. 61.

South Dakota. An assessment *in proportion to frontage* does not violate the constitutional requirement of equality of taxation, although a lot which is assessed is twice as deep as the adjacent lot. Tripp *v.* Yankton, 10 S. Dak. 516; s. c. 11 S. Dak. 353. The court remarked that it is "clearly within the reasonable exercise of the taxing power to make frontage the basis of apportionment." And in Whitaker *v.* Deadwood, 23 S. Dak. 538; 122 N. W. Rep. 590, the court held, on the authority of the North Dakota decisions cited *supra*, that the method of assessing property benefited by a local improvement in proportion to frontage did not violate any constitutional provision.

Washington. Legislative determination as to the limits of a taxing district and that the property therein is benefited is final and cannot be reviewed by the courts. Hence, assessments by the *front foot rule* are valid. Northern Pac. R. Co. *v.* Seattle, 46 Wash. 674. See also Seattle *v.* Kelleher, 195 U. S. 351.

West Virginia. An assessment by *the front foot* for the cost of paving sidewalks is held to result in a fair apportionment and to be constitutional. Wilson *v.* Philippi, 39 W. Va. 75. So, too, a statute which authorizes the municipality to assess two-thirds of the expense of paving a street and the whole expense of a sewer against the abutting property in proportion to frontage is constitutional and valid. Parkersburg *v.* Tavenner, 42 W. Va. 486. An assessment of two-thirds of the cost of paving a street in proportion to frontage was held not to violate either the Fourteenth Amendment to the Federal Constitution or the provisions of the State Constitution. Dancer *v.* Mannington, 50 W. Va. 322, 327. This case was decided after Norwood *v.* Baker, 172 U. S. 269, but makes no reference thereto.

Wyoming. Special assessment for sewer imposed in proportion to area of property held to be constitutional and valid. McGarvey *v.* Swan, 17 Wyo. 120.

Construction of word "fronting." Authority to pave a highway at the expense of the property *fronting* thereon does not authorize an assessment against a lot which is separated from the highway so paved by a railway running side by side therewith, which is liable to be "fenced up at any moment." The court add, "We are unable, indeed, to see how it can be said that this lot fronts on the highway in question, when its real front is on another public highway — the railroad — forty-seven feet south of it." Philadelphia *v.* Eastwick, 35 Pa. 75. See also Philadelphia *v.* Philadelphia, W. & B. R. Co., 33 Pa. 41.

Corner lots. According to the weight of authority a corner lot has *two fronts;* it abuts on or fronts on both streets, and may be assessed for street improvements as fronting or abutting on each street. Springfield *v.* Green, 120 Ill. 269, 274, 276; Wilbur *v.* Springfield, 123 Ill. 395, 400; Des Moines *v.* Dorr, 31 Iowa, 89; Morrison *v.* Hershire, 32 Iowa, 271; Lawrence *v.* Killam 11 Kan. 499, 511; Anderson *v.* Bitzer (Ky.), 49 S. W. Rep. 442; Elder *v.* Cassilly (Ky.), 54 S. W. Rep. 836; Nowlen *v.* Benton Harbor, 134 Mich. 401; Moberly *v.* Hogan, 131 Mo. 19; Collier's Estate *v.* Western Pav. & Supply Co., 180 Mo. 362, 377; People *v.* Adams, 18 N. Y. Supp. 443; Michener *v.* Philadelphia, 118 Pa. 535; Weeks *v.* Milwaukee, 10 Wis. 242, 258. See also Martin *v.* Wagner, 120 Cal. 623; Wolf *v.* Keokuk, 48 Iowa, 129; Wolfort *v.* St. Louis, 115 Mo. 139; Seibert *v.* Tiffany, 8 Mo. App. 33; Allen *v.* Krenning, 23 Mo. App. 561. But in *Ohio* a peculiar rule has been adopted by the courts. When the statute authorizes an assessment for a street improvement "by the front foot of the property bounding and abutting on the improvement" regard must be had to what is the real front of the property. This is a question of fact to be determined by the manner in which it is laid out or improved by the owner. If a lot abuts lengthwise on the improvement but fronts breadthwise on another street and not on the improvement, the lot should be turned around and deemed as fronting breadthwise on the improvement and assessed according for the number of feet front on the improvement which it would have in that case and no more. Haviland *v.*

which, in these States, are regarded as underlying all special assessments. Thus, it is held in a number of States, including Georgia, Massachusetts, Nebraska, New Jersey, Ohio, and Texas, that a special assessment implies that the property specially assessed is actually benefited, that the assessment can only be made when such benefit exists in fact, that the amount of the assessment cannot exceed the amount of the special and peculiar benefit, and that the property owner is entitled to a hearing upon the question whether his property is so benefited.[1]

Columbus, 50 Ohio St. 471; Cherington v. Columbus, 50 Ohio St. 475; Sandrock v. Columbus, 51 Ohio St. 317; Toledo v. Sheill, 53 Ohio St. 447; Metcalf v. Carter, 19 Ohio Cir. Ct. Rep. 196. As to rule for the assessment of a *triangular lot* in Ohio, see Tompkins v. Norwood, 18 Ohio Cir. Ct. Rep. 883.

When the cost of an improvement is to be assessed on the lots bordering or fronting on the street and only a part in width of the street is improved, the lots upon each side of the street must be assessed although the improved part lies on one side of the centre of the street. Indianapolis & V. R. Co. v. Capitol Pav. & Const. Co., 24 Ind. App. 114; Klein v. Nugent Gravel Co. (Ind. App.), 66 N. E. Rep. 486; Morrison v. Hershire, 32 Iowa, 271, 276; Muscatine v. Chicago, R. I. & P. R. Co., 88 Iowa, 291. See also Drake v. Grout, 21 Ind. App. 534.

[1] Speer v. Athens, 85 Ga. 49; Atlanta v. Gate City St. R. Co., 80 Ga. 276; Atlanta v. Hamlein, 96 Ga. 381; Weed v. Boston, 172 Mass. 28; White v. Gove, 183 Mass. 333, 335; Sears v. Boston, 173 Mass. 71; Sears v. Boston St. Com'rs, 173 Mass. 350; Boston v. Boston & A. R. Co., 170 Mass. 95; Dexter v. Boston, 176 Mass. 247, 251; Lorden v. Coffey, 178 Mass. 489; Harwood v. Boston St. Com'rs, 183 Mass. 348; Edwards v. Bruorton, 184 Mass. 529, 530; Cheney v. Beverly, 188 Mass. 81; Harwood v. Donovan, 188 Mass. 487, 489; Tappan v. Boston St. Com'rs, 193 Mass. 498; Smith v. Boston, 194 Mass. 31, 33; Corcoran v. Cambridge, 199 Mass. 5, 13; Hanscom v. Omaha, 11 Neb. 37; Cain v. Omaha, 42 Neb. 120; Smith v. Omaha, 49 Neb. 883, 892; Equitable Trust Co. v. O'Brien, 55 Neb. 735, 737; Medland v. Connell, 57 Neb. 10; Portsmouth Sav. Bank v. Omaha, 67 Neb. 50, 60; Medland v. Linton, 60 Neb. 249; Neal v. Vansickle, 72 Neb. 105, 110; Wead v. Omaha, 73 Neb. 321, 325; Tidewater Co. v. Coster, 18 N. J. Eq. 518; Sigler v. Fuller, 34 N. J. L. 227; Delaware, L. & W. R. Co. v. Passaic, 37 N. J. L. 137; Agens v. Newark, 37 N. J. L. 415; State v. Fuller, 39 N. J. L. 576; Walsh v. Barron, 61 Ohio St. 15; Dayton v. Bauman, 66 Ohio St. 379, 393; Chicago & E. R. Co. v. Keith, 67 Ohio St. 279, 292; Hutcheson v. Storrie, 92 Tex. 685. See also Mann v. Jersey City, 24 N. J. L. 662; Chamberlain v. Cleveland, 34 Ohio St. 551. Index — *Drains; Irrigation; Levee.*

Illinois. In this State the *Constitution* makes express provision for the delegation to cities, towns, and villages of the power to make improvements by *special assessment* or *special taxation* of contiguous property, or otherwise. As construed by the courts, this constitutional provision is regarded as authorizing special taxation, *e. g.*, by frontage, as a distinct and separate form of local assessment, clearly distinguishable from special assessment. But special assessments, strictly so-called, must be imposed in proportion to the benefits and the property owner is entitled to a hearing thereon. See *post*, § 1439. In view of the fact that the Constitution of this State recognizes special taxation (which includes assessments in proportion to frontage) as a distinct method of taxation, the Constitution of Illinois and the decisions of the court thereunder are separately considered and discussed. See *post*, § 1439.

Massachusetts. In Sears v. Boston St. Com'rs, 173 Mass. 350, a sewer assessment was authorized by statute to be based on a consideration of the necessity for the works as caused by the estate assessed, the amount of use thereof, the benefit received therefrom, the amount of assessment for a

In some States *constitutional provisions* are to be found which, either expressly or by construction, are inconsistent with assessments in proportion to frontage or according to area, or, if they permit such assessments, require that they do not exceed the special benefits to the property assessed.[1] And in some States also,

sewer paid by any owner of the estate, and the length of time since such payment. The statute was held unconstitutional as taking into consideration other matters than special and peculiar benefits to the estate assessed, and as not confining the benefits to be considered to special and peculiar benefits to the estate. *Knowlton*, J., said that special assessments are only valid, "when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then only to an amount not exceeding such special and peculiar benefits." In Dexter *v.* Boston, 176 Mass. 247, a sewer assessment was imposed according to the *linear measurement* of the land along the sewer. It was held that a parcel which received but little benefit from a *turn in the sewer* was doubly assessed and that the statute was in that respect unconstitutional. In Carson *v.* Brockton Sewerage Com'n, 182 U. S. 398, aff'g 175 Mass. 242, it is held that whether the owners of property assessed for a *sewer* will be entitled to the free use thereof or not is a question of local policy; that, although such sewer may have been built by special assessments, the legislature may require persons making use of it to pay a reasonable sum for such use; and that when an ordinance fixes the charges to be paid for the use, no notice of an assessment therefor need be given to the property owners. In Lorden *v.* Coffey, 178 Mass. 489, land was assessed for *laying out a highway*. The statute directed that the "assessable cost of the work done under said order shall be assessed upon the several parcels of land," the amount for which each parcel shall be assessed to be determined "in accordance with the proportion in which said board shall determine that the said parcels are increased in value." It was held that the statute was unconstitutional, that it directed the *whole* cost to be assessed irrespective of the benefit, and that the proportion of the increase only determined the division of the cost and not the amount to be assessed. Followed in Harwood *v.* Boston St. Com'rs, 183 Mass. 348.

Nebraska. The Constitution of 1875, art. ix. § 6, which authorizes the legislature to confer upon cities, towns, and villages "power to make local improvements by special assessment or special taxation *of property benefited*," has been construed as limiting the assessments thereby contemplated to property *specially* benefited, and to the amount of the benefits conferred by the improvement. See cases cited above.

Ohio. Under the provisions of the Constitution of this State that compensation for property taken "shall be assessed by a jury without deduction for benefits to any property of the owner," compensation paid to a land owner for lands taken to open a street cannot be assessed back upon the lands of the owner remaining after such taking, nor can the costs and expenses incurred in such a proceeding be so assessed. The compensation, costs, and expenses must be paid out of the public treasury. Cincinnati, L. & N. R. Co. *v.* Cincinnati, 62 Ohio St. 465 (overruling Cleveland *v.* Wick, 18 Ohio St. 303). Nor can an assessment for the compensation paid for lands taken be imposed upon lands benefited although owned by the person whose lands are not taken. A special assessment, may, however, be made for the improvement of street surface. Dayton *v.* Bauman, 66 Ohio St. 379.

Vermont. It has been said that there can be no special assessment unless the property is *specially benefited*. Durkee *v.* Barre, 81 Vt. 530, 541, citing Barnes *v.* Dyer, 56 Vt. 469; Sowles *v.* St. Albans, 71 Vt. 418. But an assessment in proportion to frontage is not necessarily invalid under this principle although some lots may be deeper and have more valuable improvements on them than others. Durkee *v.* Barre, 81 Vt. 530, 542.

[1] *Alabama.* In Montgomery *v.* Moore, 140 Ala. 638, a paving assessment directed to be prorated according to

either by express statutory provision or by the construction adopted by the courts, assessments *in proportion to frontage*, while recog-

the frontage of abutting property was sustained as valid under the authority of French *v.* Barber Asphalt Pav. Co., 181 U. S. 324. See also, and compare, Mobile *v.* Dargan, 45 Ala. 310; Irwin *v.* Mobile, 57 Ala. 6, 9; Birmingham *v.* Klein, 89 Ala. 461; Montgomery *v.* Birdsong, 126 Ala. 632; Montgomery *v.* Foster, 133 Ala. 587. But the *Constitution of 1901*, § 223, expressly forbids special assessments "in excess of the increased value of such property by reason of the special benefits derived from such improvements." This provision has nothing to do with the manner in which the assessment is apportioned, whether by the front foot or otherwise, but only fixes a limit beyond which it cannot go. Under the constitutional provision, the property owner has the right to establish in court, if he can, that his assessment exceeds the constitutional limit. Harton *v.* Avondale, 147 Ala. 458, 468. See also Inge *v.* Board of Public Works, 135 Ala. 187.

Arkansas. In this State there are *dicta* to the effect that *special assessments* must be founded on and cannot exceed the special benefits. In Stiewel *v.* Fencing District, 71 Ark. 17, 27, *Wood*, J., said: "Special assessments for local improvements find their only justification in the *peculiar and special benefits* which such improvements bestow upon the particular property assessed. This is generally recognized by the authorities. Therefore, any statute which authorizes an assessment greater than the special benefit to the property would be unconstitutional. While the statute under consideration does not in express terms limit the assessment to the amount of the benefits received, that must necessarily be understood. For the legislature was familiar with the provisions of the Constitution of the United States and our own Constitution forbidding any person to be deprived of property without due process of law and without just compensation. Our statute must be interpreted as if these provisions were written in it. Therefore, while the statute permits the cost of the improvement to be assessed against the property, it must necessarily mean, provided such cost does not exceed the benefits received by the improvement. The legislature having provided for the improvement district and the manner in which such improvements shall be made and the costs thereof ascertained, when the district is constituted by the designated agents, and the costs of the improvement are ascertained and assessed, it will be presumed that the property included in the district is benefited, and that assessments for the cost of the improvements do not exceed the benefits." See also Ritter *v.* Drainage District, 78 Ark. 580, 584; Driver *v.* Moore, 81 Ark. 80, 84. In Mathews *v.* Kimball, 70 Ark. 451, where the court followed French *v.* Barber Asphalt Pav. Co., 181 U. S. 324, and refused to enjoin the collection of an assessment for a public park, the court remarked, "The inclusion of a piece of real property in an improvement district by city ordinance is at least *prima facie* proof that it will be benefited by the proposed improvement." But the *Constitution* of this State directs that special assessments on real property for local improvements in towns and cities "shall be *ad valorem* and uniform." Ark. Const. 1874, art. xix. § 27. As to the construction and application of the constitutional provisions of this State, see *ante*, § 1366. It has been said that the constitutional provision permits a special assessment to be made either according to the value of the property itself, or according to the value of the benefit to the property. Kirst *v.* Street Imp. Dist. No. 120, 86 Ark. 1. But assessments for he *improvement of streets cannot be according to frontage.* Monticello *v.* Banks, 48 Ark. 251, following Peay *v.* Little Rock, 32 Ark. 31.

Minnesota. In this State it is provided by the *Constitution*, art. ix. § 1, that "All taxes to be raised in this State shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the State; *provided*, that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements or upon the property to be benefited by such improvements, or both, without regard

ized and permitted, are subject to the right of the *property owner* o *a hearing* as to the existence of benefits and to have the assessment limited to the amount of the special benefit conferred.[1] When

a cash valuation and in such manner the legislature may prescribe; and *ovided* further that for the purpose of fraying the expenses of laying water pes and supplying any city or municility with water, the legislature may, r general or special law, authorize any ty or municipality, having a populaon of 5,000 or more, to levy an annual x or assessment upon the lineal ot of all lands fronting on any water ain or water pipe laid by such city or unicipality." The first clause of this ovision was the only part thereof the Constitution as originally lopted, the remainder thereof having en added by amendment. Under that ause it was held, before amendment, at assessments for grading streets ust be apportioned on the basis of e valuation of the property and that y other form was prohibited. Stinn v. Smith, 8 Minn. 366. The onstitution was then amended by lding the *first* proviso. It was held at this proviso did not reject the rinciple that taxes should "be as early equal as may be," and hence hile the legislature could authorize n assessment according to frontage, ch an assessment could not be made n any plan that disregarded actual enefits. Noonan v. Stillwater, 33 Minn. 198; State v. Hennepin County ist. Ct., 33 Minn. 235, 244; State v. amsey County Dist. Ct., 33 Minn. 5, 306; Hennepin County v. Bartlen, 37 Minn. 343. See also State Reis, 38 Minn. 371; *In re* Nor on, Minn. 542; State v. Norton, 63 Minn. 7. In State v. Pillsbury, 82 Minn. 9, a sewer assessment levied at a t rate per lineal foot without regard benefits, or actual cost of construcon, and without a hearing, was held be unconstitutional both under the ate Constitution and under the Fourenth Amendment. But compare ate v. Ramsey County Dist. Ct., 80 Minn. 293. Under the *second proso* it was held in State v. Lewis Co., Minn. 87, that a statute authorizing e levy of a tax of ten cents per lineal ot for water mains and closely folwing the constitutional provision s valid under the State Constitution. State v. Lewis Co., 82 Minn. 390, the court considered the effect on a similar water tax of the Fourteenth Amendment to the Federal Constitution as construed in Norwood v. Baker, 172 U. S. 269. In its original decision it held the tax invalid as not limited to and based on benefits to abutting property. But on reargument, although adhering to the principle of its original decision, it reversed its ruling on the strength of French v. Barber Asphalt Pav. Co., 181 U. S. 324, and held that the tax was valid under the Fourteenth Amendment as well as under the State Constitution. This latter decision was followed as to a similar water tax in State v. Macalester College, 87 Minn. 165.

Virginia. By the *Constitution* of Virginia, 1902, § 170, it is provided "No city or town shall impose any tax or assessment upon abutting landowners for street or other public local improvements, except for making and improving the walkways upon then existing streets, and improving and paving then existing alleys, and for either the construction, or for the use of sewers; and the same when imposed shall not be in excess of the particular benefits resulting therefrom to such abutting landowners. Except in cities and towns, no such taxes or assessments, for local improvements, shall be imposed on abutting landowners." In Adams v. Roanoke, 102 Va. 53, it is said that if the property owner is given a hearing by statute as to the fact and the amount of benefits, that is all that he can ask. A front foot assessment of one-half of the cost of the improvement does not necessarily violate the fundamental principle of assessment only for benefits, nor is it violated because one piece of property of smaller value is required to pay more than another of greater value. See also Viollett v. Alexandria, 92 Va. 561.

[1] *Illinois.* In this State assessments by the front foot are justified under a *special constitutional provision* quoted *supra*, authorizing cities, towns, and villages to make local improvements by special assessment or by *special taxation of contiguous property*, or otherwise. As construed by the courts, this constitutional provision does not

the rule is adopted that a special assessment can only *constitutionally* be imposed when it is based upon and does not exceed the

give a property owner whose property is specially taxed a right to a hearing upon the question of the benefits, but the rule has been changed by statute which declares that no special tax shall be levied "in an amount in excess of the special benefit which such property shall receive from such improvement," and provides that the property owner shall have a right to a hearing, upon the question of benefit and the amount of the special tax. See Palmer *v.* Danville, 166 Ill. 42; Hull *v.* People, 170 Ill. 246; Birket *v.* Peoria, 185 Ill. 369; Mercy Hospital *v.* Chicago, 187 Ill. 400; Peru *v.* Bartels, 214 Ill. 515; East St. Louis *v.* Illinois Cent. R. Co., 238 Ill. 296. Assessments by the front foot under the Constitution of this State are specially considered in § 1439, *post*.

Indiana. When the question first came before the Supreme Court of Indiana, after the decision of Norwood *v.* Baker, 172 U. S. 269, that court expressed the opinion that under the State Constitution an assessment arbitrarily by the front foot was unconstitutional, and that assessments can only be laid in proportion to benefits; but it held that the statute there in question (known as the "Barrett Law") only provided a rule of *prima facie* assessment by the front foot, and that such assessments were subject to review and alteration by the common council or board of trustees of the municipality upon the basis of special benefits received from the improvement, and the common council and board of trustees not only had the power, but it was their imperative duty, to adjust an assessment to conform to the actual special benefits accruing to each of the existing property owners. Adams *v.* Shelbyville, 154 Ind. 467, 468; Defrees *v.* Ferstl, 154 Ind. 695; Taylor *v.* Crawfordsville, 155 Ind. 403; Schaefer *v.* Werling, 156 Ind. 704, aff'd 188 U. S. 516; Martin *v.* Wills, 157 Ind. 153; Leeds *v.* Defrees, 157 Ind. 392; Shank *v.* Smith, 157 Ind. 401; Wray *v.* Fry, 158 Ind. 92; Hibben *v.* Smith, 158 Ind. 206, aff'd 191 U. S. 310; Deane *v.* Indiana Macadam & Const. Co., 161 Ind. 373, 376; Brown *v.* Central Bermudez Co., 162 Ind. 452, 459; McKee *v.* Pendleton, 162 Ind. 667, 669; Boyce *v.* Tuhey, 163 Ind. 202, 210. In McKee *v.* Pendleton, 154 Ind. 652, it was said that the power to assess by the front foot absolutely and irrespective of the benefits was not conferred by any statute of the State. In Indianapolis *v.* Holt, 155 Ind. 222, 236, the court said that if the statute then before the court (which authorized a front foot assessment) prohibited or excluded the consideration of benefits and the apportionment of the cost with reference thereto, the statute would be void; but the court construed the statute as authorizing a *prima facie* assessment only, which was not exclusive of the right of the municipality to make, or of the owner to have the assessment made to conform to the benefits. See also Indianapolis *v.* Heltzel, 157 Ind. 703. In Martin *v.* Wills, 157 Ind. 153, the court said that French *v.* Barber Asphalt Pav. Co., 181 U. S. 324, conclusively decided that an assessment by the front foot did not violate the Fourteenth Amendment to the Federal Constitution, but that it left the law under the State Constitution untouched; it held that as the statute, as construed by the court, gave the right to a hearing on the question whether an assessment in proportion to frontage did or did not exceed the benefit, the provisions of the State Constitution were not violated. It has also been held in this jurisdiction that the fact that the assessment is distributed against the property in proportion to frontage does not necessarily show that the assessment was made arbitrarily and without regard to benefits or render it void. Leeds *v.* Defrees, 157 Ind. 392; Wray *v.* Fry, 158 Ind. 92, 95; Brown *v.* Central Bermudez Co., 162 Ind. 452: Pittsburgh, C., C. & St. L. R. Co. *v.* Taber, 168 Ind. 419, 425.

But when assessments under the "Barrett Law" against "back-lying property" were attacked upon the ground that the statute gave the back-lying owner no opportunity to be heard on the account of the assessment against him, or on the question of special benefits from the improvement, the court said that the question was not involved in previous cases, and that what was said in Adams *v.* Shelbyville, 154 Ind. 467, to the effect that a law which makes no provision for a hearing on the question of special benefits violated the Fourteenth Amendment to the Federal

l and peculiar benefits to the property assessed, assessments ɔd in proportion to frontage are regarded as violating the nental principle and as invalid, if they are made solely in pro- ı to frontage, and it does not appear that the special benefits property were considered, or, if it is not in substance found, ıe property is equally and uniformly benefited in proportion ıtage.[1] But the mere fact that a computation shows that the

ution was clearly *dicta*, and , following French *v.* Barber Pav. Co., 181 U. S. 324, and es immediately succeeding it, oting from Webster *v.* Fargo, S. 394, 395, "that it is within er of the legislature of the State te special taxing districts, and ge the cost of local improvement, e or in part, upon the property in tricts, either according to valu- r superficial area or frontage." Pittsburg Plate Glass. Co., 163 9. This decision was followed tained by the Supreme Court of ited States in Cleveland, C., C. R. Co. *v.* Porter, 210 U. S. 177, g 38 Ind. App. 226. See, to the fect, Diven *v.* Burlington Sav. 0 Ind. App. 678. In Spaulding , 167 Ind. 58, 67, a taxing dis- r the construction or improve- *gravel roads* was formed con- of the territory within one and a es on either side and within one ıalf miles of either end of the d improvement. The statute stained as valid. *Monks*, J., It is settled, as a general rule, is within the discretion of the ıre to determine what property, ırds its location with respect ocal improvement shall be as- See also Edwards *v.* Cooper, l. 54, 66.

rgia. If an assessment accord- frontage be so disproportionate alue of the estate that the levy s to a virtual confiscation of ner's property, the assessment be upheld as a legal or valid of the power to tax for the ment. Thus, where property upon one street three feet, nother street seven feet, and third street 407 feet, and the reet, upon which the greatest was, was paved at a cost of 21, when the estimated value property was only $260, the eld that it was such a case of doubtful benefit and probable spoliation as required the interference of a court of equity, and the collection of the tax was enjoined. Atlanta *v.* Hamlein, 96 Ga. 381.

Massachusetts. The rule stated in the text is the rule in Massachusetts. See the cases cited above as to the fundamental principles of special assessments. In Weed *v.* Boston, 172 Mass. 28, an assessment for building a main sewer was imposed upon the petitioner's land according to the lineal measurement. The petitioner's land was of little value, and the sewer was designed principally for draining a considerable territory of valuable land at some distance. The sewer was not constructed in a street or way, and the court held that a statute authorizing an assessment by lineal measurement was unconstitutional *when applied to the facts*, particularly as the assessments according to frontage were grossly disproportionate to the benefits to the lots. The court said that the weight of authority was that an assessment by frontage might be a reasonable mode of assessing the cost of a sewer in a street or way because of the similarity of the lots, but not when the sewer was not constructed in a street or way, or was constructed in the country. But in later cases the principle was given a general application, and assessments in proportion to frontage without reference to the benefits were held to be invalid. See cases cited above. Thus, in White *v.* Gove, 183 Mass. 333, a sewer assessment by frontage was held to be unconstitutional. The Massachusetts *Constitution* requires that the legislature shall "impose and levy reasonable assessments, rates, and taxes," and the court held that the assessments could not exceed the benefits. The court pointed out that the case of French *v.* Barber Asphalt Pav. Co., 181 U. S. 324, and the other decisions of the United States Supreme Court following it, only dealt with the question

special assessment bears an exact proportion to the frontage
property assessed is not sufficient to vitiate it, if it otherwise a

of the validity of the assessments under the Federal Constitution. *Knowlton*, C. J., said: "As was pointed out in Sears *v.* Boston, 173 Mass. 71, and as was held in many other cases before Norwood *v.* Baker was decided, if one is required to pay a special assessment upon his property in addition to the general assessment which he pays equally with every one else, this special assessment cannot be properly founded upon anything but benefits to the property. If he pays his proper proportion of the general tax and then pays a special assessment greater in amount than the benefit he receives, his entire tax is excessive, unreasonable, and disproportional. Hence, under a *Constitution* which requires that taxes shall be *proportional and reasonable*, a system which imposes upon property in addition to its proportional share of the general tax a special assessment without an equivalent benefit is unconstitutional." In Cheney *v.* Beverly, 188 Mass. 81, it was held that a statute which provided for an assessment for sewer construction according to frontage or area should be construed as by implication requiring that "in no case shall an assessment be made that exceeds the special benefit received by the estate assessed," although the statute contained no express provision to that effect. The legislative intent was deduced from the general scheme of the improvement and the lauguage used. See also Corcoran *v.* Cambridge, 199 Mass. 5, 13.

The court has held that *street sprinkling*, continuously and generally made, confers a special benefit upon property abutting upon the street, and has sustained assessments therefor in proportion to frontage. There were no facts in the case to show that the front foot rule as applied to the situation was not reasonable, and the court sustained it as a fair apportionment. Sears *v.* Boston, 173 Mass. 71. See also, to the same effect, Phillips Academy *v.* Andover, 175 Mass. 118, 127; Stark *v.* Boston, 180 Mass. 293; Hodgdon *v.* Haverhill, 193 Mass. 327. But subsequently the statute providing for street sprinkling according to the front foot was construed as requiring

that the assessment should not
the benefit to the estate assess
assessments on vacant and unin
and on entirely dissimilar p
were said to be invalid as v
the fundamental principle that p
can only be assessed in propo
the benefits, although the ass
in the particular case was susta
technical grounds. Corcoran
bridge, 199 Mass. 5. But th
does not appear to have ur
adhered strictly to the princi
assessments can only be found
and in proportion to special
actually received. Thus in
Boston Street Com'rs, 180 Ma
279, where a special assessm
imposed upon property for t
struction and alteration of stre
in connection with the South T
Station, it was argued that the p
er's benefit should be limited to
from the city's expenditure in
tion therewith, and that expe
for that purpose by the railro
pany could not be considere
court, however, held that this
so, *Holmes*, C. J., saying in expl
of the basis on which special
ments are laid, "It is to be rem
that, in the language of Chief
Gray, 'The estates are assessed
the benefit conferred, but for
of the public improvement.'
benefit is referred to only as j
tion and a limit." In Smith *v.*
ter, 182 Mass. 232, a statute p
for the construction of a sewe
directed that "Every person
real estate upon any street i
any drain or sewer shall be lai
or by virtue of this act, and u
line thereof, or whose real est
be benefited thereby, shall pay
city such sum as the mayor an
men shall assess upon him as his
tionate share of the expenditur
city for drains and sewers," w
to be constitutional. *Holmes*
said, "When the legislature
templated a certain region, a
be supposed to have acted in v
specific scheme, there is no dou
within reasonable limits, it ma
mine that the cost of an inpr
shall fall upon a designated
and may fix the principles up

that the assessment was in fact made in proportion to the benefits, and if it is found that the assessments do not exceed the benefits.[1]

the cost shall be apportioned." Citing Kingman, Petitioner, 153 Mass. 566; French v. Barber Asphalt Pav. Co., 181 U. S. 324, 342, 343; Parsons v. District of Columbia, 170 U. S. 45; Bauman v. Ross, 167 U. S. 548, 553. He further said, "It may deal with the whole improvement as a unit and charge those assessed with a share of the total expense." Citing Butler v. Worcester, 112 Mass. 541, 555; Dorgan v. Boston, 12 Allen (Mass.), 223; Leominster v. Conant, 139 Mass. 384, 388; Sears v. Boston St. Com'rs, 180 Mass. 274, 278; Parsons v. District of Columbia, 170 U. S. 45. He concluded that "The legislature determined that the real estate on the line of the sewers, together with possibly some other land, would be benefited as a whole to the extent of the charge put upon it." He added that it was not necessary to consider how far the legislature might authorize an inferior body to create a special taxing district.

Nebraska. In this State it is held that in order to sustain a levy of special taxes by the frontage of lots within the taxing district, it must affirmatively appear from the record that the city council or other authorities found that the benefits were equal and uniform as to all lots and tracts to be affected by the proposed improvement. John v. Connell, 64 Neb. 233, 237; s. c. 71 Neb. 10, modifying s. c. 61 Neb. 267; Portsmouth Sav. Bank v. Omaha, 67 Neb. 50, 61; Morse v. Omaha, 67 Neb. 426. See also Smith v. Omaha, 49 Neb. 883; Medland v. Linton, 60 Neb. 249, 263. Constitutional provision quoted *supra*.

New Jersey. A front foot assessment appearing to be imposed without a consideration of the benefits is regarded as arbitrary and invalid. Sigler v. Fuller, 34 N. J. L. 227; Agens v. Newark, 37 N. J. L. 415; New Brunswick Rubber Co. v. New Brunswick St. Com'rs, 38 N. J. L. 190; Cronin v. Jersey City, 38 N. J. L. 410; Kirkpatrick v. New Brunswick St. Com'rs, 42 N. J. L. 510; Simmons v. Passaic, 42 N. J. L. 524; Doughten v. Camden, 72 N. J. L. 451, rev'g 71 N. J. L. 426. It must affirmatively appear that the assessment is not in excess of the benefits conferred upon the land. Kingsland v. Union Township, 37 N. J. L. 268; Van Houten v. Paterson, 37 N. J. L. 412; Passaic v. Delaware, L. & W. R. Co., 37 N. J. L. 538; s. c. 37 N. J. L. 137; Simmons v. Passaic, 38 N. J. L. 60; Van Solingen v. Harrison, 39 N. J. L. 51; Hutton v. West Orange, 39 N. J. L. 453; Buess v. West Hoboken, 51 N. J. L. 267; Pardee v. Perth Amboy, 57 N. J. L. 106, 109; Hendrickson v. Point Pleasant, 65 N. J. L. 535; Poillon v. Rutherford, 65 N. J. L. 538; Butler v. Montclair, 67 N. J. L. 426; Allison Land Co. v. Tenaply, 68 N. J. L. 205; Rosell v. Neptune City, 68 N. J. L. 509; Essen v. Cape May, 77 N. J. L. 361; 72 Atl. Rep. 49. It has been held that an assessment which is made by frontage only does not comply with charter requirements that the assessment shall be made in proportion to the benefits. Mann v. Jersey City, 24 N. J. L. 662; Ogden v. Hudson, 29 N. J. L. 104; Tims v. Newark, 25 N. J. L. 399; Hampson v. Paterson, 36 N. J. L. 159; Baxter v. Jersey City, 36 N. J. L. 188. Assessments upon vacant lots for water rates held void, because imposed without reference to benefits or to the value of the land. Culver v. Jersey City, 45 N. J. L. 256; Prov. Inst. for Sav. v. Allen, 37 N. J. Eq. 36. See, more fully, *supra*, § 1435.

Ohio. An assessment by the front foot is invalid if made without reference to the benefits or in apparent excess thereof. Walsh v. Barron, 61 Ohio St. 15.

Texas. Prior to Norwood v. Baker, 172 U. S. 269, assessments by the front foot were held to be valid. Roundtree v. Galveston, 42 Tex. 613; Allen v. Galveston, 51 Tex. 302; Taylor v. Boyd, 63 Tex. 533; Adams v. Fisher, 63 Tex. 651; s. c. 75 Tex. 657; Texas Transportation Co. v. Boyd, 67 Tex. 153; Harrell v. Storrie (Tex. Civ. App.), 47 S. W. Rep. 838. But after Norwood v. Baker, *supra*, was decided, it was held that an assessment by the front foot, which was imposed upon abutting lands without considering

[1] English v. Arizona, 214 U. S. 359, 363; Springfield v. Sale, 127 Ill. 359; Walker v. Aurora, 140 Ill. 402, 411; Chicago Sanitary Dist. v. Joliet, 189

It is to be noted that in New Jersey, where the rule is that an assessment by frontage not appearing to be laid in proportion to the benefits is invalid, the courts make a distinction in the case of assessments for the *improvement of sidewalks*. The sidewalk is regarded as subservient to the estate to which it is attached, and essential to the beneficial use of the premises; the improvement of the sidewalk is a burden on the land, and an order of the municipal authorities to improve the sidewalk is deemed to be a police regulation. Therefore, the expense of constructing, paving, or repairing sidewalks may be imposed upon the abutting property.[1]

§ 1438. **Front Foot Assessments; Rule in Pennsylvania, Michigan, Wisconsin.** — In *Pennsylvania, assessments in proportion to front-*

the benefits, violated the Constitution of the State as well as the Constitution of the United States. Hutcheson *v.* Storrie, 92 Tex. 685. The court remarked that Norwood *v.* Baker laid down a salutary rule. But it is within the power of the legislature to create or authorize the creation of a taxing district, and impose the cost of the improvement thereon, provided the assessment is proportioned to the benefits to the property assessed and does not exceed them. Kettle *v.* Dallas, 35 Tex. Civ. App. 632. In *Texas*, in a case in which it was not necessary to decide the point, it was suggested that sidewalks were an exception to the general rule, and that they might be constructed at the expense of abutting owners. Lentz *v.* Dallas, 96 Tex. 258.

Ill. 270; Leeds *v.* Defrees, 157 Ind. 392; Wray *v.* Fry, 158 Ind. 92, 95; Brown *v.* Central Bermudez Co., 162 Ind. 452; Pittsburgh, C., C. & St. L. R. Co. *v.* Taber, 168 Ind. 419, 425; Hedge *v.* Des Moines, 141 Iowa, 4; 119 N. W. Rep. 276; Beck *v.* Holland, 29 Mont. 234; Jersey City *v.* Howeth, 30 N. J. L. 521, 529, rev'g 30 N. J. L. 93; Hand *v.* Elizabeth, 30 N. J. L. 547, 550, aff'g 30 N. J. L. 176; Pudney *v.* Passaic, 36 N. J. L. 65; Van Solingen *v.* Harrison, 39 N. J. L. 51; Hunt *v.* Rahway, 39 N. J. L. 646, aff'g 40 N. J. L. 615; Raymond *v.* Rutherford, 55 N. J. L. 441, aff'd 56 N. J. L. 340; De Witt *v.* Elizabeth, 56 N. J. L. 119, 125; Long Branch Police S. & Imp. Com'n *v.* Dobbins, 61 N. J. L. 659; Dean *v.* Paterson, 67 N. J. L. 199; Dooling *v.* Ocean City, 67 N. J. L. 215; Shoemaker *v.* Cincinnati, 68 Ohio St. 603, 613; Schroeder *v.* Overman, 61 Ohio St. 1; Walsh *v.* Sims, 65 Ohio St. 211; Fridman *v.* Norwood, 15 Ohio Cir. Dec. 258, aff'd 70 Ohio St. 431; New Whatcom *v.* Bellingham Bay Imp. Co., 16 Wash. 131; Alexander *v.* Tacoma, 35 Wash. 366; Hayes *v.* Douglas County, 92 Wis. 429; Hennessy *v.* Douglas County, 99 Wis. 129; Sanderson *v.* Herman, 108 Wis. 662; Kersten *v.* Milwaukee, 106 Wis. 200; Friedrich *v.* Milwaukee, 114 Wis. 304, 308. See also Society for Establishing Useful Manufactures *v.* Paterson, 42 N. J. L. 615; Central New Jersey Land & Imp. Co. *v.* Bayonne, 56 N. J. L. 297; O'Reilley *v.* Kingston, 114 N. Y. 439; Delaware & H. Canal Co. *v.* Buffalo, 39 N. Y. App. Div. 333, aff'd 167 N. Y. 589; Ernst *v.* Kunkle, 5 Ohio St. 520; Upington *v.* Oviatt, 24 Ohio St. 232; Findlay *v.* Frey, 51 Ohio St. 390; Northern Indiana R. Co. *v.* Connelly, 10 Ohio St. 159. The question of special benefit and the property to which it extends is a question of fact. English *v.* Arizona, 214 U. S. 359, 363.

[1] Agens *v.* Newark, 37 N. J. L. 415, 423; Van Tassel *v.* Jersey City, 37 N. J. L. 128; Kirkpatrick *v.* New Brunswick St. Com'rs, 42 N. J. L. 510. But this principle does not apply to filling in the sidewalk; that is regarded as a part of the improvement of the street. Cronin *v.* Jersey City, 38 N. J. L. 410.

age are by the settled law of the State regarded as valid for certain improvements and under certain conditions.[1] It appears to be the view of the court in this State that assessment in proportion to frontage is not the expression of a principle of taxation, but is merely a convenient method in the built-up portions of cities for a practical adjustment of proportional benefits and a reasonably certain method of arriving at a correct, or substantially correct, result.[2] The court has said that the special assessment can only be imposed upon property benefited, apparently making the question of benefit a controlling factor in the validity of the assessment.[3] In applying this principle, as an assessment according to the front foot rule is only a substitute for an assessment according to the actual benefit, it can be enforced only so long as it furnishes a substantially fair and equal apportionment. Hence, when it ceases to furnish such fair and equal apportionment, an assessment in conformity to this rule is invalid in Pennsylvania. Therefore, in the case of *rural and farm lands*, where an assessment according to frontage will lead to inequality and injustice, it is not within the power of the legislature to impose, or to authorize the municipality to impose, an assessment for the cost of improving a highway in proportion to frontage.[4]

[1] Harrisburg *v.* McPherran, 200 Pa. 343. See also O'Connor *v.* Pittsburgh, 18 Pa. 187; Kirby *v.* Shaw, 19 Pa. 258; Schenley *v.* Allegheny, 25 Pa. 128; Philadelphia *v.* Tryon, 35 Pa. 401.

[2] Hammett *v.* Philadelphia, 65 Pa. 146, 151; Michener *v.* Philadelphia, 118 Pa. 535; Harrisburg *v.* McCormick, 129 Pa. 213; McKeesport *v.* Busch, 166 Pa. 46; Witman *v.* Reading, 169 Pa. 375, 389; Scranton *v.* Koehler, 200 Pa. 126. See also Fenelon's Petition, 7 Pa. 175; Pittsburgh *v.* Woods, 44 Pa. 113; McGonigle *v.* Allegheny, 44 Pa. 118; Magee *v.* Commonwealth, 46 Pa. 358; Wray *v.* Pittsburgh, 46 Pa. 365; Ferson's Appeal, 96 Pa. 140; Wolf *v.* Philadelphia, 105 Pa. 25.

In Harrisburg *v.* McPherran, 200 Pa. 343, aff'g 14 Pa. Super. Ct. 473, an assessment for paving a city street with asphalt was imposed according to frontage. The court declared that it regarded the right to adopt the front foot rule in assessing the cost of street paving as definitely settled in Pennsylvania, and said that it was not considered as an assessment irrespective of benefits when it was applied to the original paving of a street in the built-up portion of the city. It regarded Norwood *v.* Baker, 172 U. S. 269, as having involved the question of eminent domain, and as being decided upon its own facts and presenting a very different question from that before the court. It considered the facts of French *v.* Barber Asphalt Pav. Co., 181 U. S. 324, to be plainly applicable. See also Franklin *v.* Hancock, 204 Pa. 110.

[3] See leading and important case of Hammett *v.* Philadelphia, 65 Pa. 146.

It has also been held in Pennsylvania that special assessments cannot be imposed when the improvement is either expressed or appears to be for the general benefit. Hence, under the rule in this State, the maintenance of streets and highways is regarded as a public duty and repairs made thereon for the public benefit, and such *maintenance and repairs, including repaving*, cannot form the foundation for a special assessment. Hammett *v.* Philadelphia, 65 Pa. 146; Protestant Orphan Asylum, Appeal of, 111 Pa. 135; Wistar *v.* Philadelphia, 111 Pa. 604; Morewood Avenue, 159 Pa. 20; Fifty-fourth Street, 165 Pa. 8.

[4] Washington Avenue, *Re*, 69 Pa.

In *Michigan*, no definite rule appears to have been reached by the courts, although by the decisions of that State it is clearly settled

352; Seely *v.* Pittsburgh, 82 Pa. 360, 365; McKeesport *v.* Soles, 165 Pa. 628; s. c. 178 Pa. 363; Gilham *v.* Real Estate Title Ins. & Trust Co., 203 Pa. 24, 26. See also Philadelphia *v.* Rule, 93 Pa. 15; Scranton *v.* Pennsylvania Coal Co., 105 Pa. 445.

In the case of Washington Avenue, 69 Pa. 352, it was held to be beyond the power of the legislature to require owners of farm lands, lying within one mile on either side of a public highway, to pay for improving it by an assessment upon their lands by the acre. The highway in question was seven miles long, and was not within the bounds of a municipality; but its improvement and management was placed in the hands of a board of commissioners. The main ground on which the decision was based was that the improvement would be a general public benefit. The secondary ground was that the rule of charging benefits by frontage could "apply only to cities and large towns when the density of population along the street and the small size of lots make it a reasonably certain mode of arriving at a true result. But to apply it to the country and to farm lands would lead to such inequality and injustice as to deprive it of all soundness as a rule, or as a substitute for a fair and impartial valuation of benefits in pursuance of law." See Weber *v.* Reinhard, 73 Pa. 370, 747.

In the opinion in the Washington Avenue Case, *supra*, after referring with approval to Hammett *v.* Philadelphia, 65 Pa. 146, Judge *Agnew* says: "Indeed, I consider it a fortunate circumstance that that case came up; for it led to an inquiry into the power of special taxation, which was in danger of running wild by insensible degrees, and leading, before we had become aware of it, into the exercise of a bastard power, dangerous to the right of private property, and violative of the provisions in the Bill of Rights placed there for its protection. In questions of power exercised by agents, it is sometimes the misfortune of communities to be carried, step by step, into the exercise of illegitimate powers, without perceiving the progression, until the usurpations became so firmly fixed by precedents it seems to be impossible to recede or to break through them.

"The majority opinion in that case did not then, and this opinion does not now, dispute the long-recognized power of local taxation for local improvements, according to the benefits conferred; but they meet and dispute departures from that power, which, if recognized, will end in the overthrow of the right of private property. Laws which cast the burdens of the public on a few individuals, no matter what the pretence or how seeming their analogy to constitutional enactments, are, in their essense, despotic and tyrannical; and it becomes the judiciary to stand firmly by the fundamental law, in defence of the general, great, and essential principles of liberty and free government, for the establishment and perpetuation of which the Constitution itself was ordained."

In Seely *v.* Pittsburgh, 82 Pa. 360, it was held that *the cost of paving* Penn Avenue in Pittsburgh which extended along platted lots and also along suburban and unplatted property, could not be authorized by the legislature to be assessed by the frontage rule. After stating the cost of the improvement to have been $350,000, and the character of the avenue, *Agnew*, C. J., says, with emphasis: "This blending of city and country, of city lots and farm lands, of the residences of the living and the graves of the dead [St. Mary's Cemetery], constitute a group so motley and discordant, a series so wanting in similitude and uniformity, that the frontage, or per-foot, rule cannot be applied to it. It is so plainly, palpably, rankly, and ruinously unjust, it must be pronounced no proper or lawful mode of special taxation, but an injustice so gross as to be void against the rights of the property as protected by the Bill of Rights."

In Allegheny City *v.* Western Penna. R. Co., 138 Pa. 375, the court, applying the principle that if the property is of such a nature that it cannot be benefited it cannot be subjected to special assessment, held that a railroad right of way cannot be benefited by the paving of a street, and cannot be assessed therefor. See also Junction R. Co. *v.* Philadelphia, 88 Pa. 424;

that assessments by frontage for street paving are or may be valid.[1] But the court has refused to apply the front foot rule to sewers and other improvements when assessments for these purposes are levied according to the superficial area of the lots, and under circumstances inconsistent with the existence of any benefit.[2]

Pittsburgh's Petition, 138 Pa. 401, 434. The author feels constrained to say that unless there is some special and peculiar restriction in the Constitution of the State, such a broad principle and such a constructive limitation upon the taxing and assessment powers of the State, is of doubtful constitutional soundness. And it is to be observed that the court has not uniformly adhered to the rule that benefit to the property must appear. Thus, in Michener *v.* Philadelphia, 118 Pa. 535, 540, 541, it was said that benefit, direct or indirect, is presumed to the taxpayer or his property, and that there need not be benefit in fact. In Harrisburg *v.* McCormick, 129 Pa. 213, it was said that it is no defence to the enforcement of an assessment that the property is only a narrow strip along a street, and that it is not worth the amount of the assessment which is demanded. In Witman *v.* Reading, 169 Pa. 375, 379, where *a sewer assessment in proportion to frontage* was involved, the trial court held that a front foot assessment was invalid, because of differences in the value of the abutting property, but this decision was overruled. *Mitchell*, J., said: "While the front foot rule of assessment, it is true, does not express a principle of taxation, but merely a convenient method, yet its foundation is not in uniformity of value, but in uniformity of benefit. The latter is not always and perhaps not generally dependent on the former, or in any fixed ratio to it. Properties in the same general situation are presumed to get the same general benefit from a common improvement, and as this benefit is assessed exclusively on property abutting on the line of the improvement, it is presumed to be fairly measured by the foot frontage of the property on that line, though values may be and usually are very different, and dependent on other circumstances, such as the depth of the lots, the buildings erected upon them, the use to which they are put, and their proximity to business centres," &c.

[1] Williams *v.* Detroit, 2 Mich. 560; Motz *v.* Detroit, 18 Mich. 495; Sheley *v.* Detroit, 45 Mich. 431; Kalamazoo *v.* Francoise, 115 Mich. 554; Cass Farm Co. *v.* Detroit, 124 Mich. 433, 436, aff'd 181 U. S. 396; Detroit *v.* Parker, 181 U. S. 399, rev'g 103 Fed. Rep. 357.

In Sheley *v.* Detroit, 45 Mich. 431, *Cooley*, J., speaking of paving assessments, said, "If anything can be regarded as settled in municipal law in this country, the power of the legislature to permit such improvements and to direct an apportionment of the cost by frontage should by this time be considered as no longer open to controversy." In Cass Farm Co. *v.* Detroit, 124 Mich. 433, 436, the Supreme Court of Michigan said that it should be inclined to follow Norwood *v.* Baker, 172 U. S. 269, if that were a *paving* case, but as it was a *street opening case* it felt bound to follow its own decisions.

[2] In Thomas *v.* Gain, 35 Mich. 156, a *sewer assessment* imposed according to the superficial area of the lots within the district and without regard to the special or probable benefits, was held to be void and unconstitutional. The court said, *per Cooley*, C. J., that the only principle which justified special assessments is that those enjoying the benefits shall assume the burden. The court distinguished paving assessments as founded upon the presumption that the benefit to lots therefrom is generally in proportion to the frontage, and said that the assessment for a sewer might be valid if confined to contiguous lots all fronting or lying near the street in which the sewer was constructed and if the property was all urban. But that was not the case before the court. The statute did not require the lands to be contiguous to each other. The lots might be remote from the sewer and no right was given to drain into the sewer, and there was no distinction between the use of the property or capability of improvement. The assessment was not confined to the street upon which the sewer was laid, the particular assessment before the court

In *Wisconsin*, also, no settled principle seems to have been adopted, but in sustaining *assessments according to frontage, for sidewalks and sanitary sewers*, the court appears to have referred the authority to make the assessment to the exercise of the police power rather than to the power of taxation.[1]

being made upon property on a parallel street. The court regarded the assessment in that case as an arbitrary burden. This case was distinguished in Sheley *v.* Detroit, 45 Mich. 431, 433 (a street paving case), where *Cooley*, C. J., also wrote the opinion, as having no relevancy to the facts of that case, the court saying, "There was an attempt in that case to apportion a sewer tax in manifest disregard of any principle of justice or equity." In Cass Farm Co. *v.* Detroit, 124 Mich. 433, 435, Thomas *v.* Gain, *supra*, is referred to as sustaining the principles of Norwood *v.* Baker, *supra*, but is distinguished as involving an improvement for sewer purposes. In Auditor-General *v.* O'Neill, 143 Mich. 343, a *sewer assessment* was held to be invalid because it conclusively appeared that the apportionment did not correspond to actual benefits, although the officer making the assessment certified that it was based thereon. In Walker *v.* Detroit, 138 Mich. 639 (sewer assessment), it was held that the certificate of the officer making the assessment that it was imposed according to benefits and was not arbitrary or according to the area, was conclusive of the question. But in this case no facts appeared inconsistent with the certificate of the officer. In Voigt *v.* Detroit, 123 Mich. 547, aff'd 184 U. S. 115, the assessment was imposed *for constructing a street*. The total compensation awarded for lands taken was $73,732. The city council decided that $49,155 was the just proportion of the compensation to be paid by owners of property embraced in the assessment district established by the same resolution and directed an assessment accordingly. No notice was given of these proceedings. On a bill to enjoin the collection of the assessment, the complainants made no claim that their property was not benefited in the amount claimed, nor that they were denied a hearing as to the apportionment. It was held that the legislature might establish or authorize the council to establish an assessment district and determine the proportion of the cost to be levied thereon, but that it was implied from the statute in question that the apportionment against the property should be according to benefits thereto and limited to the benefits. See also, to the same effect, Goodrich *v.* Detroit, 123 Mich. 559, aff'd 184 U. S. 432. A statute of *Michigan* authorized the jury to determine the amount, if any, to be assessed on property in the assessment district to meet the compensation paid for lands taken for opening a street, "provided such property in such assessment district shall in no case be assessed for less than one-half of the total amount so awarded as compensation." The court held that the legislature had no power to fix an arbitrary percentage of the cost of a public improvement to be imposed upon a local assessment district regardless of the benefits received, and that the statute was unconstitutional. Detroit *v.* Judge of Recorder's Court, 112 Mich. 588.

[1] In Meggett *v.* Eau Claire, 81 Wis. 326, it was held that the city might, under its charter, apportion the *entire cost of a sewer* and of a *pavement* among the several lots fronting thereon according to their respective frontages. In determining what property would be benefited by the improvement and hence should be assessed therefor, it was said that the action of the city council was conclusive. The court, however, did not discuss any underlying constitutional question. In Chicago, M. & St. P. R. Co. *v.* Janesville, 137 Wis. 7, the court held that the construction of a *sanitary sewer* is an exercise of the police power for the benefit of the public health, and that the legislature might by statute direct an assessment in proportion to frontage without reference to the benefits to abutting property. *Winslow*, C. J., said, "So far as this court has spoken on the subject, it has sustained the right to make sewerage assessments upon the front foot rule without regard to the extent of the benefits." Citing Meggett *v.* Eau Claire, 81 Wis. 326, *supra*. It has also

§ 1439. **Constitution of Illinois; Special Assessments; Special Taxation; Front Foot Rule.** — In Illinois the making of public improvements by special assessments or by special taxes upon the property abutting thereon, or benefited thereby, is controlled by *the peculiar provisions of the Constitution* of that State as construed by the courts. The Illinois Constitution of 1848 provided that the General Assembly should provide for levying a tax by valuation so that every person and corporation should pay a tax in proportion to the value of his property.[1] That Constitution also provided that *the corporate authorities* of counties, townships, school districts, cities, towns, and villages might be vested with power to assess and collect *taxes for corporate purposes*, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same.[2] When questions involving the validity, under this Constitution, of *assessments* for improvements levied in *proportion to the frontage* of the abutting property, came before the Supreme Court of Illinois, that court recognized and applied the general principle that a special assessment upon a particular property must be founded on and cannot exceed the benefit to the property from the improvement, and that if there be any residue of the

been held that the *entire cost of a sidewalk* may properly be assessed against the adjoining lot without reference to actual benefits. Hennessy *v.* Douglas County, 99 Wis. 129, 154. A similar assessment was sustained in Lisbon Ave. Land Co. *v.* Lake, 134 Wis. 470, where the court held that the power to construct sidewalks was a branch of the police power, and added, "The right to charge the expense against the property does not depend upon, nor is it limited by, the conferring of benefit upon the property." In Chicago, M. & St. P. R. Co. *v.* Milwaukee, 89 Wis. 506, 515, it was held that railroad tracks are not so benefited by the improvement of a street as to sustain a special assessment. *Pinney*, J., said: "It is universally conceded that such assessments have their foundation, rest upon, and cannot exceed the special benefits of the improvement to the property against which the cost of its construction, to that extent, is charged. Such an assessment cannot be maintained for general benefits to the community or locality resulting from the work."

In Lathrop *v.* Racine, 119 Wis. 461, it was held that the legislature cannot authorize the municipality to require riparian owners to dredge a channel or harbor at their own expense, and, in default of their doing so, after notice, proceed to do so and assess the cost on the riparian owners. The court said that such an assessment was not founded upon, or in proportion to, special benefit, and was a taking of property for public use without compensation. Citing Norwood *v.* Baker, 172 U. S. 269. In a series of cases it has been held that where assessments for local improvements are *required by statute* to be made according to the benefits accruing to each parcel, an assessment of a level rate by front foot rule, while not necessarily void, will be held to be invalid, unless it appears that the assessing board has considered the matter and determined that the benefits are in fact proportionate to the frontage of each parcel. Hayes *v.* Douglas County, 92 Wis. 429; Hennessy *v.* Douglas County, 99 Wis. 129; Sanderson *v.* Herman, 108 Wis. 662; Kersten *v.* Milwaukee, 106 Wis. 200; Friedrich *v.* Milwaukee, 114 Wis. 304, 308.

[1] Ill. Const. 1848, art. ix. § 2.

[2] Ill. Const. 1848, art. ix, § 5.

cost of the improvement not provided for by such special assessments, such residue must be paid from general taxation or from the general funds of the municipality. It also held that, under the Constitution of 1848, there did not exist, either in the legislature, or in the corporate authorities of cities and towns, the power of apportioning taxes whether of a general or of a local character, except upon the principle of equality and uniformity; that the Constitution manifestly established equality and uniformity to be the principle of taxation throughout the State in all its subdivisions of local government; that the paving of a street or the making of a sidewalk was not merely a local improvement, but was also a matter of public benefit extending throughout the chartered limits of the city or town in which the whole population were interested and should be charged with a proportion of the expense; and that the only valid mode, under the provisions of the Constitution of 1848 referred to above, of making such improvements through the agency of special assessments was to assess each lot for the special benefits it would derive from the improvement, the residue of the cost to be paid by equal and uniform taxation. Hence, an assessment proportioned to the frontage of the abutting property was held to violate the constitutional requirements and to be invalid.[1]

But in the *present Constitution of Illinois*, which was adopted in 1870, the constitutional provisions were radically modified and the rule changed. By that Constitution it is declared, as in the Constitution of 1848, that "the General Assembly shall provide such revenue as may be needful by levying a tax by valuation, so that each person or corporation shall pay a tax in proportion to the value of his, her or its property."[2] It is also provided that "the General Assembly shall vest the corporate authorities of cities, towns, and villages with power to make *local improvements, by special assessment, or by special taxation* of contiguous property, or otherwise. For all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."[3] The Con-

[1] Chicago *v.* Larned, 34 Ill. 203 (street paving); Ottawa *v.* Spencer, 40 Ill. 211 (sidewalk); Holbrook *v.* Dickinson, 46 Ill. 285; St. John *v.* East St. Louis, 50 Ill. 92; Creote *v.* Chicago, 56 Ill. 422, 428. See also Chicago *v.* Baer, 41 Ill. 306; Scammon *v.* Chicago, 42 Ill. 192; Bedard *v.* Hall, 44 Ill. 91; Wright *v.* Chicago, 46 Ill. 44; Greeley *v.* People, 60 Ill. 19, 21; Lee *v.* Ruggles, 62 Ill. 427, 431; Illinois Cent. R. Co. *v.* Bloomington, 76 Ill. 447, 452.

[2] Ill. Const. 1870, art. ix. § 1.

[3] Ill. Const. 1870, art. ix. § 9. Under the Constitution of 1848, the courts of *Illinois* adopted the view that as special assessments are founded upon

stitution of 1870 thus recognizes "special taxation" as a distinct form of taxation, although the meaning of the term is not defined. It is upon special taxation as authorized by this constitutional provision that assessments of contiguous property in proportion to frontage are based.[1]

The provision of the Constitution of 1870, that the legislature may authorize the municipal authorities "to make local improvements" by special taxation or otherwise, by implication limits the power of special assessment and special taxation to those improve-

the benefits to the property assessed, the power to levy them was to be referred to the power of eminent domain, and not to the power of taxation. Chicago *v.* Larned, 34 Ill. 203, 211, 276. But by the Constitution of 1870 it is provided that compensation for property taken cannot be made in the form of benefits, and thereafter benefits were only allowed as a set-off to consequential damages to property not taken. The court, therefore, held that special assessments, which are recognized by the Constitution, must be referred to the power of taxation. Adams County *v.* Quincy, 130 Ill. 566, 575, citing § 1350 of this treatise; Elmore *v.* Drainage Com'rs, 135 Ill. 269, 275. It has been said that under the Constitution of 1870, art. ix. § 9, quoted in the text, only cities, towns, and villages can be vested with power to levy special taxes or special assessments. Updike *v.* Wright, 81 Ill. 49. By a constitutional amendment adopted in 1878 (art. iv. § 31) this power may be vested in *drainage districts.* Wilson *v.* Chicago Sanitary Dist., 133 Ill. 443. Index — *Sewers and Drains.*

[1] In White *v.* People, 94 Ill. 604, 612, where the court sustained a *sidewalk assessment* which was levied *in proportion to frontage, Sheldon,* J., said: "We find the phrase 'special taxation' introduced for the first time in the Constitution of 1870. There is nothing there defining its meaning. If we may resort to former legislation of the State, as it is used there, for its meaning, we find it to embrace the precise kind of tax which is here in question. For instance, the charter of the city of Alton (Laws, 1833, p. 208, § 6) contains this provision, 'It shall be lawful for the board of trustees to levy and collect a *special tax* on the owners of lots on said street, or parts of street, according to their respective fronts, for the purpose of grading and paving the sidewalks in said street.' The same provision occurs in various other municipal charters passed prior to the adoption of the Constitution of 1870, the assessments authorized by them being designated in the various acts *special taxes,* and to be levied in proportion to the frontage upon the improvement. Where a sidewalk required to be laid down extends, as in the present case, along the property of but one person, how can the cost be defrayed 'by special taxation of contiguous property' otherwise than by imposing the tax for the cost on the property in front of which the sidewalk is made?" It has been said that a special tax may be imposed in proportion to *frontage* or in proportion to the *value* of contiguous property. Sterling *v.* Galt, 117 Ill. 11, 17. See also Adams County *v.* Quincy, 130 Ill. 566.

The Supreme Court of Illinois has many times held that special taxes in *proportion to frontage* are valid under the Constitution of 1870. Craw *v.* Tolono, 96 Ill. 255; Falch *v.* People, 99 Ill. 137, 143; Enos *v.* Springfield, 113 Ill. 65; Springfield *v.* Green, 120 Ill. 269; Wilbur *v.* Springfield, 123 Ill. 395; Chicago & N. W. R. Co. *v.* Elmhurst, 165 Ill. 148; People *v.* Yancy, 167 Ill. 255; Walker *v.* Morgan Park, 175 Ill. 570; Job *v.* Alton, 189 Ill. 256, 260; Harrigan *v.* Jacksonville, 220 Ill. 134. Special tax in proportion to frontage for *cost of sewer* held valid. Payne *v.* South Springfield, 161 Ill. 285. Under the Constitution of 1870 a "special tax" can only be imposed on the property. The owner cannot be made personally liable. Craw *v.* Tolono, 96 Ill. 255. A special tax may by statute be made payable in instalments. Lightner *v.* Peoria, 150 Ill. 80.

ments which may properly be described as *local improvements.* A local improvement is defined to be a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality.[1] Whether the improvement is local in its nature so that the cost thereof may be defrayed by special assessment or taxation, is a question of fact which is primarily for the determination of the municipal authorities, but their determination is not final and conclusive, and is subject to review by the courts; an arbitrary decision, or a determination inconsistent with the inherent nature of the improvement, will be set aside.[2] A local improvement may be made partly by general taxation and partly by either special assessment or special taxation;[3] and the determination of the local authorities as to the manner in which the cost shall be raised, whether by general tax, by special assessment or by

[1] Chicago *v.* Blair, 149 Ill. 310. See also Northwestern University *v.* Wilmette, 230 Ill. 80, 86; Fahnestock *v.* Peoria, 171 Ill. 454.

"If the improvement will enhance, specially, the property adjacent to which it is made, the *improvement is local* within the meaning of the law, and may be paid for by special assessment upon the property benefited." *Per Hand,* C. J., in Northwestern University *v.* Wilmette, 230 Ill. 80, 86. See also Ewart *v.* Western Springs, 180 Ill. 318, 323; Fisher *v.* Chicago, 213 Ill. 268. "Used, as it is, in connection with special assessments, which are necessarily based upon the idea of equivalent benefits to the property owner, the idea of permanency in the improvement is necessarily involved, — that is, the benefit must flow from the actual or presumptive betterment of the street, and must be of such character as to enhance the market value of the property." Chicago *v.* Blair, 149 Ill. 310.

[2] Hewes *v.* Glos, 170 Ill. 436.

The *maintenance and repair* of a boulevard or pleasure way do not constitute a local improvement within the meaning of the Constitution. Crane *v.* West Chicago Park Com'rs, 153 Ill. 348. *Sprinkling streets* is not a local improvement resulting in benefit to the abutting property, and cannot be done by a special tax under a statute authorizing cities to make local improvements by special taxation. Chicago *v.* Blair, 149 Ill. 310. *Water works* for general water supply and fire purposes are not a local improvement which may be made by special assessment. Morgan Park *v.* Wiswall, 155 Ill. 262; Blue Island *v.* Eames, 155 Ill. 398; Hughes *v.* Momence, 164 Ill. 16; Hewes *v.* Glos, 170 Ill. 436. But a special tax or assessment may be imposed for laying a *water pipe* along the particular street; that being a local improvement within the meaning of the Constitution. Hughes *v.* Momence, 163 Ill. 535; Hewes *v.* Glos, 170 Ill. 436. See also O'Neil *v.* People, 166 Ill. 561. An ordinance which provides that the *cost of putting in lateral sewer and water service pipes* for house connections shall be paid by special tax, is for a public and not a private purpose. The fact that in a proceeding to raise by special tax the cost of lateral sewer connections, the expense of making connections on one side of the street is less than on the other because it is nearer the main, is not a ground for levying a higher rate on the more remote lots, the theory of the law of special taxation being the benefit to the property and not the cost in front thereof. Hence, an ordinance which imposes a special tax on contiguous property according to the cost of lateral sewer connections to each lot instead of apportioning it by the rule of equality, is void. Palmer *v.* Danville, 154 Ill. 156.

[3] Sterling *v.* Galt, 117 Ill. 11, 17; Adams County *v.* Quincy, 130 Ill. 566.

special tax, and if by special tax whether any, and if so, what proportion, shall be paid from the general funds of the municipality, is final and conclusive.[1] But the constitutional principle of *equality* of taxation applies as well to special assessments and special taxes as to the ordinary modes of taxation; and both special assessments and special taxes must be imposed upon a uniform principle on all property similarly situated with respect to the proposed improvement.[2] Hence, the cost of a single improvement cannot be raised partly by special assessment and partly by special taxation. The joint use of these methods in a single improvement is inconsistent with the principle of uniformity.[3]

Under the Constitution of 1870, as under the earlier Constitution, a special assessment is founded upon and cannot exceed the benefits to the property assessed, and if the cost of the improvement

[1] Pontiac *v.* Talbot Pav. Co., 96 Fed. Rep. 679; Fagan *v.* Chicago, 84 Ill. 227; Watson *v.* Chicago, 115 Ill. 78; Leitch *v.* La Grange, 138 Ill. 291, 294; Morgan Park *v.* Wiswall, 155 Ill. 262, 267; Birket *v.* Peoria, 185 Ill. 369. "When the cost of a local improvement is to be raised in whole or in part by special taxation, the ordinance itself must either state the sum or give the data by which the commissioners can fix the amount to be thus raised, and when so fixed or ascertained, in conformity with the ordinance, it is conclusive on the property owners. In such case the municipal authorities, by ordinance, practically fix and determine in advance the amount the property specially benefited is to pay, and the amount when thus fixed is not open to review." *Per Mulkey*, C. J., in Sterling *v.* Galt, 117 Ill. 11, 17. Sufficiency as to definiteness and certainty of ordinance specifying portion of cost to be raised by special tax and by general taxation respectively, see Kimble *v.* Peoria, 140 Ill. 157.

[2] Chicago *v.* Baer, 41 Ill. 306; Scammon *v.* Chicago, 42 Ill. 192; Parmelee *v.* Chicago, 60 Ill. 267; Bigelow *v.* Chicago, 90 Ill. 49; Kuehner *v.* Freeport, 143 Ill. 92, 100; Davis *v.* Litchfield, 145 Ill. 313, 327; Chicago *v.* Blair, 149 Ill. 310, 315.

[3] In Kuehner *v.* Freeport, 143 Ill. 92, a special tax for street paving was held to be void because the ordinance imposed a portion of the cost of the improvement for street intersections, gutter, &c., on the city, a further portion upon a street railway to the extent to which it was benefited, and the remainder on contiguous property by frontage. The court said that the principle of equality of taxation was carried into the Constitution of 1870, with special provision for special assessments and special taxation; but the dominant principle is equality, and the exceptions ought not to be extended beyond the clear import of the language used. Hence, in exercising the power of special assessment or special taxation, the imposition of the burden must be uniform in respect to both persons and property. Therefore, the city cannot combine special assessment and special taxation in providing for a single improvement, and direct that the property of one shall be assessed in proportion to benefit, while the property of others shall be subject to special tax. In Ware *v.* Jerseyville, 158 Ill. 234, it was held that a special tax must be uniform in proportion to frontage, and that when the assessment roll showed that the tax was assessed unequally, some being at a higher rate than others, the assessment was void. In Davis *v.* Litchfield, 145 Ill. 313, the city council imposed upon each lot abutting on a street of varying width the cost of paving the street immediately in front so that some lots bore more of the cost in proportion to frontage than others. It was held that the method adopted was an arbitrary exaction, and was not a proper exercise of the power of special taxation.

exceeds the benefits to the property assessed, the excess must be assessed against the municipality to be paid by general taxation or from the general funds of the municipality.[1] And if the proceedings show that the commissioners made the assessment according to the benefits received by the property assessed, the fact that the property is assessed for the improvement in exact proportion to the frontage

[1] White *v.* People, 94 Ill. 604, 616; Sterling *v.* Galt, 117 Ill. 11, 18; Springfield *v.* Sale, 127 Ill. 359, 362; Wilson *v.* Chicago Sanitary District, 133 Ill. 443; Newman *v.* Chicago, 153 Ill. 469; Chicago *v.* Adcock, 168 Ill. 221; Bickerdike *v.* Chicago, 185 Ill. 280; Waukegan *v.* Burnett, 234 Ill. 460.

If the benefits to the property assessed equal or exceed the cost, no part of the cost of an improvement to be paid by a special assessment needs to be levied against the municipality. Galt *v.* Chicago, 174 Ill. 605. The *limits of the district* to be specially assessed for the improvement are within the discretion of the municipal authorities, and the courts will interfere only to correct a clear abuse of such discretion. Storrs *v.* Chicago, 208 Ill. 364.

Although the excess of the cost of an improvement over the aggregate benefits to the property specially assessed therefor must be borne by the municipality, the municipal authorities may provide that the whole cost shall be paid by special assessment, as the courts have, by statute enacted in 1897, power to review the distribution of the cost between the public and the property owners. Graham *v.* Chicago, 187 Ill. 411. By statute the determination of the trial court of the question of distribution is final and cannot be reviewed on appeal. The denial of any appeal does not violate any constitutional right. Graham *v.* Chicago, 187 Ill. 411. See also Bickerdike *v.* Chicago, 185 Ill. 280; Birket *v.* Peoria, 185 Ill. 369; Hyman *v.* Chicago, 188 Ill. 462; Berdel *v.* Chicago, 217 Ill. 429.

The *special benefits* which will support a special assessment are such special and peculiar benefits resulting from the improvement as increase the market value of the land. Fahnestock *v.* Peoria, 171 Ill. 454. In a question with the owner whose property is specially assessed, it is immaterial what the public benefit is. The only question is what the benefit to the property is. Leitch *v.* La Grange, 138 Ill. 291. Where portions of certain lots were taken for a market place, and the damages for the portions taken were assessed back on the portions remaining, irrespective of the fact that the lots were differently situated and differently benefited, the assessment was held to be void as arbitrary and unjust. Berdel *v.* Chicago, 217 Ill. 429. A special assessment for the construction of a *sewer* may be made upon *farm lands*, if the property is specially benefited. Leitch *v.* La Grange, 138 Ill. 291. See also Clark *v.* Chicago, 166 Ill. 84. But a special assessment for a sewer is invalid when the property assessed is not in the drainage district and there is no evidence of any benefit to the property. Chicago *v.* Adcock, 168 Ill. 221; Bickerdike *v.* Chicago, 185 Ill. 280.

The *right of way of a railroad* in a public street is subject to special assessment for paving the street. Rich *v.* Chicago, 152 Ill. 18; Illinois Cent. R. Co. *v.* Kankakee, 164 Ill. 608. When a street railway company is required by the ordinance granting its right of way to pave the portion of the street occupied by it, assessment of property benefited by the paving of the remainder of the street is not invalidated because no assessment is imposed upon the street railway. Billings *v.* Chicago, 167 Ill. 337.

The words "contiguous property" in the Constitution of 1870, art. ix. § 9, relate to and qualify only special taxes and do not affect special assessments which may be laid on property specially benefited whether it is contiguous or not. Guild *v.* Chicago, 82 Ill. 477, 478; Rich *v.* Chicago, 152 Ill. 18, 27; Roberts *v.* Evanston, 218 Ill. 296. But a special assessment is not invalid merely because it is confined to property contiguous to the improvement. West Chicago Park Com'rs *v.* Farber, 171 Ill. 146. See also Lake *v.* Decatur, 91 Ill. 596.

thereon, does not invalidate the assessment.[1] Special taxation is also imposed as the equivalent in theory of benefits received, and is justified upon that theory, but the levy of a special tax is a legislative function and the determination of the city council that the special tax should be levied is held to be a final and conclusive determination of benefit to the contiguous property which cannot be reviewed in the absence of any statutory provision to the contrary.[2]

[1] Springfield *v.* Sale, 127 Ill. 359; Walker *v.* Aurora, 140 Ill. 402, 411; Chicago Sanitary Dist. *v.* Joliet, 189 Ill. 270.

In the case of a special assessment, the report of the commissioners that they have assessed the expense of the improvement according to the frontage of the contiguous lots without any finding that special benefits are in that proportion, will render the assessment invalid; but the mere fact that the commissioners in their report gave the frontage of the lots upon the street or that they assessed upon each lot the exact cost of the sewer in front of the same will not of itself vitiate the assessment, if it appears that the commissioners determined that the benefit to each lot was equal to the cost of the sewer in front thereof. Springfield *v.* Sale, 127 Ill. 359.

[2] White *v.* People, 94 Ill. 604; Craw *v.* Tolono, 96 Ill. 255; Enos *v.* Springfield, 113 Ill. 65, 73; Galesburg *v.* Searles, 114 Ill. 217, 219, 220; Bloomington *v.* Chicago & A. R. Co., 134 Ill. 451; Davis *v.* Litchfield, 145 Ill. 313, 326; Chicago *v.* Blair, 149 Ill. 310, 315; Lightner *v.* Peoria, 150 Ill. 80, 86; Chicago & A. R. Co. *v.* Joliet, 153 Ill. 649; Palmer *v.* Danville, 154 Ill. 156, 166; Payne *v.* South Springfield, 161 Ill. 285; Chicago & N. W. R. Co. *v.* Elmhurst, 165 Ill. 148; Job *v.* Alton, 189 Ill. 256, 264; People *v.* Latham, 203 Ill. 9, 16.

It has been said that in special taxation, the question whether the special tax exceeds the actual benefit to the lot is not material. It may be supposed to be based upon a presumed equivalent. The city council may determine the frontage upon the improvement to be the proper measure of special benefits. That is generally considered as a very reasonable measure of benefits in the case of a street improvement, and if it does not in fact, as may happen, represent actual benefits, it is enough that the city council have deemed it to be the proper rule to apply. White *v.* People, 94 Ill. 604, 613. "In cases of special taxation, the municipal authorities, if they think proper, may impose the whole of the burden upon the contiguous property, and although, theoretically, this is permitted upon the hypothesis that the benefits will be equal to the burden cast upon the property, yet, whether it be so or not, cannot be inquired into." *Per Mulkey*, C. J., in Sterling *v.* Galt, 117 Ill. 11, 17.

The *limits of an improvement* to be made by special taxation are within the discretion of the city council, to be fixed by ordinance, subject only to the requirement that the improvement shall be so far single that, presumptively at least, some benefit will flow from the improvement to the property that is to be subjected to taxation. When the limits of improvement are fixed by ordinance the contiguous property is created by law into a taxing district, and when the tax is to be imposed according to frontage presumptively each lot or parcel of land is benefited by the proposed improvement. Davis *v.* Litchfield, 145 Ill. 313, 322. See also Lightner *v.* Peoria, 150 Ill. 80; People *v.* Latham, 203 Ill. 9, 17. The imposition of a special tax is of itself a determination by the legislative authority of the city that the benefit to the contiguous property will be as great as the burdens imposed. Lightner *v.* Peoria, 150 Ill. 80; Pierson *v.* People, 204 Ill. 456, 465; Harris *v.* People, 218 Ill. 439, 441. Where a special tax is imposed in proportion to frontage, the owner may show a mistake or error as to frontage, but evidence that the tax levied is unequal on the basis of the superficial area of the property, or the value or the amount of the benefits resulting to it, is immaterial and inadmissible. Green *v.* Springfield, 130 Ill. 515.

An *exemption from taxation* contained

But the legislature may provide that the determination of the ci council as to the benefits to the property specially taxed shall n be final, that in the exercise of the power of special taxation no l shall be taxed in an amount in excess of the special benefit whi it shall receive from the improvement, and that the property own shall have the right to a hearing on the question of benefit to h property and the amount of the special tax.[1]

in the charter of a railroad company does not exempt the railroad property from a *special tax* imposed in conformity to the Illinois Constitution. Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 206.

[1] The rule that the determination of the city council that an improvement shall be made by special taxation is a final and conclusive determination that the property assessed is benefited to the extent of the tax was changed by a statute enacted July 1, 1895, which amended the act for the incorporation of cities and villages and declared that no special tax shall be levied "in an amount in excess of the special benefit which such property shall receive from such improvement," and that the question of benefit and the amount of the special tax shall be tried in the same manner as in the case of special assessments. See Palmer *v.* Danville, 166 Ill. 42. Prior to the enactment of this statute the court expressed the view that the fact that in special assessments the property owner is entitled to have the assessment made in proportion to and not in excess of benefits and to have notice and a hearing on the question constituted the principal distinction between special assessments and special taxation. "A *special assessment differs from special taxation* mainly in this, that the assessment cannot, in any case or under any circumstances, exceed the benefits the property will derive from the improvement, and the owner of the property has the right, if dissatisfied with the assessment, to have this question passed upon by a jury, and if not content with their finding, to have it reviewed in an appellate tribunal, whereas, in cases of special taxation, the jury have nothing to do with the amount which is by ordinance assessed upon the contiguous property." *Per Mulkey*, J., in Sterling *v.* Galt, 117 Ill. 11, 18. See also Springfield *v.* Green, 120 Ill. 269. "*Special taxation*, as spoken of in our Constitution, is bas upon the supposed benefit to the conti uous property, and differs from speci assessments only in the mode of asc taining the benefits. In the case special taxation, the imposition of t tax by the corporate authorities is itself a determination that the benef to the contiguous property will be great as the burden of the expense the improvement, and that such ben fits will be so nearly limited, or co fined in their effect, to contiguo property that no serious injustice w be done by imposing the whole e pense upon such property. In t case of *special assessments*, the pro erty to be benefited must be ascertain by careful investigation, and the bu den must be distributed according the carefully ascertained proportion which each part will be beneficial affected." *Per Dickey*, C. J., in Cr *v.* Tolono, 96 Ill. 255, 262. See al Enos *v.* Springfield, 113 Ill. 65, 71.

But after the enactment of t statute which limited special taxation the special benefit to the property a gave the property owner the right a trial of the question, the court clared that the statute did not dest all distinction between special ass ments and special taxatio , but o gave the right of review Hull People, 170 Ill. 246, 248; Birket Peoria, 185 Ill. 369; Mercy Hosp *v.* Chicago, 187 Ill. 400, 402; East Louis *v.* Illinois Cent. R. Co., 238 296. Notwithstanding this stat the city council still has sole powe determine what proportion of a spe tax levied to pay for an improvem shall be borne by the city, and t question cannot be reviewed by courts. Under this statute the c question to be tried by the jury application to confirm a special ass ment is whether the tax exceeds special benefit which will accrue to property from the making of the provement. A special tax may

Constitution limits special taxes to property which is "con-
' to the improvement.[1] It is implied that the improvement
ct of which special taxation may be imposed shall be single
ature, so that the property taxed may fairly be said to be
ous to the improvement of which it is to bear the cost.[2] The
nation of what constitutes a single improvement rests
ly in the discretion of the council, but it is subject to judicial
on for abuse of discretion.[3] In the exercise of its discretion

f it does not exceed the benefit
accruing to the property
improvement. Peru *v.* Bar-
Ill. 515. In this case, *Cart-*
, said: "If a special tax is levied
g to frontage, the distribution
ost as between different lots
n the basis of proportionate
nd still the tax is valid as with-
mit of the benefits conferred.
ay be a very great difference
nefits to different lots having
frontage on account of one
; near a business centre with
improvements and devoted
ess purposes, while the other
or of much less value, or where
s of much greater depth than
; and yet a special tax on each
g to frontage may be no more
benefits derived from the
nent. A special tax accord-
rontage is authorized by the
nd if the tax does not exceed
fits, it is valid." See also
Louis *v.* Illinois Cent. R. Co.,
96.

words "contiguous property"
a statute in relation to special
for local improvements are
nderstood in their popular
meaning "in actual or close
"touching," or "near."
nprovement is of a street or
"contiguous" property is
uts upon the street or sidewalk
nded by the street. Adams
. Quincy, 130 Ill. 566. When
vement of the street is between
e property abutting on the
"contiguous" although the
intervenes. Chicago, B. &
. *v.* Quincy, 136 Ill. 563. *In-*
streets are not contiguous
and a special tax cannot be
thereon. Lightner *v.* Peoria,
30. The *right of way of a*
n a street which is improved
iguous," and is subject to a
ax to improve the street.

Jacksonville R. Co. *v.* Jacksonville, 114 Ill. 562; Kuehner *v.* Freeport, 143 Ill. 92, 104; Chicago, R. I. & P. R. Co. *v.* Moline, 158 Ill. 64; Cicero & P. St. R. Co. *v.* Chicago, 176 Ill. 501. See also Chicago *v.* Baer, 41 Ill. 306; Parmelee *v.* Chicago, 60 Ill. 267; Chicago City R. Co. *v.* Chicago, 90 Ill. 573; Freeport St. R. Co. *v.* Freeport, 151 Ill. 451; Chicago & N. W. R. Co. *v.* Elmhurst, 155 Ill. 148. When the estimate of the proportion to be imposed upon a railroad right of way in a street for the improvement of the street is made in the exercise of reasonable discretion, the tax imposed will be presumed to represent the share to be borne by the railroad property upon the principle of uniformity. It may be laid upon the railroad property by percentage, while abutting property is assessed by frontage. A tax imposed by percentage will not be held illegal as arbitrary when the public authorities have made the estimate in apparent good faith. Chicago, R. I. & P. R. Co. *v.* Moline, 158 Ill. 64. See also Chicago & N. W. R. Co. *v.* Elmhurst, 165 Ill. 148. A railroad company's right of way adjoining a street is also contiguous property which may be specially taxed for the improvement of the street on the basis of frontage. Palmer *v.* Danville, 66 Ill. 42. See also Chicago & A. R. Co. *v.* Joliet, 153 Ill. 649. The right of way may be taxed for sidewalks when it intersects the street, although the sidewalk is not continued across the right of way. Illinois Cent. R. Co. *v.* People, 170 Ill. 224.

[2] Sidewalks upon separate and distinct streets have been held not to constitute a single improvement, and therefore they cannot be included in a single special tax levy. People *v.* Latham, 203 Ill. 9; People *v.* Stearns, 213 Ill. 184.

[3] Church *v.* People, 179 Ill. 205, 206. *Different streets* may be included in

the city council may, when an improvement of an entire street benefits the contiguous property on different parts of it in unequal proportions, divide the improvement so as to secure a practical uniformity in the distribution of the burden, and the court will assume, in the absence of evidence to the contrary, that the division is properly made.[1] Although the question of the benefit to contiguous property resulting from an improvement which is made by special taxation is one which is to be determined by the local authorities, and although that determination is conclusive except in so far as the power of review is given by statute, yet the improvement can only be directed to be made and the special tax imposed by ordinance, and the ordinance is subject to the general rule that it must be reasonable and not arbitrary and oppressive; if it appears upon the face of the ordinance, or upon the uncontroverted facts, that no benefit can in fact accrue to the contiguous property from the improvement, or that the local authorities abused their discretion, the ordinance will be declared invalid and a special tax levied pursuant to it set aside.[2]

a single scheme of improvement. The limits of the district are within the discretion of the council, subject always to the qualification that the elements of combination must not be so separate and distinct that the making of one cannot fairly be said to benefit the whole district. Davis *v.* Litchfield, 145 Ill. 313, 328; People *v.* Latham, 203 Ill. 9, 16. A main sewer and its branches may be treated as a single improvement. Payne *v.* South Springfield, 161 Ill. 285.

[1] Lightner *v.* Peoria, 150 Ill. 80, 86; Bradford *v.* Pontiac, 165 Ill. 612.

[2] Bloomington *v.* Chicago & A. R. Co., 134 Ill. 451; Chicago & N. W. R. Co. *v.* Elmhurst, 165 Ill. 148; Job *v.* Alton, 189 Ill. 256; Harris *v.* People, 218 Ill. 439. Where a city council ordered that a street be widened where a railroad crossed it by an overhead bridge, and a new bridge built "under the rails" of the railroad and directed that the cost should be defrayed by a special tax to be assessed on "abutting" property, the result whereof was that a total cost estimated at $15,799, including compensation for a portion of the railroad property taken and the cost of constructing the railroad bridge, was assessed against the railroad as the only abutting property, it was held that the ordinance directing the improvement was arbitrary and unreasonable and therefore void. Bloomington *v.* Chicago & A. R. Co., 134 Ill. 451. An alley was directed to be opened by taking a part of only two lots, and the award of compensation for the land taken was directed to be imposed by special taxation on the remainder of the lots. It was held that the ordinance was unreasonable and void; that it compelled the property owner not only to pay for his own lands, but also to pay himself the damages to lands not taken; and that it did not therefore make adequate provision for compensation. The court said that it was an arbitrary exercise of the taxing power which could not be sustained. Bloomington *v.* Latham, 142 Ill. 462.

After the decision of the Supreme Court of the United States in Norwood *v.* Baker, 172 U. S. 269, which is discussed *ante*, § 1436, the Supreme Court of Illinois held that a statute which required lot owners to construct a sidewalk in front of their respective lots and provided that in default thereof the city might do so and apportion by special taxation the cost to the contiguous lots according to frontage, was not unconstitutional as violating the Fourteenth Amendment to the Federal Constitution in that it did not limit the amount of the special tax to the special benefits received by the property upon a hearing

§ 1440. **Special Assessment; Special and General Benefits to Property assessed.** — As special assessments are a branch of the taxing power,[1] the purpose for which the assessment is imposed *must be public in its nature.*[2] But the foundation principle which justifies the imposition of a special assessment upon territory not coinciding with a municipal or political subdivision, is that the property assessed is, either actually or presumptively, specially benefited by the improvement; and in those exceptional jurisdictions in which it is held that a special assessment can only be constitutionally imposed after a determination of the fact of the benefit upon notice and a hearing to the property owner, it seems to follow that no special assessment can be imposed if the work or improvement is of such a nature that it only confers a general benefit upon the community, and cannot by reason of its nature possibly confer special benefits, differing in nature and kind from the public benefit, upon the particular property sought to be assessed.[3] But even in those jurisdictions in which it is held that the legislature has the power to delimit the taxing district, to determine that the property within such district shall bear the expense of the improvement, to fix the basis of apportionment, as by frontage or area or *ad valorem*, and to impose the whole expense upon that apportionment upon the property within the district without any notice or hearing to the abutter, the underlying principle still is that the property is presumed to be specially benefited by the improvement, and it would seem in this case also to follow that if the nature of the work be such that it cannot possibly confer any special or peculiar benefit upon adjoining property, but only a general benefit in common with the rest of the community, no special assessment may or at least ought to be imposed.[4] On this point no rule

and determination. It distinguished Norwood *v.* Baker, *supra*, and said that under the decisions of Illinois the property owner could be protected from arbitrary exactions by the rule that a municipal ordinance to be valid must be reasonable, and if it were unreasonable, unjust, and oppressive, the courts would set it aside. Job *v.* Alton, 189 Ill. 256. See also Harris *v.* People, 218 Ill. 439.

[1] See *ante*, § 1430.

[2] Bloomington *v.* Chicago & A. R. Co., 134 Ill. 451, 457; Elmore *v.* Drainage Com'rs, 135 Ill. 269; Gifford Drainage Dist. *v.* Shroer, 145 Ind. 572; Butler *v.* Saginaw County, 26 Mich. 22; *In re* Theresa Drainage Dist., 90 Wis. 301.

[3] This principle follows as a necessary corollary from the decisions in those jurisdictions which hold that special assessments must be based upon special and peculiar benefits and limited to the amount of such benefits and that any excess beyond special and peculiar benefits must be paid from the city treasury or by general taxation. See *ante*, § 1437.

[4] The terms "local improvements" signify "improvements made in a particular locality by which the real property adjoining or near such locality is specially benefited." *Per Berry*, J., in Rogers *v.* St. Paul, 22 Minn. 494, 507. "It would be difficult to state in what cases local assessments for

of universal application can be laid down. Implied limitation on the *taxing power* of the legislature must be limited to cases so exceptional, arbitrary, and oppressive as to amount to confiscation. The application of this principle has resulted in some jurisdictions in a differentiation of the character of the improvement which justifies a special assessment, and in many instances a divergence of opinion appears in the decisions of the courts.[1]

benefits may or may not be made. In practice, the rule is usually adopted in the case of street improvements, sewers, water mains, &c., while as respects public buildings or improvements of like general character, for the use of the people of a city or district, the burden is properly apportioned by a general tax upon the property of the whole city, or of the district peculiarly benefited. But in reference to the class of improvements which are under consideration here, — grading, filling, and bridging on a street, — for which such assessments are usually deemed applicable, this court has held that 'the fact that the street to be improved is the most public thoroughfare in the city does not prevent the improvement from being "local," but the local character of the improvement depends upon the special benefit which will result to the real property adjoining or near the locality in which the improvement is made.' Rogers *v.* St. Paul, 22 Minn. 494, 507. Whether, in any particular case, the improvement partakes of this local character, and creates such special benefits, must ordinarily be deemed questions of fact, to be determined by the proper authorities as the legislature may prescribe." *Per Vanderburgh*, J., in State *v.* Ramsey County Dist. Ct., 33 Minn. 295, 307.

The term "local improvement," as applied to a street, signifies "the actual or presumptive betterment of the street, and involves the idea of permanency." *Per Macgruder*, J., in Illinois Cent. R. Co. *v.* Decatur, 154 Ill. 173. The removal of noxious weeds, *e. g.*, *the Canada thistle*, is not a local improvement which justifies a special assessment. People *v.* Cook County, 221 Ill. 493.

Expenses incurred in unsuccessfully defending suits against a municipality for illegal and negligent acts in constructing a public improvement cannot be specially assessed as a part of the *cost* of the improvement. DeWitt *v.* Rutherford, 57 N. J. L. 619.

Whether an improvement is *local in its character* so that it may be made by special assessment is a question of fact. The decision of the corporate authorities as to the character of the improvement, while controlling in case of doubt, is subject to review by the courts, and the local authorities cannot arbitrarily determine that the improvement shall be treated as local in its nature when it is general in its character. Morgan Park *v.* Wiswall, 155 Ill. 262; Hewes *v.* Glos, 170 Ill. 436. Lands are not assessable for the increase of healthfulness which may accrue to a neighborhood by reason of the drainage of swamps and low-lands lying in their *vicinity;* such bene fits are too uncertain and indirect The *lands drained* are the lands pecu liarly benefited. Skinkle *v.* Clinton 39 N. J. L. 656. Increased facilit *for fire protection* is a benefit accruin to property to be considered in makin a paving assessment. Chicago Unio Traction Co. *v.* Chicago, 202 Ill. 576.

[1] *Country roads.* In Sperry *v.* Fl gare, 80 Minn. 325, 327, it was held th the opening of an ordinary country ro or highway is not a "local improv ment" within the meaning of t provision of the *Minnesota* Constit tion authorizing special assessmen for local improvements, and the legi lature cannot authorize a speci assessment therefor. *Brown*, J., sai "In the city, the improvement w benefit and improve the proper adjacent to, and abutting upon, t improved street, but will not bene property remote therefrom, while the country districts the highway an advantage to the public at larg and the benefit thereof is not confin to farms through which it may pa It is therefore reasonable to requi the benefited city property to p the expense of the improvemen while it would not be reasonable

§ 1441. **Special Assessments; Special and General Benefits; Pennsylvania.** — In Pennsylvania, the courts have not only given effect

just or fair to require the farms along the line of a country road to pay the entire cost and expense of opening and laying the same out." See also State *v.* Gunn, 92 Minn. 436, 440. These decisions were rendered upon the authority of Graham *v.* Conger, 85 Ky. 582, in which it was held that the legislature cannot impose a tax *upon the land bordering on a country road* to pay the entire cost of converting it into a turnpike. The court remarked that this method of assessment was not adapted to country roads or agricultural lands, and that a statute which authorized an assessment in proportion to area was not justified in the case of these lands. See also Parkland *v.* Gaines, 88 Ky. 502; Barber Asphalt Pav. Co. *v.* Gaar, 115 Ky. 334, 358. The decisions of the *Kentucky* court are founded upon the reasoning of the *Pennsylvania* courts to the effect that the system of assessment by frontage is unjust and inequitable when applied to farm lands or rural property. See *ante*, § 1438. It is to be observed, however, that the *Pennsylvania* decisions do not hold that a country road is not a local improvement which cannot be made by special assessment according to benefit, the only determination by that court being that an assessment by frontage was not a fair or reasonable apportionment of the benefits in the case of rural or farm lands.

Railroads. Taxation *in aid of a railroad* is for a public purpose and cannot be imposed in the form of a special assessment. Dyar *v.* Farmington, 70 Me. 515, 527. *Walton*, J., said: "It is a sufficient answer to the inquiry whether this tax can be sustained as an assessment for a local improvement, to say that the purpose for which it is to be assessed is public, not local, within the meaning of the law; that no tax in aid of a railroad has ever been justified or sustained upon the ground that it is an assessment for a local improvement. The courts have had much difficulty in their efforts to discriminate between local and public works, and the dividing line is but ill defined. But all agree that taxation in aid of railroads must be justified as taxation for a public purpose, or it cannot be justified at all." In this case it was also held that taxation in aid of a railroad, when imposed upon all the property of the municipality upon an *ad valorem* basis, is not a special assessment, but is general taxation. But in Sears *v.* Boston St. Com'rs, 180 Mass. 274, it was held that the building of a *union railroad station* and its approaches, a work undertaken in part at least by the municipality, and which resulted in the increase of value of the property, because of the direction which it gave to public travel, was a proper subject for a special assessment upon property benefited.

Lighting. In *Michigan*, it has been held that electric light "towers" owned by a lighting company are not a local improvement justifying a special assessment on property benefited. Putnam *v.* Grand Rapids, 58 Mich. 416, 423. In *Illinois*, it has been held that the power house and generator plant of an electric lighting system of a municipality are a public benefit only, and the cost thereof must be raised by general taxation. But poles, electrical conductors, lamps, and appliances in particular streets are a local benefit, and the cost thereof may be met by special assessment. Ewart *v.* Western Springs, 180 Ill. 318.

Water works. A water works plant and general water supply system for a municipality for purposes of fire protection are not a local improvement, and no special assessment can be imposed in respect thereof. Morgan Park *v.* Wiswall, 155 Ill. 262; Blue Island *v.* Eames, 155 Ill. 398; Hughes *v.* Momence, 163 Ill. 535; Hughes *v.* Momence, 164 Ill. 16, 19; Hewes *v.* Glos, 170 Ill. 436. But *hydrants and water mains in particular streets* are a local improvement in respect of which a special assessment or special tax may be imposed. Hughes *v.* Momence, 163 Ill. 535; O'Neil *v.* People, 166 Ill. 561, 566; Hewes *v.* Glos, 170 Ill. 436; Harts *v.* People, 171 Ill. 458; Allentown *v.* Henry, 73 Pa. 404; Allen *v.* Drew, 44 Vt. 174; Smith *v.* Seattle, 25 Wash. 300; Vreeland *v.* Tacoma, 48 Wash. 625, 627; Gleason *v.* Waukesha County, 103 Wis. 225. See also Palmer *v.* Danville, 154 Ill.

to the principle that local or special assessments are only constitutional when imposed to pay for a local improvement conferring

156; Gault *v.* Glen Ellyn, 226 Ill. 520. In Lee *v.* Mellette, 15 S. Dak. 586, it was held that the statute did not confer authority to impose a special assessment for *water mains in a street*, there being no express authority conferred therefor, while express authority was conferred to impose special assessments for other clearly defined street improvements. Compare Allentown *v.* Henry, 73 Pa. 404. The fact that a city may make a profit by furnishing water to consumers does not destroy the public character of the improvement so as to deprive the city of the power to impose a special assessment for water mains. Smith *v.* Seattle, 25 Wash. 300. Special assessments for *constructing public wells and cisterns* at or near street intersections under charter provisions, see Louisville *v.* Osborne, 10 Bush (Ky.), 226; Louisville Steam Forge Co. *v.* Anderson (Ky.), 57 S. W. Rep. 617; Abraham *v.* Louisville (Ky.), 62 S. W. Rep. 1041. See further, *ante*, § 1323, as to the distinction between water rates and special assessments.

Public parks, although to some extent a general benefit to the whole municipality, may also be regarded as a special benefit to the locality or the parts of the city where they are established wa ranting a special assessment upon property specially benefited. State *v.* Ramsey County Dist. Ct., 75 Minn. 292; Kansas City *v.* Ward, 134 Mo. 172; Kansas City *v.* Bacon, 147 Mo. 259. See also State *v.* Hunt, 74 Minn. 496. See further as to *parks and public squares*, *ante*, § 1094.

Sewage system. A *pumping station for sewage* and a system of sewers in connection therewith covering only a portion of the city, is a local improvement which may be constructed by special assessment. Fisher *v.* Chicago, 213 Ill. 268. *Cartwright*, J., said: "It is clear that a large portion of the city would derive little or no benefit or advantage from the improvement. The substantial benefits to be derived from it are local in their nature, and a portion of the city where the sewers are laid will be specially and peculiarly benefited in the enhancement of property. The system of sewers and a sewage pumping station, although a benefit to a considerable area of the city, covers but a small part of the city, and is not a general water works plant or a plant for street lighting, which is of general utility to all the inhabitants of the municipality." See also Northwestern University *v.* Wilmette, 230 Ill. 80.

Shade trees. Special assessment for planting, maintaining, and protecting, see Heller *v.* Garden City, 58 Kan. 263.

Navigable waters. In People *v.* Buffalo, 147 N. Y. 675, and Delaware & H. Canal Co. *v.* Buffalo, 39 N. Y. App. Div. 333, aff'd 167 N. Y. 589, a special assessment founded on special benefits for deepening a navigable river was sustained without any discussion as to the power of the legislature. But in Chicago *v.* Law, 144 Ill. 569, it was held that the widening of a navigable stream which is under the control of the United States Government, is a public purpose and has none of the elements of a local improvement for which a special assessment may be imposed. In Terrell *v.* Paducah, 122 Ky. 331, 343, it was held that, under the peculiar circumstances of the case, the cost of *constructing a wharf* on land between high and low water mark belonging to the city or the State could not be specially assessed on abutters whose lands were also largely under water. In McGee *v.* Hennepin County 84 Minn. 472, a statute authorized th establishment of a uniform height o water in Lake Minnetonka in orde "to improve the navigation or t promote the public health or welfare." It was held that in respect of th improvement of the public health o welfare a special benefit accrued t water front property which justifie a special assessment under the pr vision of the *Minnesota* Constitutio art. ix. § 1, as amended in 1881, th "the legislature may, by general c special Act, authorize municipal co porations to levy assessments for loc improvements upon the property fron ing on such improvements, or upo the property to be benefited by suc improvements, or both, without r gard to a cash valuation, and in suc manner as the legislature may pr scribe." The court expressly declar that it did not decide whether the in

special benefits on the properties assessed, and only to the extent of these benefits, and that the expense of the performance of the ordinary public duties of the municipality for the general good must be defrayed from the general funds of the municipality or by means of general taxation and cannot be made the basis of local or special assessment;[1] but in applying these principles, have denied to the legislature the power to authorize special assessments in respect of improvements which in other jurisdictions are recognized as justifying the exercise of legislative authority. Thus, it is held that while the cost of the *original paving* of a city street may be assessed against properties abutting thereon as species of taxation for the special benefit accruing to the properties, the *repaving* of the roadway of such a street is a purely public duty for the general public benefit, and the legislature has no power to impose, or to authorize a municipality to impose, the cost thereof upon abutting properties by special assessment.[2] The operation of the principle is not con-

provement of the lake solely for purposes of public navigation would be of such general utility only, as distinguished from local benefit, as to except the improvement from the authority to make a special assessment conferred by this constitutional provision.

[1] In Saw-Mill Run Ridge, 85 Pa. 163, it was held that a *bridge* which is part of a public highway of a city is a public and not a local improvement, and that legislation which authorizes the assessment of its cost upon properties benefited cannot be sustained, as all citizens have an interest in such an improvement, and the assessment of its cost upon individuals would be a taking of private property for public use without just compensation.

[2] Hammett *v.* Philadelphia, 65 Pa. 146; Williamsport *v.* Beck, 128 Pa. 147; Erie *v.* Russell, 148 Pa. 384; Boyer *v.* Reading, 151 Pa. 185; Philadelphia *v.* Ehret, 153 Pa. 1; Morewood Avenue, 159 Pa. 20; Scranton *v.* Sturges, 202 Pa. 182, 185.

In Hammett *v.* Philadelphia, 65 Pa. 146, a statute authorized the city to take a street already laid out and in good condition, to improve it for a public drive or carriage way, and to assess the expense of the improvement upon the property abutting upon the street. The court held that this statute was unconstitutional on the ground that it imposed a local assessment for improvements which were made for the public benefit. There was no clause in the Constitution of *Pennsylvania* restraining the legislative discretion, but it was said that the limitation grew out of the very nature of the subject. *Sharswood*, J., after discussing some of the authorities, said: "The original paving of the street brings the property bounding upon it into the market as building lots. Before that it is a road, not a street. It is, therefore, a local improvement, with benefits almost exclusively peculiar to the adjoining properties. Such a case is clearly within the principle of assessing the cost on the lots lying upon it. . . . But, when a street is once opened and paved, thus assimilated with the rest of the city and made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of the municipality — for the general good — as cleaning, watching, and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments."

The court laid down the following general rule: "Local assessments can only be constitutional when imposed to pay for local improvement, clearly conferring special benefits on the properties assessed, and to the extent of these benefits. They cannot be so imposed where the improvement is either expressed or appears to be for

fined to cases where the original improvement has been made at the cost of the abutter; no special assessment can be imposed for *reconstruction or repaving* although the cost of the original construction may have been paid out of the city treasury.[1] The same rules govern the *construction of sewers*. The abutting owners cannot be subjected to special assessment for the construction of a new sewer, when the original sewer was constructed at the expense of the abutter[2] or at the expense of the municipality.[3]

In applying these principles, or rules, to *the repaving of streets*, the courts have been obliged to define what constitutes an original paving thereof, with a view to determining the liability of the owner to special assessment. The question whether a particular kind of improvement of a street is an original paving or not is a question of fact, the controlling consideration being the intent of the municipality as deduced from its actions with reference to the street or highway.[4] A first pavement in the legal sense which exempts the

general public benefit." This rule, though clearly sound upon principle, would be inconvenient of application from the difficulty in many cases of determining whether an improvement was a public or a private benefit. In order to justify an assessment, the improvement must be for a public purpose, since the public have no right to tax a citizen to make improvements for his own benefit solely. All streets which are opened for public use are public benefits, and it is upon that ground only that the State can take private property for streets; but the cost of opening and improving them is assessed on adjoining owners on the ground of private benefit. The last two sentences were quoted with approval in Baltimore *v.* anson, 61 Md. 462.

When adjacent property has paid the original cost of grading or paving a street, it has fully paid for all its local advantages, and it cannot thereafter be charged for maintenance and repairs. Appeal of Protestant Orphan Asylum, 111 Pa. 135. A city street was paved with cobble stones, except certain spaces in the middle, which were reserved for use as market places. It was held that, upon the termination of the use of these spaces for market places, the city might assess upon the abutters the cost of paving such spaces. Philadelphia *v.* Evans, 139 Pa. 483. In paving a street at the cost of abutters the city left a strip eight feet wide in the centre unpaved for trees and shrubbery. Subsequently the plan was changed, and the city caused the strip to be paved. It was held that this was an original paving of the strip for which abutters might be assessed. Alcorn *v.* Philadelphia, 112 Pa. 494. Compare Philadelphia *v.* Yewdall, 190 Pa. 412.

[1] Williamsport *v.* Beck, 128 Pa. 147; Harrisburg *v.* Segelbaum, 151 Pa. 172; West Third Street Sewer, 187 Pa. 565. When a city, pursuant to statute, *took possession of a turnpike road*, it was held that there was no statutory recognition of the existing pavement as a first pavement which prevented an assessment on adjoining property for the cost of first paving. If, however, the city recognizes or adopts such road as a street sufficiently well paved for all the requirements of the present or the near future, it becomes a street as a result of such action, and the future growth of the city and the necessity for a different pavement did not change its character, or subject the abutting owners to a charge for new pavement. Philadelphia *v.* Gowen, 202 Pa. 453. See also *In re* Lincoln Avenue, 193 Pa. 432; Dick *v.* Philadelphia, 197 Pa. 467.

[2] Erie *v.* Russell, 148 Pa. 384.

[3] West Third Street Sewer, 187 Pa. 565.

[4] Harrisburg *v.* Funk, 200 Pa. 348. "No particular material is necessary

abutting owner from liability for any subsequent improvement has been defined by the courts generally as one that is put down originally, or adopted or acquiesced in subsequently, by the municipal authorities for the purpose and with the intent of changing an ordinary road into a street. It may be macadam or anything else. That is a matter of evidence only.[1] But merely maintaining the original road or highway by making ordinary repairs is not to be regarded

to constitute a pavement. It may be made of anything which will produce a hard, firm, smooth surface for travel." *Per Mitchell*, J., in Philadelphia *v.* Eddleman, 169 Pa. 452, 454.

[1] Harrisburg *v.* Segelbaum, 151 Pa. 172. "A first pavement, in the legal sense, which exempts the abutting property owner from liability for any subsequent improvement, may be defined generally as one that is put down originally, or adopted or acquiesced in subsequently, by the municipal authority, for the purpose and with the intent of changing an ordinary road into a street. It may be macadam or anything else. That is a matter of evidence only. If the purpose and intent be wanting, a mere surfacing of the road, however carefully or expensively done, will not be a paving, but if the intent and purpose are present, or to be fairly inferred, then there is a paving whatever the material may be. It may perhaps be safely stated as a corollary that, *prima facie*, macadamizing is not a street paving in Philadelphia or probably in other large cities, while, on the other hand, there may be a presumption the other way in smaller cities or towns, as indicated in Greensburg *v.* Laird [138 Pa. 533], Harrisburg *v.* Segelbaum [151 Pa. 172], and Boyer *v.* Reading [151 Pa. 185]. Some illustrations of the legislative use of the word in relation to paving will be found in the opinion of *Willson*, J., quoted in Leake *v.* Philadelphia, 150 Pa. 643, 649, 650, and in some of the other cases cited *supra*. But Philadelphia *v.* Ehret, 153 Pa. 1, shows that there is no hard and fast rule on the subject of the kind of paving. It is a question of fact in each case, and the governing consideration is the nature of the municipal action with regard to it." Philadelphia *v.* Eddleman, 169 Pa. 452, 458, *per Mitchell*, J. To same effect, Leake *v.* Philadelphia, 171 Pa. 125; Dick *v.* Philadelphia, 197 Pa. 467; Philadelphia *v.* Hafer, 38 Pa. Super. Ct. 382; Chester *v.* Evans, 32 Pa. Super. Ct. 641, 644. "The controlling consideration is not so much whether the prior improvement of Market Street by macadamizing, &c., was in the strict sense of the word a paving thereof, as whether, by said improvement, the street was changed from an ordinary clay road into a good, reasonably smooth, and substantial artificial highway, practically equivalent to an ordinarily well-improved street, paved with cobble stone or other materials then used for paving." Harrisburg *v.* Segelbaum, 151 Pa. 172, 181, *per Sterrett*, J. See also Philadelphia *v.* Baker, 140 Pa. 11; Harrisburg *v.* Funk, 200 Pa. 348, 350; Chester *v.* Evans, 32 Pa. Super. Ct. 641, 644.

Macadamizing is *prima facie* not a paving of a street within the rule which exempts abutting property from further assessments for paving, yet it may be put down by the city in the first instance or adopted by it subsequently as a pavement for the purpose of turning a road into a street, and when that is the case the macadamizing is to be regarded as original paving. Assimilation of a city street with the rest of the city streets by macadamizing it, and recognition by the city of the macadamizing as a proper and suitable paving for many years before an asphalt paving was laid, was held to make an asphalt pavement subsequently laid a repaving for which the abutting owners could not be assessed. Leake *v.* Philadelphia, 171 Pa. 125. A strip in the centre of the street was macadamized pursuant to ordinance, and paid for by assessment on the owners of premises. It was held that a subsequent owner should not be compelled to pay the cost of a vulcanite pavement laid on the same strip pursuant to subsequent ordinance. Philadelphia *v.* Ehret, 153 Pa. 1.

as an original paving of the street which precludes a subsequent assessment on the abutters for paving it.[1]

It also results from the application of these principles that a street paving assessment can in Pennsylvania *only be laid upon abutting property.* As to property which does not abut upon the improvement, the paving of the street only confers a general benefit common to the rest of the community and therefore no special assessment can be imposed in respect thereof. If non-abutting property were subject to assessment for the paving of a street, the result would be that such property might be subjected to a series of assessments, not only for the paving of the street upon which it abuts, but also for the paving of other streets in the vicinity, in violation of the rule adopted in Pennsylvania which limits the liability of the property to one assessment for paving.[2] For similar reasons local or special *assessments for sewers* can only be assessed upon property abutting upon the sewer.[3]

§ 1442 (753). **Whether Whole Cost may be imposed on Abutter.** — Upon the question whether it is competent for the legislature to require the *abutter to bear the whole expense* of the improvement in *front of his particular property,* — in other words, whether the abutters can be made to pay the cost of the improvement in front of their respective lots, instead of having the whole expense of the improvement assessed or apportioned among all, on the basis of frontage or of benefits, — the decisions since previous editions of this treatise have further developed and illustrated this subject. In previous editions, the author has expressed the opinion that while it may be true that in some instances more hardship will be occasioned by requiring each owner to make or pay for the improvement in front of his own property than if the cost were assessed on the basis of frontage or of benefits received, still it seemed to the author difficult to find satisfactory and solid grounds on which to discriminate the cases so as to hold that one is within the constitutional power of the legislature and the other is not. It seems still to the author, but the general though not uniform course of the

[1] Philadelphia *v.* Dibeler, 147 Pa. 261; Philadelphia *v.* Hill, 166 Pa. 211; Harrisburg *v.* Funk, 200 Pa. 348; East Street, 210 Pa. 539.

[2] Morewood Ave., 159 Pa. 20; Fifty-fourth Street, 165 Pa. 8.

[3] Park Ave. Sewers, 169 Pa. 433; Witman *v.* Reading, 169 Pa. 375; Beechwood Ave. Sewers, 179 Pa. [illegible] A property owner cannot be assessed for the cost of a main sewer where a small local sewer would give the property all the benefit it derived from the main sewer. Park Ave. Sewers, 169 Pa. 433.

more recent decisions tends to support the proposition that there are or may be grounds for the supposed distinction. But it is always to be remembered that *implied* limitations upon the legislative *power* of taxation, including the apportionment of public burdens as the legislature deems reasonable and necessary, are not lightly to be recognized or adjudged.

In jurisdictions where it is held that a special assessment can only be imposed *because of benefits received* and within the limits of such benefits, and that the owner is entitled to a hearing upon the question of the benefits and the amount thereof, a special assessment for the cost of the improvement in front of the particular property without apportionment according to benefits cannot be sustained.[1] In other jurisdictions where assessments *according to frontage are sustained* on the theory that the legislative authority may determine that property abutting on the improvement is benefited in proportion to frontage and direct an assessment accordingly, and that such determination is conclusive upon the courts and upon the property owner, certain decisions cited in the notes hold that an assessment of the cost of paving or improving a street in front of abutting property cannot be imposed without an apportionment among all the lands on the basis of frontage.[2] But charges

[1] See *ante*, § 1437, where the decisions holding that a special assessment must be founded upon actual benefit received and limited thereto, are collated.

[2] "General taxation implies a distribution of the burden upon some general rule of equality. So a local assessment, or tax for a local benefit, should be distributed among and imposed upon all equally, standing in like relation. But equality can never be but a approximation." *Per Redfield*, J., in Allen *v.* Drew, 44 Vt. 174, 186.

Michigan. In Woodbridge *v.* Detroit, 8 Mich. 274, *Martin*, C. J., and *Manning*, J., held that the provision of the charter of Detroit authorizing the council to cause streets to be improved and to assess the whole expense in front of each lot upon the lot and make the same a lien thereon was valid. *Campbell* and *Christiancy*, JJ., *contra*. But in Motz *v.* Detroit, 18 Mich. 495, the court held that a special assessment, being an exercise of the power of taxation, implies an apportionment and not an arbitrary exaction, and that a special assessment which imposes the cost of grading and paving a street on the lots in front of which the work is done, without apportionment on the basis of benefit or frontage, is unconstitutional. See also Thomas *v.* Gain, 35 Mich. 156, 162.

Missouri. In Independence *v.* Gates, 110 Mo. 374, 383, the court held that a special assessment cannot be imposed upon an abutting lot merely on the basis of the cost of the work in front of the lot, and that there must be an apportionment either on the basis of benefits, or according to frontage, or *ad valorem*. *Thomas*, J., said: "It is now almost universally denied that an owner can be compelled to pay the whole cost of the improvement of the street in front of his lot. In such case, his tax would neither be increased nor diminished by the assessment upon his neighbors, and each particular lot would arbitrarily be made a taxing district and charged with the whole expenditure. It is evident, therefore, that a law for making assessments on this basis could not have in view such distribution of burdens in proportion to benefits as ought to be a cardinal item in every tax law. It would be nakedly an arbitrary command of the law to each lot owner to construct the

imposed upon property by virtue of the exercise of *the police power*, as for instance for the *cost of filling and grading low lying lots* for

street in front of his lot at his own expense according to a prescribed standard; and a power to issue such a command could never be exercised by a constitutional government, unless we are at liberty to treat it as a police regulation and place the duty to make the streets upon the same footing as to keep the sidewalks free from obstructions and fit for passage. But any such idea is clearly inadmissible." See also, to the same effect, Adams *v.* Green, 74 Mo. App. 125, 129; Childers *v.* Holmes, 95 Mo. App. 154, 160.

Illinois. In this State, special assessments are by constitutional provision divided into special assessments proper and special taxation. See *ante*, § 1439, where the Constitution of this State is fully considered. Assessments by frontage are justified as special taxation under the Constitution. In Palmer *v.* Danville, 154 Ill. 156, it was held that the cost of constructing lateral water service pipes and lateral sewer pipes must be apportioned upon the abutting lots upon some rule of equality such as frontage, and that the cost of each lateral connection cannot be charged to the abutting lot in front of which it is constructed. See also Davis *v.* Litchfield, 145 Ill. 313; Ware *v.* Jerseyville, 158 Ill. 234.

Iowa. This State appears to hold that a special assessment for the cost of the improvement in front of the particular lot assessed is valid. In Warren *v.* Henly, 31 Iowa, 31, a provision of the charter of the city of Lyons authorizing the city council to cause the streets to be paved and the pavement repaired, and to that end to require the adjacent owners to pave or repair one-half in width of the street contiguous to their respective lots, and in case of neglect authorizing the city to do the work and assess the expense as a tax on the lots, was held not to be unconstitutional. The principle upon which this decision was rendered is thus explained by *Beck*, J., in Morrison *v.* Hershire, 32 Iowa, 271, 277, "The power of the city to perform the work does not depend upon benefits to be derived by property owners. The work is done for the benefit of the public; the assessment for its payment is levied upon the abutting lots, not because of any special benefits their owners derive from the improvement, but because the public good demands it, and the law authorizes special taxation for such objects." See also Gatch *v.* Des Moines, 63 Iowa, 718, 720; Dewey *v.* Des Moines, 101 Iowa, 416, 423; Allen *v.* Davenport, 107 Iowa, 90, 103.

Wisconsin. In Weeks *v.* Milwaukee, 10 Wis. 242, 258, the power of the legislature to impose a special assessment upon abutting property upon such basis as it deems reasonable appears to be asserted without qualification. Although *Paine*, J., makes a strong argument against all local assessment upon principle, he, however, considers the right to make them as recognized by the Constitution of the State which requires the legislature in organizing municipal corporations "to restrict their power of taxation, *assessment*," &c.

In King *v.* Portland, 38 Oreg. 402, 430, aff'd 184 U. S. 61, the charter of the city provided that the cost of an improvement should be apportioned as follows: "Each lot or part thereof within the limits of the proposed street improvement abutting upon the street shall be liable for the full cost of making the improvement upon one-half of the street in front of and abutting upon it, and also for the proportionate share of improving the intersections of two streets." By other provisions of the charter the assessment was to be founded upon the "probable cost" of the improvement as ascertained and determined by the city engineer and the city council. The constitutionality of an assessment so made was attacked in a case which involved the construction of an elevated roadway in front of plaintiff's property. It will be observed that inasmuch as the assessment was founded upon the "probable cost," it of necessity must have been apportioned upon some principle of average cost, and in the case before the court it was found as matters of fact that the improvement was a benefit to the abutting property, that the benefits were equal to the cost of the improvement, and that the common council of

the purpose of removing conditions injurious to health, do not rest upon the taxing power and may be assessed upon the property without violating any provision of the Constitution.[1]

In some jurisdictions the *construction and maintenance of sidewalks* at the cost of the abutting owner is regarded as an exercise of the police power, and assessments on the property for the cost of the construction or repair of the sidewalks in front of the particular lot have been sustained.[2] In other jurisdictions, the sidewalk, although a part of the street, is regarded as an appendage to the abutting property and existing for its peculiar benefit, and the abutter, in consequence of the peculiar relation of the sidewalk to his property, is obliged to maintain it in repair and to pave it when necessary, or to bear the cost thereof when repairs are made or the

the city apportioned the cost according to the benefits. It was held that, under the circumstances, the rule of apportionment prescribed by the charter was not unconstitutional.

When the statute authorizes an assessment in *proportion to the frontage* of abutting property, an assessment of each particular lot for the cost of the improvement in front thereof is invalid. St. Louis *v.* Clemens, 49 Mo. 552; Neenan *v.* Smith, 50 Mo. 525; Weber *v.* Schergens, 59 Mo. 389; Adams *v.* Green, 74 Mo. App. 125; State *v.* Portage, 12 Wis. 562. Similarly it has been held that when the assessment is required to be made *according to benefits*, an assessment which imposes the whole cost of a retaining wall built in the course of grading a street against the property in front of which it is built is made upon a wrong principle and is invalid. Keller *v.* Mt. Vernon, 23 N. Y. App. Div. 46.

[1] In *Ohio*, lot owners may be constitutionally required to *drain and fill up their lots*, and the power may be delegated to the municipal authorities. Legislation of this character is sustained as a legitimate exercise of the police power for the preservation of the public health. Bliss *v.* Krauss, 16 Ohio St. 54. Assessment of *entire expense of filling and grading a lot* imposed upon the lot held constitutional, being rather the abatement of a nuisance than a tax or assessment. The court regarded the filling and grading under the circumstances as an exercise of the police power. Horbach *v.* Omaha, 54 Neb. 83. A city may by virtue of the police power be authorized by statute *to fill low lots* which are declared to be injurious to public health upon the failure of the owner so to do and to recover the cost from the owner. Charleston *v.* Werner, 38 S. Car. 488. But when the stagnant water on low lying lots or other nuisance is *caused by the act of the municipality*, the city cannot charge against the abutting property the cost of abating such nuisance by filling in the lots. Hannibal *v.* Richards, 82 Mo. 330; Lasbury *v.* McCague, 56 Neb. 220; Weeks *v.* Milwaukee, 10 Wis. 242.

[2] James *v.* Pine Bluff, 49 Ark. 199; Little Rock *v.* Fitzgerald, 59 Ark. 494; Leiper *v.* Minnig, 74 Ark. 510, 516; Palmer *v.* Way, 6 Colo. 106; Speer *v.* Athens, 85 Ga. 49; Palmyra *v.* Morton, 25 Mo. 593, 596; Washington *v.* Nashville, 1 Swan (Tenn.), 177; Whyte *v.* Nashville, 2 Swan (Tenn.), 364; Galveston *v.* Heard, 54 Tex. 420; Galveston *v.* Loonie, 54 Tex. 517; Highland *v.* Galveston, 54 Tex. 527; Adams *v.* Fisher, 63 Tex. 651, 656; Lentz *v.* Dallas, 96 Tex. 258; Hennessy *v.* Douglass County, 99 Wis. 129, 154; Lisbon Ave. Land Co. *v.* Lake, 134 Wis. 470. See also *In re* Goddard, 16 Pick. (Mass.) 504, 509; Carthage *v.* Frederick, 122 N. Y. 268. Index—*Sidewalks*.

An ordinance which requires the abutter to pave a sidewalk is in the nature of an exercise of the power to remove nuisances. Franklin *v.* Maberry, 6 Humph. (Tenn.) 368.

pavement laid by the municipality.[1] Some courts also regard the *construction of sewers* as an exercise of the police power justifying an assessment of the cost thereof upon the property upon which they abut.[2]

§ 1443 (761). **General Result summed up.** — The general results of the foregoing extended reference to the judgments of the courts, State and Federal, concerning local improvements, and assessments in respect thereof, are here summed up by the author accompanied with some critical and explanatory observations:[3] —

[1] Greensburgh *v.* Young, 53 Pa. 280. Index — *Sidewalks; Streets.*

New Jersey. The courts of *New Jersey* have long uniformly held that assessments for local improvements in the roadbed of streets such as pavements, water pipes, sewers, &c., can only be imposed in respect of actual benefits and are limited thereto. But a *distinction is made between the roadbed of streets and sidewalks.* Sidewalks are regarded as an appendage to or part of adjoining premises and so essential to their use as to make their improvement a burden belonging to the ownership of the premises, and an order for the improvement of sidewalks is a police regulation. Hence the cost of constructing and maintaining sidewalks can be imposed upon the abutting lands. Sigler *v.* Fuller, 34 N. J. L. 227; Van Tassel *v.* Jersey City, 37 N. J. L. 128; Kirkpatrick *v.* New Brunswick St. Com'rs, 42 N. J. L. 510. See also Doughten *v.* Camden, 72 N. J. L. 451. The doctrine has been extended to include the *cost of a curb and gutter* necessary for the security of the sidewalk, Robins *v.* New Brunswick, 44 N. J. L. 116; and has also been extended to justify the imposition upon abutting land of the whole cost of constructing house connections from a sewer in the street to the curb line in front of the property. Van Wagoner *v.* Paterson, 67 N. J. L. 455. Index — *New Jersey.*

In Sands *v.* Richmond, 31 Gratt. (Va.) 571, an assessment of the cost of paving a sidewalk in front of a lot was sustained as founded on general custom, and the court considered it to be unnecessary to determine whether the assessment required to be justified as an exercise of the police power.

Illinois. In this State it is held that a city cannot be vested with authority to require an abutting owner or occupant to keep the *sidewalk clear of snow and ice,* or to sprinkle sand or ashes thereon. The duty so to do rests upon the public as a part of the duty to maintain the street, and it cannot be imposed upon the abutting owner or occupant as an exercise of the police power. Chicago *v.* O'Brien, 111 Ill. 531; Gridley *v.* Bloomington, 88 Ill. 554; Chicago *v.* McDonald, 111 Ill. App. 436. Similarly the city cannot by ordinance impose a fine or penalty upon an abutting owner for failure to keep the sidewalk in repair. Chicago *v.* Crosby, 111 Ill. 538. But a street railway has, by virtue of its franchise, a special privilege and interest in its right of way to which the public in using the street must to some extent yield, and the city may in the exercise of the police power require that the railway company remove snow, dirt, &c., from between its tracks. Chicago *v.* Chicago Union Traction Co., 199 Ill. 259. Index — *Illinois.*

Indiana. In Reinken *v.* Fuehring, 130 Ind. 382, it is held that *sweeping the street* is an exercise of the police power, and that it may be done at the cost of the abutting owner.

[2] Chicago, M. & St. P. R. Co. *v.* Janesville, 137 Wis. 7. Index — *Sewers and Drains.*

In *Colorado,* the *construction of sewers* is regarded as an exercise of the police power, and it is held that a special assessment in proportion to area may be imposed for the construction thereof. Keese *v.* Denver, 10 Colo. 112; Pueblo *v.* Robinson, 12 Colo. 593; Wolff *v.* Denver, 20 Colo. App. 135.

[3] Although the subject of special assessments has been exhaustively re-

.. A local assessment upon property immediately and specially ıefited by a local improvement of a street, although resting for its ımdation upon the taxing power, is distinguishable in many re- :cts from a tax levied for the general purposes of the State or : general purposes of the municipality.[1]

The soundness or reasonableness of this proposition is recognized by the legislation of Parliament, which has constantly distinguished between taxes for the benefit of the whole kingdom and those laid for the improvement of a particular district.[2] It is also recognized by the legislation of perhaps every State in the Union.[3] Hence, as is elsewhere shown, a statutable exemption of designated property from "taxation" does not include an exemption from local assessments.[4] Hence, also, as we have already seen, provisions in State Constitutions concerning equality of "taxation" are generally, although not invariably, held not to apply by their intrinsic force to local assessments.[5]

sidered by the courts since previous ions, the text of this section has ı but slightly modified to meet the lt of recent decisions. This sec-, as it appeared in previous edi- s, is cited and quoted in the ion of Mr. Justice Harlan, in wood *v.* Baker, 172 U. S. 269, 288.

Rolph *v.* Fargo, 7 N. Dak. 640, citing text; Arnold *v.* Knoxville, Tenn. 195, 205, quoting text.

Boston Seamen's Fr. Soc. *v.* Bos- 116 Mass. 181; *per Devens*, J. ord Union Poor Guard *v.* Bedford :. Com'rs, 7 Exch. 777; Viner's , "Sewers"; Comyn's Dig., "Sew-

That local assessments while : by virtue of the taxing power are "taxes" as that word is generally in constitutions, charters, and rev- statutes, see McGehee *v.* Mathiss, rk. 40; Sanders *v.* Brown, 65 Ark. People *v.* Lynch, 51 Cal. 15; Edger- ». Green Cove Springs, 19 Fla. 140; den *v.* Atlanta, 70 Ga. 817; Wright icago, 46 Ill. 44; Palmer *v.* Strumpf, Ind. 329; Hines *v.* Leavenworth, an. 186; Lexington *v.* McQuillan's s, 9 Dana (Ky.), 513; Zable *v.* hans' Home, 92 Ky. 89; Holzhauer lewport, 94 Ky. 396, 407; Gosnell Louisville, 104 Ky. 201; Louisville McNaughten (Ky.), 44 S. W. Rep. ; Crowley *v.* Copley, 2 La. An. 329; Yeatman *v.* Crandell, 11 La. An. 229; Merrick *v.* Amherst, 12 Allen (Mass.), 500; Wright *v.* Boston, 9 Cush. (Mass.) 233, 241; Boston Seamen's Fr. Soc. *v.* Boston, 116 Mass. 181; Motz *v.* Detroit, 18 Mich. 495; Hoyt *v.* East Saginaw, 19 Mich. 39; Williams *v.* Cammack, 27 Miss. 209; Lockwood *v.* St. Louis, 24 Mo. 20; Garrett *v.* St. Louis, 25 Mo. 505; Egyptian Levee Co. *v.* Hardin, 27 Mo. 495, 497; Uhrig *v.* St. Louis, 44 Mo. 458; Tidewater Co. *v.* Coster, 18 N. J. Eq. 518; Wilmington *v.* Yopp, 71 N. Car. 76; Maloy *v.* Marietta, 11 Ohio St. 636; Jones *v.* Holzapfel, 11 Okla. 405; King *v.* Portland, 2 Oreg. 146; Ladd *v.* Gambell, 35 Oreg. 393; Greensburg *v.* Young, 53 Pa. 280; Roundtree *v.* Galveston, 42 Tex. 613, 626; Austin *v.* Gulf, C. & S. F. R. Co., 45 Tex. 234; Allen *v.* Galveston, 51 Tex. 302; Lovenberg *v.* Galveston, 17 Tex. Civ. App. 162; Wey *v.* Salt Lake City (Utah), 101 Pac. Rep. 381; Richmond & A. R. Co *v.* Lynchburg, 81 Va. 473; Norfolk *v.* Ellis, 26 Gratt. (Va.) 224; *ante*, §§ 1372 *et seq.*, 1430, and *post*, §§ 1444 *et seq.*

[3] *Ante*, § 1052, and note; §§ 1430, 1431.

[4] *Post*, § 1444, and cases cited.

[5] *Ante*, §§ 1432, 1433; Arnold *v.* Knoxville, 115 Tenn. 195, 205, quoting text.

2. A local assessment or tax upon the property benefited by a local improvement may be authorized by the legislature.[1]

Where the Constitution of a State treats local assessments as taxes, and includes them in its provisions as to the manner in which taxes shall be laid, its requirements in that behalf must, of course, be observed.[2]

Where there is no special constitutional restriction, the expense of the local improvement may be authorized by the legislature to be apportioned on some other basis than that of value of the property within the taxation district.

3. Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, is the equitable and just foundation upon which local assessments rest;[3] and to the extent of special benefits it is ever-

[1] Nugent *v.* Jackson, 72 Miss. 1040, 1056, citing text; Arnold *v.* Knoxville, 115 Tenn. 195, 221, citing text. *South Carolina* appears to be the only State in which the legislative power to impose a special assessment founded upon benefits is denied. See *ante*, § 1431.

[2] *Illinois.* In Chicago *v.* Larned, 34 Ill. 203, it was held that special assessments were subject to the rule of equality and uniformity prescribed by the then Constitution, and that an assessment imposed in proportion to the frontage of the property abutting on the improvement violated that principle and could not be sustained. But by the Constitution of 1870 it was expressly provided that local improvements might be made by cities, &c., "by special assessment or special taxation or contiguous property or otherwise." Const. 1870, art. ix. § 9. Under this constitutional provision assessments by frontage are valid, but the constitutional requirement of equality and uniformity still applies to special assessments to the extent that they must be imposed upon a uniform rule. Thus, some property cannot be assessed for an improvement in proportion to benefit and other property in proportion to frontage. Kuehner *v.* Freeport, 143 Ill. 92; Davis *v.* Litchfield, 145 Ill. 313; Ware *v.* Jerseyville, 158 Ill. 234; *supra*, § 1439.

Colorado. Following the earlier decisions of the Illinois courts, it was at first held that the constitutional requirement of uniformity in taxation prohibited special assessments of property according to benefits. Palm[illegible] *v.* Way, 6 Colo. 106; Wilson *v.* Chilco[illegible] 12 Colo. 600; *In re* House Resolution[illegible] 15 Colo. 598. But upon reconsideration of the case, these decisions were overruled, and it was held that the constitutional requirement did not apply to special assessments. Denver [illegible] Knowles, 17 Colo. 204.

Tennessee. In McBean *v.* Chandler, [illegible] Heisk. (Tenn.) 349, it was held that under the constitutional requirement of equality and uniformity of taxation, abutting property could not be specially assessed, but this decision was overruled in Arnold *v.* Knoxville, 115 Tenn. 195, in which it was held that the constitutional provision did not apply to special assessments.

[3] Baltimore *v.* Johns Hopkins Hospital, 56 Md. 1; McMillan *v.* Butte, 30 Mont. 220, 225, quoting text; Hanscom *v.* Omaha, 11 Neb. 37; C[illegible] *v.* Omaha, 42 Neb. 120; Smith *v.* Omaha, 49 Neb. 883; Barnes *v.* Dyer, 56 Vt. [illegible] citing text; Chicago, M. & St. P. [illegible] Co. *v.* Milwaukee, 89 Wis. 506, [illegible] citing text; Oshkosh City R. Co. [illegible] Winnebago County, 89 Wis. 435, [illegible] citing text. But it must always be kept in mind that what is just or equitable or reasonable does not mean or limit the *power* of the legislature. The proposition of the text coincides with the conclusion reached by Mr. Hare, after a very full review of the course of American decisions upon the subject. 1 Hare, Am. Const. Law, 286, 315.

where admitted that the legislature may authorize local taxes or assessments to be made.[1]

4. When not restrained by the Constitution of the particular State, the legislature has a discretion, commensurate with the broad domain of legislative power, in making provisions for ascertaining what property is specially benefited and how the benefits shall be apportioned.[2]

This proposition, as stated, is nowhere denied; but the adjudged cases do not agree upon the extent of legislative power. The courts which have followed the doctrine of the leading case in New York[3] have asserted that the authority of the legislature in this regard is quite without limits; but the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan, and Pennsylvania, is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it *legally impossible* that the bur-

[1] Iowa Pipe & Tile Co. *v.* Callanan, 125 Iowa, 358, 363, quoting text. In *South Carolina*, the power of the legislature to impose or authorize local taxes or special assessments is denied by the Courts. See *ante*, § 1431.

[2] Iowa Pipe & Tile Co. *v.* Callanan, 125 Iowa, 358, 363, quoting text; Newman *v.* Emporia, 41 Kan. 583, 589, quoting text; McMillan *v.* Butte, 30 Mont. 220, 225, quoting text; Delaware & H. Canal Co. *v.* Buffalo, 39 N. Y. App. Div. 333, 345, quoting text; Ladd *v.* Gambell, 35 Oreg. 393, 397, citing text; King *v.* Portland, 38 Oreg. 402, 420, citing text.

[3] People *v.* Brooklyn, 4 N. Y. 419; *ante*, §§ 1052, 1432. See cases from the States named, and others referred to in the notes to §§ 1436, 1437. If the reader will compare the opinion of Chief Justice *Gibson* in Kirby *v.* Shaw, 19 Pa. St. 258, with that of Chief Justice *Agnew* in Washington Avenue, *Re*, 69 Pa. 352, and in Seely *v.* Pittsburgh, 82 Pa. 360, referred to *infra*, he will discover how widely they differ (although the actual judgments may not conflict) concerning the amplitude of legislative power in respect of taxes and impositions. In the case of Guest *v.* Brooklyn, 69 N. Y. 506, *Church*, C. J., not denying the power of the legislature to authorize local assessment against the owner's consent, condemns the system, as authorized and practised in New York and Brooklyn, as "unjust and oppressive, unsound in principle, and vicious in practice. The right to make a public street is based upon public necessity, and the public should pay for it. To force an expensive improvement [against the consent of the owners, or a majority of them] upon a few property owners against their consent, and compel them to pay the entire expense, under the delusive pretence of a corresponding *specific* benefit conferred upon their property, is a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty. Besides its manifest injustice, it deprives the citizen practically of the principal protection [aside from constitutional restraints] against unjust taxation, viz., the responsibility of the representative for his acts to his constituents. As respects general taxation where all are equally affected, this operates, but it has no beneficial application in preventing local taxation for public improvements. The majority are never backward in consenting to, or even demanding, improvements which they may enjoy without expense to themselves."

den can be apportioned with proximate equality are a trary exactions and not a legitimate exercise of legisla authority or of the taxing power.[1]

5. The assessments may be made upon all the property *speci* benefited by the particular improvement according to the exc tional benefit each lot or parcel of property *actually and separa* receives.[2]

This is, perhaps, the method most generally adopted the legislation in this country, and it is the one which, in author's judgment, is right in principle and the most just its practical workings.

6. Where the property is urban, and has been platted into bloc with lots of equal depth which abut the local improvement which the assessment is made, and there are no special const tional restrictions in the way, and nothing in the nature and circu stances of the particular case to make an assessment in proport to the *frontage* of the lots upon the improvement work mani injustice, it is generally, but not always, regarded as within competency of the legislature to provide that it may be so made

As to *sidewalks*, this is scarcely disputed or open to pute. As to grading, paving, and sewers, the basis of fr age, where sustained, is regarded as a convenient, practica and in most cases in the long run a just method of ascert ing the benefits severally received, since the benefits ac and probable to the abutters are generally proportione the length of their respective fronts; and hence this rule a rule of apportionment, is one which, on the condit above named, the legislature may, in its discretion, prescri

7. Under the same conditions and restrictions, the legisla may authorize the assessment upon the lots benefited, in pro tion to their *superficial area*.[4]

But if other than abutting lots are assessed in this m and especially if the property thus assessed cannot as of r

[1] Iowa Pipe & Tile Co. *v.* Callanan, 125 Iowa, 358, 364, quoting text; Newman *v.* Emporia, 41 Kan. 583, 589, quoting text; Chicago, M. & St. P. R. Co. *v.* Milwaukee, 89 Wis. 506, 515, citing text.

[2] Delaware & H. Canal Co. *v.* Buffalo, 39 N. Y. App. Div. 333, 345, citing text.

[3] Speer *v.* Athens, 85 Ga. 49, 65, citing text; Weed *v.* Boston, 172 Mass. 28, 32, citing text; Thomas *v.* Gain, 35 Mich. 156, *infra;* Washin Avenue, *Re*, 69 Pa. St. 352, *infra; s* § 1438, note, where the decisio *Pennsylvania* and elsewhere are ref to; *supra*, §§ 1434, 1435, where course of decision in *New Jersey*, the present doctrine therein, are st *ante*, § 1442, and note.

[4] Ahern *v.* Texarkana Imp. Dis Ark. 68, 77, citing text; McMill Butte, 30 Mont. 220, 225, citing

participate in the benefit and use of the local improvement, and the extent of the assessment district is such as to include lots directly and largely benefited with those only indirectly and slightly benefited, then, since, on this basis, all lots are to be assessed by the same rule, viz., that of superficial area, this mode of assessment ought not, under such circumstances, to be sustained.[1]

8. Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvement, thus for itself conclusively determining, not only that such property is specially benefited, but that it *is* thus benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed.[2] Almost all of the earlier cases asserted that the legislative discretion in the apportionment of public burdens extended thus far, and such legislation is still upheld in most of the States. But since the period when express provisions have been made in many of the State Constitutions, requiring *uniformity and equality of taxation*, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that *special benefits actually received* by each parcel of contributing property, was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive, and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must upon principles of equity and equality be regarded as the just and reasonable doctrine, that the cost of a local improvement ought to be assessed upon particular property only to the extent that it is specially and peculiarly benfited; and since the excess beyond that is a benefit to the municipality at large, it ought to be borne by the general treasury.[3]

[1] Thomas *v.* Gain, 35 Mich. 156, *infra;* Seely *v.* Pittsburgh, 82 Pa. St. 360, *infra;* Preston *v.* Rudd, 84 Ky. 150.

[2] *Supra*, §§ 1433–1439, and notes.

[3] Seely *v.* Pittsburgh, 82 Pa. 360, Washington Avenue Case, 69 Pa. 352, in both of which Judge *Agnew* discusses the subject and vindicates the two propositions laid down in the opinion of *Sharswood*, J., in Hammett *v.* Philadelphia, 65 Pa. St. 146: "Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of these benefits. They [local assessments] cannot be imposed when the improvement is either expressed, or appears to be for the general benefit."

9. It has now been definitely decided by the Supreme Cour of the United States that the Federal courts ought not to inter

Hammett's Case followed. Appeal of Protestant Orphan Asylum, 111 Pa. 135; Wistar *v.* Philadelphia, 111 Pa. 604; Dallas *v.* Ellison, 10 Tex. Civ. App. 28, quoting text.

In *Hammett's Case*, on the principle that *repaving* a street is a general benefit, it was decided that the expense could not be met by a local assessment, although it is admitted that the expense of the original paving may be thus defrayed. This particular application of the principle is of doubtful correctness, and it has been denied to be sound in *Missouri*. See *infra*, § 1447, note. In Wistar *v.* Philadelphia, 80 Pa. St. 505, the exact point decided was that under power to the city to "prescribe by ordinance that paving of streets and of footways should be done at the expense of the owners of the ground," the city could not tear up a pavement which was good, had been built at the abutter's expense only three years before, and needed no repair, and require it to be replaced at the owner's expense with a new and costly one [granite curb, &c.], the right to do this not being deemed sufficiently explicit; and the case was distinguished from one of *repair*. The point decided in Washington Avenue, *Re*, 69 Pa. 352, is stated *ante*, § 1438, note. Seely *v.* Pittsburgh, 82 Pa. 360, *infra*, was similar to the case of Washington Avenue; and it was held that the cost of paving Penn Avenue in Pittsburgh, which extended along platted lots and also beyond and along suburban and unplatted property, could not be authorized by the legislature to be assessed by the *frontage* rule. After stating the cost of the improvement to have been $350,000 and the character of the avenue, *Agnew*, C.J., says, with emphasis: "This blending of city and country, of city lots and farm lands, of the residences of the living and the graves of the dead [St. Mary's Cemetery], constitute a group so motley and discordant, a series so wanting in similitude and uniformity, that the frontage or per-foot rule cannot be applied to it. It is so plainly, palpably, rankly, and ruinously unjust, it must be pronounced no proper or lawful mode of special taxation, but an injustice so gross as to be void against the rights of property as protected b the Bill of Rights" (the indefeasib right to acquire, possess, and prote *property*, &c. See opinion in Washin ton Avenue, *Re*, 69 Pa. 352, the enumeration of these rights). statute authorizing the assessment property in the rural district used farm land, by the foot-front rule, grading or other local improveme upon a public avenue upon wh it abuts, held unconstitutional. Scr ton *v.* Pennsylvania Coal Co., 105 445; following Washington Ave. Ca 69 Pa. St. 352; Seely *v.* Pittsbur 82 Pa. 360; Craig *v.* Philadelphia, Pa. 265; Philadelphia *v.* Rule, 93 15; *ante*, § 1395.

The judgment in the Seely Case, view of the facts, must be admitte be right by all except those who ascr a practical omnipotence to the legis tive power in such matters, — a vi which overlooks the substantial d ference between general taxation a the imposing of a special burden up particular property, irrespective of p litical or municipal districts. This di tinction is clearly stated by *Beasle* C. J., in State *v.* Newark, 37 N. J. L 415; *supra*, §§ 1434, 1435, and note In this case the city of Newark ha been authorized by the legislature t repave the roadbed of any of it streets, and to assess two-thirds of th cost on the abutting property, and th remaining third on the public at larg It improved a street accordingly. N point was made that the work w *repaving*, instead of original pavin There was no special provision of t Constitution applicable. The Chi Justice says: "It thus appears that t statute in question [city charter] unde takes to fix at the mere will of the legi lature the ratio of the expense to be p upon the owner of the property alo the line of the improvement; and t question is, whether such an act is valid The Court of Errors and Appe decided it was not. The basis of t judgment, affirming the principle Tidewater Co. *v.* Coster, 18 N. J. E 518, was "that cost of a public i provement might be imposed on pa ticularized property to the extent which such property was exceptional benefited, and that any special burd

fere, under the provisions of the Fourteenth Amendment, when a special assessment is imposed according to the settled laws of the State applicable to all persons in like circumstances and conditions;

beyond that was illegal." This is the only theory, it is maintained, upon which local assessments can be sustained; and the judgment of the court necessarily implied that the amount or proportion of special benefits could not be arbitrarily determined by a legislative act and charged upon the abutters, but would have to be ascertained and apportioned in some other mode, as by an estimate of such benefits, to be separately made by a proper board of officers. In the subsequent case of the New Brunswick Rubber Co. v. New Brunswick Street Com'rs, 38 N. J. L. 190, the Supreme Court held the very strict view that a sewer act which authorized the Commissioners of Streets and Sewers, upon the completion of any sewer, "to ascertain the whole cost thereof and the size of all the lots drained thereby, and to fix the amount to be paid for each in such *proportions as may, in the judgment of the commissioners, be just and equitable,*" was unconstitutional, because it failed specifically to determine the mode of distributing the burden; that is, as we understand it, since no assessments can be made except for special benefits, the act ought distinctly to require the assessments to be made on this basis. But the act did not exclude this basis, and it would probably be held elsewhere as sufficient to support an assessment which was in fact made upon the right principle. See Thomas v. Gain, 35 Mich. 156, *infra*. Neither absolute certainty nor exact equality is practicable in such matters, and cannot be judicially exacted. A similar provision to that condemned in *New Jersey* may be found in many of the States. See *supra*, § 1435.

Thus the General Municipal Incorporation Act of *Indiana*, in respect of sewers, drains, and cisterns, provides that the assessment of the cost thereof shall be upon the owners of the property benefited thereby, "in such equitable proportion as the common council may deem just," not to exceed ten per cent of the value of the property. First Presb. Church v. Ft. Wayne, 36 Ind. 338.

In *Vermont* a statute empowering a city to make local assessments on the property fronting upon sidewalks "for so much of the expense thereof as *they shall deem just and equitable*" was held to be unconstitutional, because it did not fix a certain standard of assessment, the court, *per. Veasy*, J., saying, "The words *just and equitable* do not import with reasonable certainty a limitation to particular benefits to property benefited." Barnes v. Dyer, 56 Vt. 469.

In *Michigan* the court was of opinion that a sewer assessment on the *basis of frontage* could not as a *matter of law* be held to be illegal because not laid in proportion to actual or probable benefits. Warren v. Grand Haven, 30 Mich. 24. The subject of such assessments was elaborately discussed by *Cooley*, C. J., in the subsequent case of Thomas v. Gain, 35 Mich. 155, in which, while the court did not deny that with proper provisions a sewer assessment might be authorized to be made upon the basis of *superficial area*, yet, as in the case before it, this plan was made to apply to all property (irrespective of its character and the amount of benefits actually received) which the city council might *resolve* had been benefited, it was considered to be unconstitutional, because it was legally impossible that it could "apportion the burden justly, or with such approximate justice as is usually attainable in tax cases, and that it must fall to the ground like any other merely arbitrary action which is supported by no principle." See also New York & N. H. R. R. Co. v. New Haven (what constitutes special benefits), 42 Conn. 279; State v. Ramsey County Dist. Ct., 33 Minn. 295, holding also that grading, filling, &c., in several streets may be so connected as to be properly prosecuted as one improvement for which one assessment may be made. Mode of making *sewer assessments* further discussed, *post*, §§ 1458-1463.

In Rolph v. Fargo, 7 N. Dak. 640, the court held that the legislature, in assessing abutting property on the front foot basis is *not* limited to the increase in value of the property occasioned by the improvement. Followed in Roberts v. First Nat. Bank, 8 N. Dak. 504.

that the legislature of the State may, without violating the provisions of the Fourteenth Amendment, create or authorize the creation of a special taxing district and charge the cost of a local improvement, in whole or in part, upon the property in such district, according to valuation, superficial area or frontage; that the property within the district may be legislatively declared to be benefited to the extent of the cost of the improvement; that the whole expense of improving a street or highway, constructing a sewer therein, or making any other improvement, may be assessed by a municipality pursuant to statutory authority upon the lands abutting upon the improvement in proportion to frontage, or in proportion to area, without providing for a judicial inquiry into the value of such lands and the benefits actually accruing from the improvement; and that a special assessment so imposed will not violate the provisions of the Fourteenth Amendment to the Federal Constitution, unless the circumstances, as in the case of Norwood *v.* Baker,[1] clearly establish an abuse of the law, or an act of confiscation, and show the assessment is not a valid exercise of the taxing power.

§ 1444 (777). **Exemption from "Taxation" does not include Local Assessments.** — Although an "assessment" is in the nature of a tax, and is authorized by, or is a branch of, the taxing power, yet a general statute exempting certain property — as, for example, churches — from "*taxation* by any law of the State" does not exempt it from liability for a *special assessment.*[2] So, the exemption of

[1] Norwood *v.* Baker, 172 U. S. 269.

[2] Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190; Ford *v.* Delta & P. L. Co., 164 U. S. 662; Bridgeport *v.* New York & N. H. R. Co., 36 Conn. 255; Altanta *v.* First Pres. Church, 86 Ga. 730, 737, citing text; McLean County *v.* Bloomington, 106 Ill. 209, 213; Adams County *v.* Quincy, 130 Ill. 566, 578, quoting text; Bloomington Cemetery Assoc. *v.* People, 139 Ill. 16; Chicago *v.* Chicago, 207 Ill. 37, 43; Farwell *v.* Des Moines Brick Mfg. Co., 97 Iowa, 286, 298, citing text; Allen *v.* Davenport, 107 Iowa, 90, 103; Broadway Bapt. Church *v.* McAtee, 8 Bush (Ky.), 508; Louisville *v.* McNaughten (Ky.), 44 S. W. Rep. 380; Gould *v.* Baltimore, 59 Md. 378, 380; Boston Seamen's Fr. Soc. *v.* Boston, 116 Mass. 181; Boston Asylum *v.* Boston St. Com'rs, 180 Mass. 485; Lake Shore & M. S. R. Co. *v.* Grand Rapids, 102 Mich. 374, 381, quoting text; State *v.* Macalester College, 87 Minn. 165, 91 N. W. Rep. 484; Sheehan *v.* Good Samaritan Hospital, 50 Mo. 155; Kansas City Exposition Driving Park *v.* Kansas City, 174 Mo. 425, 443; Lincoln St. R. Co. *v.* Lincoln, 61 Neb. 109; New Jersey R. & T. Co. *v.* Newark, 27 N. J. L. 185; Bleecker *v.* Ballou, 3 Wend. (N. Y.) 263; Sharp *v.* Speir, 4 Hill (N. Y.), 76, 82; Sharp *v.* Johnson, 4 Hill (N. Y.), 92; Brick Presb. Church *v.* New York, 5 Cow. (N. Y.) 538; New York *v.* Cashman, 10 Johns. (N. Y.) 96; *Re* Nassau Street, 11 Johns. (N. Y.) 77; People *v.* Brooklyn, 4 N. Y. 419, 432, and cases reviewed; Second Avenue M. E. Church, *In re*, 66 N. Y. 395; Roosevelt Hosp. *v.* New York, 84 N. Y. 108; Lima *v.* Lima Cemetery Assoc., 42 Ohio St. 128;

y of a *cemetery company* from "any tax or public imposition er," does not exempt it from a paving tax for improving a n front of the property, the court (in an opinion elaborately ing the subject) holding that the intent of the legislature was ıpt the property from all taxes or impositions for the *purpose ıue*, but not to exonerate it from charges inseparably incident ɔcation with respect to other property.[1] And the same view ɜn taken in a variety of cases, mostly referring to *churches, ınd charitable institutions*.[2] Where the charter of a chari-

ɪreet, 165 Pa. 475; New Castle hurch Graveyard *v.* Jackson, 86; Beltzhoover Borough *v.* ıver's Heirs, 173 Pa. 213; ɔhia *v.* Union Burial Ground 3 Pa. 533; Matter of College .. I. 474; Beals *v.* Providence Co., 11 R. I. 381; Winona & . Co. *v.* Watertown, 1 S. Dak. ɪosh City R. Co. *v.* Winnebago 89 Wis. 435, 438; citing text, Milwaukee, 92 Wis. 352; Bedion Poor Guardians *v.* Bedford, om'rs, 7 Exch. 777; Queen m Bor., L. R. 3 Q. B. C. 474. stitutional provision which ; the duty of the legislature to the power of taxation and ɜnt of municipal corporations to prevent abuses in assessnd taxation" does not destroy ver of the legislature to exproperty from liability for ssessments. Milwaukee Elect. L. Co. *v.* Milwaukee, 95 Wis.

timore *v.* Green Mt. Cem. Md. 517. In thus holding, rt does not proceed upon the that it was an *assessment*, and *x*, which was sought to be colrom the cemetery company; ted it was a *tax*, but held it was ı a tax as was meant by the ex- statute, which is the sound the subject. The Chief Justice s: "The distinction, if any, ı a '*tax*' and an '*assessment*' is y palpable. The meaning of ds is the same in our laws." *Grand*, C. J., *Ib.* 535. See also . Baltimore, 4 Gill (Md.), 394. l *v.* Atchison, 9 Kan. App. 251, held that a special assessment roving a street was a tax within aning of the provision of the ution *declaring homesteads subtaxation*, and that it was not intended to exempt homesteads from the payment of special assessments.

As to the exemption of cemeteries, see St. Joseph *v.* O'Donoghue, 31 Mo. 345; Olive Cemetery *v.* Philadelphia, 93 Pa. 129; Philadelphia *v.* Union Burial Ground Soc., 178 Pa. 533; New Castle Stone Church Graveyard *v.* Jackson, 172 Pa. 86; Beltzhoover Borough *v.* Beltzhoover Heirs, 173 Pa. 213; McBean *v.* Chandler, 9 Heisk. (Tenn.) 349. In *New York, cemeteries* are by statute exempt from general taxation and from assessments for local improvements. Matter of New York City, 192 N. Y. 459, 465, modifying, 120 N. Y. App. Div. 201; Buffalo Cemetery Assoc. *v.* Buffalo, 118 N. Y. 61; People *v.* Pratt, 129 N. Y. 68; Oakland Cemetery *v.* Yonkers, 63 N. Y. App. Div. 448, aff'd 182 N. Y. 564; Matter of New York City (Morris Ave.), 118 N. Y. App. Div. 117; Matter of White Plains Presb. Church, 112 N. Y. App. Div. 130. In *Kentucky*, it was held that a cemetery could not be subjected by judicial decree to sale to satisfy liens for adjacent street improvements. Louisville *v.* Nevin, 10 Bush (Ky.), 549.

[2] Pray *v.* Northern Liberties, 31 Pa. 69, followed in Greensburg *v.* Young, 53 Pa. 280; Northern Liberties *v.* St. John's Church, 13 Pa. 104, following Nassau St., *In re*, 11 Johns. 77, *supra*; s. p. Boston Seamen's Fr. Soc. *v.* Boston (assessment for widening and grading street), 116 Mass. 181, where the subject is well presented by *Devens*, J.; followed in Boston Asylum for Boys *v.* Charles, 180 Mass. 485; Lockwood *v.* St. Louis, 24 Mo. 20; Garrett *v.* St. Louis, 25 Mo. 505; Egyptian Lev. Co. *v.* Hardin, 27 Mo. 495. In the case of the St. Louis Pub. Schools *v.* St. Louis, 26 Mo. 468, following Lockwood *v.* St. Louis (local assessment on church property), 24 Mo. 20,

table institution provided that its property "shall not be subject to *taxes or assessments*," it was held by the Court of Errors and Ap-

it was held that the real estate of the board of *public* schools of a city (a distinct corporation) was liable to a local assessment for sewers, sidewalks, opening streets, &c.; but *quaere?* See Hartford *v.* West Middle Sch. Dist., 45 Conn. 462, where, under the charter of Hartford, all land specially benefited by a city improvement is liable to be assessed for the expense of such improvement. *Held*, that a piece of land owned by a school district, upon which its school-house stood, and which was used solely for school purposes, and of which no other use was contemplated in the future, was not so benefited that it could be assessed for the expense of a street laid out by the city near it. *Church property* held subject to assessment for local improvements though exempt from taxation. Ahern *v.* Texarkana Imp. Dist., 69 Ark. 68; Sewickley M. E. Church's Appeal, 165 Pa. 475.

The exemption of a charitable corporation by its charter from "taxation of every kind," does not exempt it from an assessment upon its land to pay for a street improvement in front of it. Sheehan *v.* Good Samaritan Hosp., 50 Mo. 155. See also Emery *v.* San Francisco Gas Co., 28 Cal. 345; Taylor *v.* Palmer, 31 Cal. 240; Brightman *v.* Kirner, 22 Wis. 54. Exemption of an institution "from all *taxation* by State, parish, or city" is not an exemption from sidewalk or street *assessments*. Lafayette *v.* Male Orphan Asylum, 4 La. An. 1.

So a railroad charter exempting the company (in consideration of the payment of a certain tax) from "any other or further *tax* or *imposition* upon it," does not exempt it from liability for an assessment upon houses and lots owned by it, and benefited by the opening and widening of a street; but the corporation cannot, for such a purpose, be assessed without reference to the special benefit conferred upon property owned by it, since such an assessment would be, in fact, a *tax*, from which it is exempt. State *v.* Newark, 27 N. J. L. 185. So an exemption from "*taxes, charges*, and *impositions*" does not exonerate a private corporation from assessments on its property for opening or paving streets on which it fronts. Paterson *v.* Soc. for E. U. Manuf., 24 N. J. L. 385, following Nassau St., *In re*, 11 Johns. 77. Further illustrations, see also Paine *v.* Spratley, 5 Kan. 525; Chicago *v.* Colby, 20 Ill. 614; Bridgeport *v.* New York & N. H. R. Co., 36 Conn. 255; Indianapolis, P. & C. R. Co. *v.* Ross, 47 Ind. 25; Marshall *v.* Vicksburg, 15 Wall. (U. S.) 146, as to "tax" and "wharfage charge." See, as to difference between "tax" and "assessment," and for views not coincident with those generally entertained, Chicago *v.* Larned, 34 Ill. 203 (1864); Ottawa *v.* Spencer, 40 Ill. 211; Burlington & Mo. R. R. Co. *v.* Spearman, 12 Iowa, 112; New York & N. H. R. Co. *v.* New Haven, 42 Conn. 279; McBean *v.* Chandler, 9 Heisk. 349; *ante*, §§ 1372, 1433, 1443, *post*, § 1445.

County court-house property held not liable to a sewer assessment made by a city. Worcester County *v.* Worcester, 116 Mass. 193. In Boston Asylum for Boys *v.* Charles, 180 Mass. 485, it was held that a statute which provided that a charitable institution might hold real estate and personal property "free from taxation" did not exempt its land from a special assessment for benefit by the widening and construction of a street. A statutory exemption from "all public taxes, rates, and assessments," does not exempt from a municipal assessment for a local improvement. The adjective "public" in the clause quoted applies to the noun "rates" and "assessments" as well as to the noun "taxes," and the use of it limits the meaning, and implies that there were, in the view of the framers of the statute, taxes, rates, and assessments other than those which it designates as public, and from which the plaintiff was not to be exempted. Buffalo Cemetery *v.* Buffalo, 46 N. Y. 503. To the same effect, Batterman *v.* New York City, 65 N. Y. App. Div. 57, where it is held that *water rates* assessed against cemetery property by a municipal corporation are not public assessments within the meaning of an exemption from "public taxes, rates, and assessments." Where a cemetery company was exempted from the payment "of any tax or public imposition

eals of New Jersey that these words were not synonymous, and hat they had the effect to exempt the property not only from rdinary taxes, public and municipal, but from an assessment for urbing and flagging a street on which the property abutted.[1]

§ 1445 (778). **Distinction between "Tax" and "Assessment" as sed in Constitutions and Statutes.** — But aside from the rule of trict construction which applies to exemptions from taxation, the ases cited in this and in the previous section will show that there s, in their ordinary use, a recognized *difference between the words 'tax" and "assessment,"* and that the one does not always, or sually, include the other.[2] Thus, a constitutional provision that taxation shall be equal and uniform throughout the State" does ot apply to local assessments upon private property to pay for local nprovements.[3] So, a provision of the Constitution of a State which

hatever," it was held that a paving x was not embraced in the exemption. ltimore *v.* Green Mt. Cemetery op., 7 Md. 517. Other cases hold at a statutory exemption from *asment and taxation* exempts from bility to special assessment. State St. Paul, 36 Minn. 529; Milwaukee ct. R. & L. Co. *v.* Milwaukee, 95 a. 42. An exemption from "any l all taxes or assessments, national municipal, or county," was held exempt an incorporated educational titution from special assessments local improvements as well as from eral taxes. District of Columbia Sisters of Visitation, 15 App. D. C. 0. A special assessment is a "civil position," and a college is exempt refrom under an exemption "from civil impositions, taxes, and rates." rvard College *v.* Boston, 104 Mass. 0. But compare Paterson *v.* Society r Establishing Useful Manufactures, N. J. L. 385.

[1] Protestant Foster Home Soc. *v.* ewark, 36 N. J. L. 478, reversing the dgment of the Supreme Court in me case, 35 N. J. L. 157, distinguishg Paterson *v.* Society for E. U. Manuf., N. J. L. 385, where the language was ll taxes, charges, and impositions der the authority of this State," also stinguishing State *v.* Newark, 27 J. L. 185, where the exempting clause the charter was "that no other or rther tax or imposition shall be vied or imposed on said company." e First Presb. Church *v.* Ft. Wayne, 36 Ind. 338, where, however, the exact language of the Constitution and the statute is not given. Gould *v.* Baltimore, 59 Md. 378.

Where church property is exempted by statute from general taxation, and where it is held that local assessments do not come within the exemption, and where the act authorizing local improvements provided that the same should not in any year exceed ten per cent of the property as assessed and valued on the tax duplicate for State, county, and city taxes, it was decided that, as church property could not be valued and assessed on the tax duplicate, it could not, although otherwise liable, be assessed for the construction of a sewer. First Presb. Church *v.* Ft. Wayne, 36 Ind. 338. See however, in *New York*, Second Avenue M. E. Church, *In re*, 66 N. Y. 395; Hebrew Benev. O. A. Soc., *In re*, 70 N. Y. 476; St Joseph's Asylum, *In re*, 69 N. Y. 353.

The *claim of exemption is personal* and cannot be invoked by the municipality on behalf of the taxpayer, but must be pleaded by the taxpayer himself. So held where the police jury of a county assessed and attempted to collect taxes in a town, notwithstanding exemption of property in the town therefrom, and the town brought suit to restrain the imposition and collection of the tax. Donaldsonville *v.* Ascension Parish Police Jury, 113 La. 16.

[2] Atlanta *v.* First Presb. Church, 86 Ga. 730, 737, citing text.

[3] New Orleans Draining Co., *In re*,

requires "the rule of taxation to be uniform" in connection with another provision, that "it shall be the duty of the legislature to provide for the organization of cities, and to restrict their power of taxation, assessment, &c., so as to prevent abuses in assessments and taxation," is construed not to apply to special assessments by municipal corporations, made by authority of the legislature, for local improvements.[1]

11 La. An. 338, where the subject is very fully examined. S. P. Surgi *v.* Snetchman (paving assessment), 11 La. An. 367; Yeatman *v.* Crandall (levee tax), 11 La. An. 229; *In re* Ford, 6 Lans. (N. Y.) 92; Taylor *v.* Boyd, 63 Tex. 533; Texas Trans. Co. *v.* Boyd, 67 Tex. 153; Cain *v.* Davie County Com'rs, 86 N. C. 8; Ladd *v.* Gambell, 35 Oreg. 393; Lovenberg *v.* Galveston, 17 Tex. Civ. App. 162; *supra*, §§ 1369, 1433, note, *et seq.*

[1] See to the same effect, Weeks *v.* Milwaukee, 10 Wis. 282 (street assessment); Lumsden *v.* Cross, 10 Wis. 282 (street assessment); State *v.* Portage, 12 Wis. 562 (street assessment); Bond *v.* Kenosha, 17 Wis. 284 (harbor tax or assessment); Farwell *v.* Des Moines Brick Mfg. Co., 97 Iowa, 286, 298; Rosetta Gravel P. & I. Co. *v.* Jollisaint, 51 La. An. 804, citing text; Shreveport *v.* Prescott, 51 La. An. 1895; Lake Shore & M. S. R. Co. *v.* Grand Rapids, 102 Mich. 374, 381, quoting text; Jones *v.* Holzapfel, 11 Okla. 405, 418, quoting text (sewer assessment); Kadderly *v.* Portland, 44 Oreg. 118; McMillan *v.* Tacoma, 26 Wash. 358; Seattle *v.* Whittlesey, 17 Wash. 292; Yates *v.* Milwaukee, 92 Wis. 352.

The Supreme Court of *Wisconsin* professes to follow the construction given by the Supreme Court of *Ohio* to similar provisions in the Constitution of that State. Hill *v.* Higdon, 5 Ohio St. 243; Reeves *v.* Wood County, *Ib.* 333. See observations of Judge *Cooley*, Const. Lim. 510, note. But the principle of uniformity is considered by the court to apply to ordinary municipal taxes. Weeks *v.* Milwaukee, 10 Wis. 242, *supra, per Paine*, J.; Dean *v.* Gleason, 16 Wis. 1–16. General result of the cases concerning the nature of local assessments, see *ante*, § 1444.

In Bond *v.* Kenosha, 17 Wis. 284, the Supreme Court of *Wisconsin* decided that the provision of the charter of the city of Kenosha, authorizing the council, for the purpose of constructing a harbor in the city, to levy a special tax on all lands within the city subject to taxation, *not including any improvements made thereon*, was in the nature of a special assessment for local improvements, and did not contravene any provision of the Constitution of the State. Hale *v.* Kenosha, 29 Wis. 599, distinguishing Bond *v.* Kenosha, 17 Wis. 284, *supra*; Weeks *v.* Milwaukee, 10 Wis. 242, following Hurford *v.* Omaha, 4 Neb. 336.

It is held in many States that local *assessments* are not within the meaning of the term *taxation* as usually employed in our Constitutions and statutes. Allen *v.* Galveston, 51 Tex. 302; Austin *v.* Gulf, Colo. & S. F. R. R. Co., 45 Tex. 234, 271; Roundtree *v.* Galveston, 42 Tex. 613; Taylor *v.* Boyd, 63 Tex. 533; Galveston *v.* Guaranty Trust Co., 107 Fed. Rep. 325; Atchison, T. & S. F. R. Co. *v.* Peterson, 5 Kan. App. 103; Higgins *v.* Bordages, 88 Tex. 458. See also Cooper Hospital *v.* Camden, 68 N. J. L. 208; Paine *v.* Spratley, 5 Kan. 525; Leavenworth *v.* Laing, 6 Kan. 274; Burroughs, Tax., p. 435; Cooley on Taxation, p. 446, and cases cited, n. 2; *supra*, §§ 1432, 1433; *infra*, § 1386; 1 Desty, Taxation, § 4, pp. 5–7, and cases. "A *special assessment* differs from *special taxation* mainly in this, that the assessment cannot, in any case or under any circumstances, exceed the benefits the property will derive from the improvement, and the owner of the property assessed has the right, if dissatisfied with the assessment, to have this question passed upon by a jury, and if not content with their finding, to have it reviewed in an appellate tribunal, whereas, in cases of special taxation, the jury have nothing to do with the amount which is by ordinance assessed upon the contiguous property." *Per Mulkey*, C. J., Sterling *v.* Galt, 117 Ill. 11. *Ante*, § 1439 as to *Constitutional* provision in *Illinois* on this subject.

The words "any tax" in statutory

1446. Liability of Public and Municipal Property to Special ssment for Local Improvements. — The principle which makes erty of the State or of any of its political or municipal subdi- ns non-taxable under general statutory provisions[1] and in the nce of a positive direction therefor, according to the great nt of authority, also precludes the imposition of a special as- ent for a street or other local improvement upon such property, s there is positive legislative authority therefor.[2] But property

ion for the collection of taxes tion held to include special as- ents, where the phrase occurred tatute in which the word "tax" lefined as "any tax, special as- ents, or costs." Omaha *v.* Hodg- 70 Neb. 229. See also Wilson urn, 27 Neb. 435.

nte, § 1396.

oyle *v.* Austin, 47 Cal. 353; *v.* Kilburn, 81 Conn. 9.

e property. State insane asylum. ore County *v.* Maryland Hos- or Insane, 66 Md. 127.

ois. Although, as we shall see, roperty held by municipal cor- ons of this State is subject to an nent under general statutes for xpense of local improvements, ty of the State cannot be assessed or in the absence of express ory authority. In this State a ding to confirm a special tax public improvement is a suit at although it is *in rem;* and the cannot be made a party thereto nt its consent. *In re* Mt. Vernon, l. 359.

a. In this State also municipal rty may be subjected to special ment under general statutory ions, but the property of the used for governmental purposes t be subjected thereto without ve legislative authority therefor. County Sav. Bank *v.* State, 69 24 (capitol square); Ottumwa & Const. Co. *v.* Ainley, 109 Iowa, 90 (lands under water). But the ture may expressly authorize owned by the State to be specially ed for a local improvement. n *v.* Rochester, 67 N. Y. 528; Deventer *v.* Long Island City, 139 . 133; People *v.* Reis, 109 N. Y. Div. 748, 753.

nty property. Court houses and Edwards *v.* Ocala, 58 Fla. 217; 50 lep. 421; Worcester County *v.* ester, 116 Mass. 193; Big Rapids *v.* Mecosta County, 99 Mich. 351; St. Louis *v.* Brown, 155 Mo. 545; Harris County *v.* Boyd, 70 Tex. 237.

County squares. Lagrange *v.* Troup County, 132 Ga. 384; Lowe *v.* Howard County, 94 Ind. 553; Clinton *v.* Henry County, 115 Mo. 557. *County poor farm.* Stiewel *v.* Fencing Dist., 71 Ark. 17, 21.

School property. School houses. Board of Improvements *v.* School Dist., 56 Ark. 354; Witter *v.* Mission School Dist., 121 Cal. 350; Sutton *v.* Montpelier, 28 Ind. App. 315; Toledo *v.* Toledo Board of Education, 48 Ohio St. 83; Pittsburg *v.* Sterrett Subdistrict School, 204 Pa. 635. In *Connecticut* it was held that a *school house and lot,* used solely for school purposes, was not so benefited by a street improvement near the same that it could be assessed therefor, as the value of the property was not increased thereby for school purposes. Hartford *v.* West Middle Dist., 45 Conn. 462. It was also held that property acquired by the State by foreclosure of a mortgage to secure a loan from the school fund was not subject to taxation under general authority. State *v.* Hartford, 50 Conn. 89. *Congressional township lands* reserved to the State by act of Congress for school purposes are not subject to taxation. Chicago *v.* People, 80 Ill. 384; People *v.* Trustees of Schools, 118 Ill. 52; Edgerton *v.* Huntington School Township, 126 Ind. 261.

City property. Greene *v.* Hotaling, 44 N. J. L. 347, aff'd 46 N. J. L. 207. *Public parks.* Herman *v.* Omaha, 75 Neb. 489, State *v.* Several Parcels of Land, 79 Neb. 638. In *New York* the general custom is not to assess *public streets* for local improvements, and an assessment of a street will not be sustained in the absence of special legislative authority therefor. Schenectady *v.* Union College, 144 N. Y. 241; Smith *v.* Buffalo, 159 N. Y. 427,

of a municipal corporation is not excepted by implication from the operation of laws authorizing the imposition of special assessments when it is not held for public use.[1] In some States the *implied exception* is not recognized, and a statute authorizing the imposition of special assessments upon property abutting on an improvement or benefited thereby is held to authorize the imposition of special assessments upon the property of municipalities and other civil divisions of the State.[2]

§ 1447 (780). **Special Assessments; Special and General Benefits; Repaving.** — Charter and statutory provisions are frequently to be found limiting and restricting the power of the municipality

432. This is the rule *although the fee of the street* is not vested in the municipality, but is *held by an individual.* Schenectady *v.* Union College, 144 N. Y. 241. *Missouri.* The constitutional provision that "the property real and personal of the State, counties, and other municipal corporations and cemeteries shall be exempt from taxation" does not relieve property held by a county or municipality, *e. g.*, a public square, from liability to assessments for street improvements. But such liability will not arise in the absence of positive statutory provision therefor. Clinton *v.* Henry County, 115 Mo. 557, 570 (distinguishing St. Louis Public Schools *v.* St. Louis, 26 Mo. 468); St. Louis *v.* Brown, 155 Mo. 545, 560; Barber Asphalt Pav. Co. *v.* St. Joseph, 183 Mo. 451. But by statute, in some instances at least, cities are subject to liability for special assessments for improvements in front of public property. See Barber Asphalt Pav. Co. *v.* St. Joseph, 183 Mo. 451.

[1] Ft. Smith School Dist. *v.* Board of Improvement, 65 Ark. 343; San Diego *v.* Linda Vista Irr. Dist., 108 Cal. 189; Witter *v.* Mission School Dist., 121 Cal. 350; City Street Improvement Co. *v.* University of California, 153 Cal. 776; Tulare Irr. Dist. *v.* Collins, 154 Cal. 440, 443. Index — *Property.*

[2] Sioux City *v.* Sioux City Indep. School Dist., 55 Iowa, 150 (school property); Edwards & W Const. Co. *v.* Jasper County, 117 Iowa, 365 (public square owned by county); Franklin County *v.* Ottawa, 49 Kan. 747 (county court house square); Whitaker *v.* Deadwood, 23 S. Dak. 538; 122 N. W. Rep. 590 (county, city, and school property); *In re* Howard Ave. North, 44 Wash. 62 (school property).

Illinois. In this State it is held that exemption from taxation does not exempt from special assessment; that general language authorizing the assessment of property benefited by a local improvement includes the property of counties, cities, and other municipal bodies as well as private property; that exemptions must specifically appear even in the case of property held for public purposes; that special assessments against public property are not to be enforced by sale, but by mandamus to compel payment from the treasury, and hence the objection that a special assessment permits the sale of public property on execution is obviated. Higgins *v.* Chicago, 18 Ill. 276; Cook County *v.* Chicago, 103 Ill. 646; McLean County *v.* Bloomington, 106 Ill. 209, 214; Colfax Highway Com'rs *v.* East Lake Fork Drainage Com'rs, 127 Ill. 581; Adams County *v.* Quincy, 130 Ill. 566; Chicago *v.* Chicago, 207 Ill. 37. See also Scammon *v.* Chicago, 42 Ill. 192; West Chicago Park Com'rs *v.* Chicago, 152 Ill. 3[illegible] In *Louisiana*, municipal corporati[illegible] are held liable for special assessme[illegible] against themselves for benefit to p[illegible]lic property, including streets, regar[illegible]less of the rule that public property [illegible] exempt from taxation. New Orle[illegible] *v.* Warner, 175 U. S. 120, 139; War[illegible] *v.* New Orleans, 87 Fed. Rep. 829, 8[illegible] Marquez *v.* New Orleans, 13 La. 3[illegible] Correjolles *v.* Foucher, 26 La. [illegible] 362; Barber Asphalt Pav. Co. *v.* [illegible]greve, 41 La. An. 251, 259.

make a special assessment for street improvements, *to original nstruction or paving*, and under these statutes intricate questions equently arise as to what is to be deemed original construction or iginal paving.[1] But although it is eminently just and reasonable

[1] A street, which had been conucted as a macadamized road some irty years before, was *paved with fire y bricks*. It was held that the paving s an original construction within meaning of a statute imposing the t of the original construction only the abutting property, and that it s not a reconstruction or repaving yable by the city. Catlettsburg *v.* f, 115 Ky. 669. Under a *Kentucky* tute authorizing assessments for cost of *original* improvements of blic ways, abutting property is not rgeable with the cost of *reconction*, although the original conction was not at the expense of itting owners. Louisville *v.* Tyler, Ky. 588; Louisville Steam Forge *v.* Mehler, 112 Ky. 438; Louisville . R. Co. v. Nehan (Ky.), 64 S. W. 457. The court remarked that as cial assessments can only be made express legislative authority a ute which only authorizes an assessnt for the original improvement of treet confers no authority for subent assessments for repaving, &c. fact that no sidewalk was made at ince the original construction of the et does not prevent a subsequent rovement from being reconstruc. Louisville *v.* Tyler, 111 Ky. 588. ere, by statute, a sidewalk could y be paved on the petition of the perty holders, it was held that the ewalk *could not be widened* leaving original pavement undisturbed hout a new petition, the additional lth of the sidewalk being repaving. re Smith, 99 N. Y. 424. See also tter of Garvey, 77 N. Y. 523.

A city street was two hundred feet le, and a strip in the centre forty t in width was originally paved. Subuently the street was further imved by constructing driveways of halt twenty-five feet wide on each e of a strip one hundred feet wide t in the middle for park purposes. was held that the subsequent imvement constituted a *repavement* hin the meaning of a charter proion requiring the cost of all "repav-" to be paid out of the repaving fund instead of by abutters when there was nothing to show that the original pavement was inadequate for the ordinary street purposes. Dickinson *v.* Detroit, 111 Mich. 480. Where the original paving is removed and a wider part of the street is paved, there is also a *repaving* within the meaning of this charter provision and an assessment cannot be made upon abutters for the paving of the additional width. Wreford *v.* Detroit, 132 Mich. 348. *Grant*, J., said: "The principle upon which abutting owners are charged with the expense of paving the street in the first instance is that their property is benefited by the pavement. After the pavement has once been made, its care belongs to the entire public; and it must be kept in repair and in condition, or widened or improved in any manner, by the public, and not at the expense of the owners. It is difficult to imagine what benefit accrues to abutting owners where, as in this instance, their shade trees are cut down, the grass plots in front of their property removed, and the travel upon the street, with its dust and noise, brought nearer to their dwellings. Such improvements are clearly not for the benefit of private owners, but for the benefit of the public. We are of the opinion that when the authorities of the city laid out this street, and paved a roadway therein, suitable at the time for the use of the public, their power to assess such improvements upon abutting owners was exhausted."

In 1869, a street was improved by macadamizing a strip in the centre ten feet wide, and the cost thereof was assessed against the abutting property. The remainder of the street was left with an ordinary earth surface. The city charter of 1885 provided that when a street had been paved, macadamized, or graded and the cost thereof assessed against abutting property, the abutting property should not be assessed for a *second improvement*. The court held that, to exempt the property from the second improvement, it was necessary that the first improvement should be one which substantially covered the

that repaving and reconstruction should be done at the expense of the municipality, or by general taxation, it is within the *power* of the legislature in most jurisdictions to direct or to authorize it to be done by special assessment upon abutting lots or property benefited. According to the weight of authority and, as we think, on principle, the mere fact that a street has been paved or otherwise previously improved, either at the cost of the municipality or at the cost of the abutter, does not thereafter attach to the street such a character of general public utility only as will preclude, in the absence of special constitutional restriction, the *subsequent repaving or improvement* from being also a special and local benefit which will, as a question of Constitutional power, warrant the legislature in authorizing or directing a special assessment upon the abutting property.[1]

Not only the general power to tax, but the power to make local improvements at the expense of the property benefited, is, like all other legislative power of the municipality, a *continuing one*, unless the contrary appears; and hence it is not exhausted by being once exercised.[2] Therefore the power to compel property owners to

street from curb to curb; that the improvement of 1869 was not of such a character; and that abutting property was not exempt from assessment for curbing and macadamizing the street over its entire width in 1902. McMillan *v.* Fond du Lac County, 134 Wis. 576. But the mere grading of a dirt road so as to form a crown and to leave depressions at the sides for surface drainage and the levelling of inequalities do not constitute a street construction within the meaning of a charter. McHenry *v.* Selvage, 99 Ky. 232; Barfield *v.* Gleason, 111 Ky. 491, 506; Ormsby *v.* Jamison, 9 Ky. Law Rep. 325 Mackin *v.* Wilson, 20 Ky. Law Rep. 218. See also Wymond *v.* Barber Asphalt Pav. Co. (Ky.), 77 S. W. Rep. 203.

[1] Field *v.* Barber Asphalt Pav. Co., 194 U. S. 618, 625; McVerry *v.* Boyd, 89 Cal. 304; Regenstein *v.* Atlanta, 98 Ga. 167; Burckhardt *v.* Atlanta, 103 Ga. 302; Draper *v.* Atlanta, 126 Ga. 649; Gurner *v.* Chicago, 40 Ill. 165; Bush *v.* Peoria, 215 Ill. 515; Lafayette *v.* Fowler, 34 Ind 140 (change of grade); Yeakel *v.* Lafayette, 48 Ind. 116; Kokomo *v.* Mahan, 100 Ind. 242; Lux & T. Stone Co. *v.* Donaldson, 162 Ind. 481; Williams *v.* Detroit, 2 Mich. 560; Auditor-General *v.* Chase, 132 Mich. 630; State *v.* Ramsey County Dist. Ct., 80 Minn. 293; McCormick *v.* Patchin, 53 Mo. 33; Skinker *v.* Heman, 148 Mo. 349; Marionville *v.* Henson, 65 Mo. App. 397; Heman *v.* Ring, 85 Mo. App. 231; Heman *v.* Franklin, 99 Mo. App. 346; Jelliff *v.* Newark, 48 N. J. L. 101, aff'd 49 N. J. L. 239; Ladd *v.* Portland, 32 Oreg. 271; Adams *v.* Beloit, 105 Wis. 363. Under the peculiar reasoning of the *Pennsylvania* courts a contrary rule has been adopted, and when a street has once been paved at the expense of the municipality or abutter, no special assessment for repaving can be imposed upon abutting property. See *ante*, § 1441. It is believed that on the question of legislative *power* Pennsylvania stands almost if not quite alone on this matter, although as a matter of statutory provision in many municipalities repaving can only be done by general taxation.

[2] *Ante*, chap. xxiv. § 1152; McCormick *v.* Patchin, 53 Mo. 33. A "street" includes sidewalks and gutters, and "paving" includes "flagging." The work, therefore, of setting curb and gutter-stones, and "flagging" the sidewalk of a street which has once been thus improved, is included in the phrase "repaving any street"; it is intended to embrace the whole street, and every kind of paving. Board of Public Works of Denver *v.* Hayden, 13 Colo. App. 36,

pave ordinarily extends to compelling them to *repave*, when required by the municipal authorities.[1] *Charter provisions*, which

iting text and note; Burmeister, *In re*, 76 N. Y. 174; Phillips, *In re*, 60 N. Y. 6; Burke, *In re*, 62 N. Y. 224; Smith, *In re*, 52 N. Y. 526; Levy, *In re*, 63 N. Y. 637; Folsom, *In re*, 56 N. Y. 60; Kokomo *v.* Mahan, 100 Ind. 242; Dickinson *v.* Worcester, 138 Mass. 555; Taber *v.* Grafmiller, 109 Ind. 206, iting note; Dooley *v.* Sullivan, 112 Ind. 151; Wiles *v.* Hoss, 114 Ind. 371; Warner *v.* Knox, 50 Wis. 429. Where a gutter is necessary for the protection of the sidewalk, the street being unpaved, its cost may be included in the assessment for constructing the sidewalk. State *v.* New Brunswick, 44 N. J. L. 116.

[1] Williams *v.* Detroit, 2 Mich. 560; Sheley *v.* Detroit, 45 Mich. 431; Wilkins *v.* Detroit, 46 Mich. 120; McCormick *v.* Patchin, 53 Mo. 33, citing text. The improvement of a street does not deprive the council of the right to require it to be improved again at the expense of the abutting owners. Lux *v.* Talbot Stone Co. *v.* Donaldson, 162 Ind. 481, 490; Lafayette *v.* Fowler, 34 Ind. 140; Yeakel *v.* Lafayette, 48 Ind. 16; Kokomo *v.* Mahan, 100 Ind. 242, citing text; Galt *v.* Chicago, 174 Ill. 605. Power to "repair or pave streets" authorizes a corporation to remove an old pavement and *replace it with a new one* of different description. Gurner *v.* Chicago (Nicholson pavement), 40 Ill. 165; Kokomo *v.* Mahan, 100 Ind. 242 (raising grade of sidewalk); Jelliff *v.* Newark, 33 N. J. L. 101. In Municipality No. 2 *v.* Dunn, 10 La. An. 57, the city sued to recover a portion of the cost of repaving a street in front of the defendant's lot. It appeared that the street had been previously paved with round stone, at the expense of the property. This, it was found, would not resist the heavy hauling, and was replaced by the one built of square block stone, for which suit was brought. The defence was, that although the right to assess the property for the first pavement was given, yet the corporation had no right to compel a contribution from the same property for the second pavement. The majority of the court held that the power to pave the streets was a continuing power, to be exercised when the public good requires it, and extended as well to the making of a new in the place of an insufficient pavement as to the one first built, the equity in both cases being regarded as the same. These cases are approved in the case of McCormick *v.* Patchin, 53 Mo. 33; followed in Farrar *v.* St. Louis, 80 Mo. 379, and Estes *v.* Owen, 90 Mo. 113; and the power of the legislature to authorize local assessments for repaving admitted. These cases were followed in Skinker *v.* Heman, 148 Mo. 349, holding that an ordinance requiring the replacement of a brick pavement by a stone pavement, though at a greatly increased cost to the abutting owner, was not unreasonable and oppressive. As to *repaving*, compare Hammett *v.* Philadelphia, 65 Pa. 146, cited *supra;* followed Appeal of Protestant Orphan Asylum, 111 Pa. 135; Wistar *v.* Philadelphia, 111 Pa. 604; and see Lafayette *v.* Fowler, 34 Ind. 140; State *v.* Jersey City, 34 N. J. L. 277.

In McCormick *v.* Patchin, *supra*, *Wagner*, J., makes the following reference to the case of Hammett *v.* Philadelphia, 65 Pa. 146, *supra:* "The only cases which I have been able to find sustaining the views urged by the appellant are those decided in the Supreme Court of *Pennsylvania*. The first and principal case is Hammett *v.* Philadelphia, 65 Pa. 146, in which a majority of the court held that, although the original paving of a street was a local improvement, and within the principle of assessing the costs upon the lots lying upon it, yet where a street was once opened and paved, it was thereby assimilated with the rest of the city and made part of it, and all the particular benefit to the locality derived from the improvements were then received and enjoyed. The learned judge who delivered the prevailing opinion discussed with considerable fulness the principles underlying the power to make assessments for local benefits. The opinion consists mostly of generalizations in regard to established and well admitted principles. It is perfectly true that it would be wholly beyond the scope of legislative power to authorize a municipality to levy a local tax for general purposes. The burdens of the whole community cannot be shifted to the shoulders of

only confer authority upon the municipality to make original construction or paving of the city streets at the expense of the abutters, and which require the city to bear the expense of reconstruction and repaving, *do not constitute a contract* with an abutter who has paid an assessment for original construction or repaving that his property shall be exempt from assessment for repaving or reconstruction, and the legislature may repeal or amend such provisions at pleasure without impairing any contract right of the abutter or affecting any vested right.[1]

On the question of *mere repair of streets*, as distinguished from paving or repaving, there does not appear to be any general and

one man who has only an interest in common with all the rest. The whole theory of local taxation or assessment is that the improvements for which it is levied afford a remuneration in the way of benefits. A law which would attempt to make one person or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large would not be an exercise of the taxing power, but an act of confiscation. In effect, it would be transferring the property of one individual to another. These are legal truisms, which have long been entertained and firmly established. The line of separation exists between local and general taxation, and the boundary between them is not always very clear or definite. The case of Hammett *v.* Philadelphia shows that it is difficult to draw the true line of distinction between these respective modes of taxation; and the judge who wrote the opinion of the majority of the court finally placed it upon the fact that the act which he was construing relieved the case of all difficulty and showed upon its face that the special taxation authorized was avowedly for a general and not a local object. The law was for the uses and purposes of the public, and not especially beneficial to any particular class." See also as to local assessments, State *v.* Leffingwell, 54 Mo. 458; *ante*, §§ 1430, 1431; *supra*, § 1401, note.

The general doctrine of Hammett's case is adhered to in *Pennsylvania*, and it is held that "power to pave" at the expense of the abutter does not authorize the city to tear up a pavement or curbing which is good and needs no repairs, and which was paid for by the abutter, and at his expense to replace the same with one more costly. Wistar *v.* Philadelphia, 80 Pa. 112; Appeal of Protestant Orphan Asylum, 111 Pa. 135; Wistar *v.* Philadelphia, 111 Pa. 604. See *ante*, § 1441. But does not this view substitute the judicial judgment in the place of that of the city council as to the necessity of a change? Where, in the original plan of paving a street, a strip was left in the middle for trees and shrubbery, a subsequent change by paving the strip was held to be an original improvement, for which the property owners could be assessed. Alcorn *v.* Philadelphia, 112 Pa. 494.

In the charter of the city of New York there is a provision that no street once paved, and the expense thereof paid by assessment by the adjoining owners, shall be thereafter paved or an assessment imposed therefor, unless petitioned for by a majority of the owners. Where the city has once determined the character and extent of the work, and assessed and collected the expense from the owners, it has no further jurisdiction over that property until a petition is presented as provided, and an assessment for re pavement without such petition is void. Garvey, *In re*, 77 N. Y. 52. Where a city tore up a good pavement for the purpose of constructing a sewer in the street, the court refused to permit the cost of restoring it to be assessed to the owners of abutting property, the cost of restoration being considered a part of the expense of making the sewer. Burlington *v.* Palmer, 67 Iowa 681.

[1] Ladd *v.* Portland, 32 Oreg. 271; Carstens *v.* Fond du Lac, 137 Wis. 465, 471.

uniformly adopted rule. In some jurisdictions mere repairs may be made at the expense of the abutting property owners.[1] Whilst in other jurisdictions, the power to impose a special assessment for mere repairs appears to be denied,[2] and a similar diversity of opinion appears in the decisions of the courts in regard to the *sprinkling of streets*. In some jurisdictions a special assessment therefor may be imposed,[3] whilst in others the power to impose a special assess-

[1] Farrar *v.* St. Louis, 80 Mo. 379; Estes *v.* Owen, 90 Mo. 113, 115. In *Indiana*, it is held that the maintenance and repair of *a public drain* may be specially assessed on property benefited thereby. Roundenbush *v.* Mitchell, 154 Ind. 616. A statute may provide that special assessments for improving or repairing a street authorized thereby, shall not be deemed to be authorized for *ordinary repairs*. Under such a statute it was held that where the wooden blocks constituting the pavement of the street had become worthless and were removed and replaced with vitrified brick laid on the old concrete base, there was a *repavement* of the street and not an "ordinary repair," and that the abutters might be specially assessed therefor. Robertson *v.* Omaha, 55 Neb. 718.

[2] The mere maintenance and repair of a public street or boulevard is not a local improvement within the meaning of the *Illinois* Constitution, and no special assessment or special tax can be imposed therefor. Crane *v.* West Chicago Park Com'rs, 153 Ill. 348.

Massachusetts. "Where lands have paid assessments for special benefits from the construction of all sewers by whose operation they are affected, it cannot be said that they receive an additional special and peculiar benefit from the general oversight and operation of the sewers of Boston such as to subject them to a second special assessment. Expenses of this kind should be made the subject of general taxation. The grouping of these various expenses would seem to make it difficult, if not impracticable, under this statute to make assessments of special and peculiar benefits duly received by particular estates from the construction of sewers near them." Sears *v.* Boston St. Com'rs, 173 Mass. 350, 353, holding a statute in *Massachusetts* invalid which provided for the maintenance as well as the construction of sewers by special assessment.

[3] In State *v.* Reis, 38 Minn. 371, a special assessment for sprinkling a street was sustained. The court said that permanence or durability of the improvement was not the test of the *power* to impose a special assessment; that watering a street cannot be distinguished in its effect upon abutting property from paving; and that a special benefit accrues to abutting property therefrom in that it makes the abutting property more comfortable and pleasant for purposes of residence and business. Compare Hawes *v.* Fiegler, 87 Minn. 319, 321; Keigher *v.* St. Paul, 69 Minn. 78.

In Sears *v.* Boston, 173 Mass. 71, a special assessment for sprinkling a street in the thickly settled part of the city was sustained as conferring a special and peculiar benefit upon abutting property. The court said that the fact that it conferred a public benefit was beyond controversy, but the greatest benefit was to abutting estates as places of residence or business; that it conferred on these a special benefit accruing from day to day, increasing their value for rental purposes. See to the same effect Phillips Academy *v.* Andover, 175 Mass. 118; Stark *v.* Boston, 180 Mass. 293; Ward *v.* Newton, 181 Mass. 432; Hodgdon *v.* Haverhill, 193 Mass. 327.

Where, however, the property was not in the thickly settled part of the city and was vacant and unimproved, it was held under the State Constitution that a special assessment for street sprinkling was unconstitutional in that it could not confer any special or peculiar benefit on the property. Corcoran *v.* Cambridge, 199 Mass. 5. In Union Pac. R. Co. *v.* Abilene, 78 Kan. 820; 98 Pac. Rep. 224, a special assessment for sprinkling was sustained without any discussion of the question whether it was a local improvement of such a nature as would justify a special assessment.

In *Indiana*, it has been held that

ment for that purpose is denied on the ground that the effects ar not substantial or permanent, and are too intangible to be desig nated as an improvement which will confer a special and peculia benefit on the property.[1]

§ 1448 (799). **Power to improve Streets construed.** — Unde power to improve "any street," the city council is *not required* t improve *the entire length* of the street or none; it may improve part and confine the assessment to the lots adjoining the part improved.

sweeping a street is an exercise of the police power which confers a special benefit on abutting property and may be made the foundation for a special assessment. Reinken *v.* Fuehring, 130 Ind. 382. See also Palmer *v.* Nolting, 13 Ind. App. 581; Myers *v.* Indianapolis Un. R. Co., 12 Ind. App. 170.

In *New York*, it has been held that the abutter may, by virtue of the police power, be compelled to *remove snow and ice* from the sidewalk at his own expense. Carthage *v.* Frederick, 122 N. Y. 268.

[1] New York L. Ins. Co. *v.* Prest, 71 Fed. Rep. 815; Chicago *v.* Blair, 149 Ill. 310; Stevens *v.* Port Huron, 149 Mich. 536; Kalamazoo *v.* Crawford, 154 Mich. 58; Kansas City *v.* O'Connor, 82 Mo. App. 655; Butte *v.* School Dist. No. 1, 29 Mont. 336; Pettit *v.* Duke, 10 Utah, 311. *Street sprinkling* is a *general public purpose* authorizing the levy of a tax therefor on all taxable property within the municipality. Maydwell *v.* Louisville, 116 Ky. 885. In Chicago *v.* Blair, 149 Ill. 310, 315; *Shope*, J., having reference to the *Illinois* Constitution and decisions, said: "A *local improvement* is a public improvement, which, by reason of its being confined to a locality, enhances the value of the adjacent property, as distinguished from benefits diffused by it throughout the municipality. The only basis upon which either special assessment or special taxation can be sustained is that from the proposed local improvement the property subjected to the tax or assessment will be enhanced in value to the extent of the burden imposed. If, therefore, from an inspection of the ordinance authorizing the making of the improvement, it appears from the nature of the proposed improvement that the market value of abutting or adjacent property would not be increased thereby, as a matter of law i would not be an improvement withi the meaning of the statute, and no dec laration of corporate authorities coul make it so. On the other hand, if th property is or may be benefited by th improvement, the extent of such bene fit, and hence the amount thereby as sessed upon the property in proceed ings for special assessment, is a ques tion of fact to be determined in th mode prescribed by the statute." I Kalamazoo *v.* Crawford, 154 Mich. 58 63, *Carpenter*, J., said, "If it can b said as a matter of law that the lan will not be specially benefited by th improvement in question, — that is that its value will not be enhanced, — there can be no special assessment an a law authorizing a special assessmen for such an improvement is unconsti tutional and void."

[2] Scoville *v.* Cleveland, 1 Ohio St 126, approved and applied in Northern Ind. R. R. Co. *v.* Connelly, 10 Ohio St 159–163; s. p. Creighton *v.* Scott, 1 Ohio St. 438; Craycraft *v.* Selvage, 1 Bush (Ky.), 696. See also St. Louis *v* Clemens, 36 Mo. 467; Lafayette *v* Fowler, 34 Ind. 140. Compare Chest nut Av., *In re*, 68 Pa. 81; Alameda Ma cadamizing Co. *v.* Williams, 70 Cal 534; People *v.* Hyde Park, 117 Ill. 462

A town was empowered, "when re quested in writing by the owners of two thirds of the property on any street, o *part* thereof, to cause the same to b graded, and to levy the expense on th property bounding on such street," &c Under this charter the Court of Appeal of *Maryland* decided that "the assent c the owners of two-thirds of the propert on the whole line of the street to be im proved was a prerequisite to the exercis of the authority conferred upon the co poration. If a *part* only is to be im proved, the charter enables the corpora

Where the widening of a street is sought to be made by sections instead of its entire length, the commissioners appointed to assess the enefits of a particular section may properly confine their assessment of benefits to lots situated upon that part of the street emraced in such particular section of the proposed improvement, and eir action in this respect was, under the legislation involved, held be conclusive as to the limits of the property which was speally benefited.[1]

§ 1449 (801). **Same Subject.** — So, where a statute enacted that no contract should be made by the head of any department for ork or materials for the city, unless for objects authorized by e city council," and the council authorized a department to contract for paving, with the condition that the *contractor be selected y a majority* of the owners of the front to be paved, and who were pay the cost of the improvement, it was held that a selection of he contractor by a majority of the lot-owners was essential to their ability to the contractor to pay for the paving, and that the city, y adopting the work of a paver not thus chosen, could not oblige he lot-owners to pay for it.[2]

on to grant an application made for at object by the owners of two-thirds the property lying on that part, by ordinance directing that particular rt of the street to be improved. They n only order the *whole* street to be improved by an application from twoirds of the property owners on the ole street." And it was held that ere the town, on a petition of the ners of two-thirds of the property ng upon a *part* only of the street, improved the *whole* street, its action was authorized, and that it could not enrce the collection of the expenses of ch improvement from the adjoining operty owners. Swann *v.* Cumberd, 8 Gill (Md.), 150. May order lewalk upon one side only. State *v.* ortage, 12 Wis. 562. Lot-owner oppote a public common held, upon conruction of the statutes, to be liable for e expense of grading and paving the *hole*, and not simply half, of the street front of his lot. McGonigle *v.* Algheny, 44 Pa. 118. The city may rade and improve *less than the whole idth*. Morrison *v.* Hershire, 32 Iowa, 71; *ante*, § 593, note. Under the charer of St. Louis it was held that special assessments or taxes for street improvements could not be enforced until the entire contract was completed, for the reason that the grading of a single lot or block, instead of the whole work, might be an injury rather than a benefit. St. Louis *v.* Clemens, 49 Mo. 552. See Neenan *v.* Smith, 60 Mo. 292. The property owner cannot refuse to pay because the paving does not extend to the sidewalk, the city being the judges as to how far it is necessary to pave. Moran *v.* Lindell, 52 Mo. 229. Right to join in a single assessment the expense of constructing sidewalks in different streets denied. Arnold *v.* Cambridge, 106 Mass. 352; but see Cuming *v.* Grand Rapids, 46 Mich. 150.

[1] Bigelow *v.* Chicago, 90 Ill. 49; Lake *v.* Decatur, 91 Ill. 596, distinguishing Chicago *v.* Baer, 41 Ill. 306; Scammon *v.* Chicago, 42 Ill. 192, and Parmelee *v.* Chicago, 60 Ill. 267.

[2] Reilly *v.* Philadelphia, 60 Pa. 467, distinguished from Philadelphia *v.* Wister, 35 Pa. 427, and Philadelphia *v.* Burgin, 50 Pa. 537. See Brophy *v.* Landman, 28 Ohio St. 542; Leach *v.* Cargill, 60 Mo. 316.

An *agreement or combination among parties petitioning* for the improvement of a street, by which a few individuals,

§ 1450 (802). **Same Subject.** — By one section of the organic la of a city it was authorized, on the *petition of two-thirds* of the ow ers of the abutting property, to make improvement of its stree by a subsequent section, power was conferred upon the council order such improvement by a *two-thirds vote of the council.* It w held that although proceedings relative to the improvement we commenced by petition from the property holders, yet, having be ordered by a two-thirds vote of the council, they are valid, althou two-thirds of the property owners may not have united in the pe tion for the improvement, — the two-thirds vote of council made t proceedings valid, notwithstanding any defect in the prior proce ings of the petitioners.[1]

§ 1451. **Special Assessments against Railroad Property.** — A cording to the view very generally held, land occupied and used railroad companies for roadbeds, depots, freight houses, and otl corporate purposes, whether the company be owner of the fee has only an easement or qualified right therein, is to be regarded real estate, which may be subjected by the legislature to special sessment for the opening, paving, and grading of streets and other local improvements in the same manner as the real prope of private individuals.[2] But this view is not uniformly accept

desirous of causing the improvement to be made, procure the signatures of others to the petition by paying, or agreeing to pay, a consideration therefor, either directly or indirectly, is a fraud on the law, and contrary to public policy. Maguire *v.* Smock, 42 Ind. 1. Until the city authorities act on the application of real-estate owners to have a street improved, any one of the applicants *may revoke his action;* and if this reduces the number to less than that required by the charter, the power to make such improvements is thereby taken away; if the city has entered into a contract to have the work done, it is too late for the property owner to revoke his consent. Irwin *v.* Mobile, 57 Ala. 6.

Where a statute relating to local improvements, to be made by special assessment, requires the passage of an ordinance "specifying therein the nature, character, locality, and description of such improvement," an assessment made under an ordinance, which does not conform to such requirements, is void. Kankakee *v.* Potter, 119 Ill. 324 (lowering a sewer); Sterling Galt, 117 Ill. 11 (constructing sew Levy *v.* Chicago, 113 Ill. 650 (pav and curbing); Hyde Park *v.* Spen 118 Ill. 446 (drainage); App. *v.* Sto ton, 61 N. J. L. 520 (paving, &c.).

[1] Indianapolis *v.* Mansur, 15 Ind. 1

In a case under the General Inc poration Act of that State (see a § 41, note); it is held that the cou of a city may, by a two-thirds v without any petition, cause the gr of a street which has been improved, such improvements having been p for by the owners of the property b dering on such street, and is in g repair, — to be changed, and the st as so changed to be improved, and n pay the damages occasioned by change out of the general revenue the city, and assess the expense of improvement against the owners of adjoining property, or cause such pense to be paid out of such gen revenue. Lafayette *v.* Fowler, 34 I 140; *supra*, § 1437, note, § 1447, frau lent petition; *ante*, § 791, and note.

[2] Illinois Cent. R. Co. *v.* Deca

Thus, in some jurisdictions it is held that a railroad is, in contemplation of law, a public highway; that it is therefore property devoted to public use, and comes within the general rule that a special assessment cannot be imposed upon public property, unless the legislature has expressly authorized such an assessment to be made.[1] In

147 U. S. 190, aff'g 126 Ill. 92; Louisville & N. R. Co. *v.* Barber Asphalt Pav. Co., 197 U. S. 430, 433; Kansas City, P. & G. R. Co. *v.* Waterworks Imp. Dist., 68 Ark. 376; Chicago & N. W. R. Co., *v.* People, 120 Ill. 104; Ill. Cent. R. Co. *v.* East Lake Drainage Com'rs, 129 Ill. 417; Wabash East. R. Co. *v.* East Lake Fork Drainage Com'rs, 134 Ill. 384; Chicago, R. I. & P. R. Co. *v.* Chicago, 139 Ill. 573 (depot); Illinois Cent. R. Co. *v.* Mattoon, 141 Ill. 32; Chicago & A. R. Co. *v.* Joliet, 153 Ill. 649; Chicago & N. W. R. Co. *v.* Elmhurst, 165 Ill. 148; Ill. Cent. R. Co. *v.* People, 170 Ill. 224; Chicago Terminal Transfer Co. *v.* Chicago, 178 Ill. 429; Chicago Union Traction Co. *v.* Chicago, 215 Ill. 410; Peru & I. R. Co. *v.* Hanna, 68 Ind. 562; Pittsburg, C., C. & St. L. R. Co. *v.* Fish, 158 Ind. 525; Pittsburg, C., C. & St. L. R. Co. *v.* Taber, 168 Ind. 419; Lake Erie & W. R. Co. *v.* Bowker, 9 Ind. App. 428; Pittsburg, C., C. & St. L. R. Co. *v.* Hays, 17 Ind. App. 261; Indianapolis & V. R. Co. *v.* Capitol Pav. & Const. Co., 24 Ind. App. 114; Atchison, T. & S. F. R. Co. *v.* Peterson, 58 Kan. 818; s. c. 5 Kan. App. 103; Ludlow *v.* Cincinnati S. R. Co., 78 Ky. 357; Figg *v.* Louisville & N. R. Co., 116 Ky. 135; Louisville & N. R. Co. *v.* Barber Asphalt Pav. Co., 116 Ky. 856; Nevada *v.* Eddy, 123 Mo. 546, 562 (depot and yard); Heman Const. Co. *v.* Wabash R. Co., 206 Mo. 172 (disapproving Sweaney *v.* Kansas City R. Co., 54 Mo. App. 265); Chatham County *v.* Seaboard Air Line R. Co., 133 N. Car. 216; Northern Ind. R. Co. *v.* Connelly, 10 Ohio St. 159; New Whatcom *v.* Bellingham Bay R. Co., 16 Wash. 138; Northern Pac. R. Co. *v.* Seattle, 46 Wash. 674; Seattle *v.* Seattle & M. R. Co., 50 Wash. 132; London & N. W. R. Co. *v.* St. Pancras, 17 Law Times, (N. S.) 654. See *infra*, § 1452.

In Louisville & N. R. Co. *v.* Barber Asphalt Pav. Co., 197 U. S. 430, aff'g 116 Ky. 856, an assessment had been imposed in proportion to area upon the roadbed of a railroad for grading, curbing, and paving with asphalt the carriageway of a street adjoining. The validity of the assessment was contested on the ground that the land could not be benefited by the improvement owing to its particular use for railroad purposes, but the court held that such benefit was not required to sustain the assessment, and that the assessment so imposed did not violate the Fourteenth Amendment to the Federal Constitution. Mr. Justice *Holmes* said: "That, apart from the specific use to which this land is devoted, land in a good-sized city will get a benefit from having the streets about it paved, and that this benefit generally will be more than the cost, are propositions which, as we have already implied, a legislature is warranted in adopting. But, if so, we are of opinion that the legislature is warranted in going a step further and saying that on the question of benefit or no benefit, the land shall be considered simply in its general relations and apart from its particular use. See Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190. On the question of benefits the present use is simply a prognostic, and the plea a prophecy. If an occupant could not escape by professing his desire for solitude and silence, the legislature may make a similar desire fortified by structures equally ineffective. It may say that it is enough that the land could be turned to purposes for which the paving would increase its value. Indeed, it is apparent that the prophecy in the answer cannot be regarded as absolute, even while the present use of the land continues, — for no one can say that changes might not make a station desirable at this point; in which case the advantages of a paved street could not be denied." In *Illinois*, it has been held that railroad property may be assessed for the *improvement of a park or boulevard*, if it is specially benefited. Chicago & N. W. R. Co. *v.* People, 120 Ill. 104.

[1] *Massachusetts.* In Boston *v.* Boston A. R. Co., 170 Mass. 95, 98, the court held that the roadbed of a railroad corporation was not subject to a special assessment for the construction

other jurisdictions where special benefits are considered as absolutely essential to the power of the legislature to authorize special assessments, the decisions hold that land occupied as a roadbed or right of way, (as distinguished from stations, depots, depot grounds, freight houses, etc.,) being permanently held and applied to use as a right of way, in contemplation of law, cannot possibly be benefited by the improvement of a street adjoining or contiguous thereto, and that, therefore, the essential requisites for a special assessment do not exist, and it cannot be imposed.[1] In other jurisdictions the

of sidewalks in adjacent streets. One of the grounds assigned for so holding was, that, in the absence of express legislative declaration, the statute could not be construed as being intended to apply to the land of a railroad lying within its location. *Knowlton*, J., said: "It is well established law in *Massachusetts* that the land of a railroad corporation lying within its location, not exceeding five rods in width, and used for the purposes for which the corporation is established, is exempt from taxation. Worcester *v.* Western R. Co., 4 Met. (Mass.) 564; Charlestown *v.* Middlesex County, 1 Allen (Mass.), 199; Boston & M. R. Co. *v.* Lowell & L. R. Co., 124 Mass. 368; Norwich & W. R. Co. *v.* County Com'rs, 151 Mass. 69. This rule is founded on the nature of the use for which the land is taken or purchased. The land is appropriated to a public use in much the same way as a highway, or the land under a court house or school house or jail. Although the corporation is permitted to derive profit from it, this is incidental to the main purpose for which it is taken in the exercise of the right of eminent domain. The fundamental fact on which the rights of the corporation depend is that a public highway is being prepared for the use and convenience of all the people. The reason of the rule is as applicable to special taxation for local improvements particularly affecting only a small neighborhood near the railroad, as to general taxation. It is that property held and used for the benefit of the public should not be made to share the burden of paying public expenses. The rule has often been applied to special taxation in this Commonwealth, as well as to general taxation. Worcester County *v.* Worcester, 116 Mass. 193; Mt. Auburn Cemetery *v.* Cambridge, 150 Mass. 12; Harvard College *v.* Boston, 104 Mass. 470." But it would seem that the location of a railroad may be subject to special assessment for the improvement of a street or highway, if it is specially benefited, and if express or plain statutory provision authorizes the imposition of the assessment. Hampshire County Com'rs, Petitioners, 143 Mass. 424, 434.

Wisconsin. In this State the general doctrine is recognized that the franchise of a railroad corporation, together with the property owned by it, which is necessary for its use in order to accomplish the purposes of its existence, constitutes an entirety which is not ordinarily subject to division by sale of a part under an order of the court or a proceeding for taxation. Chicago & N. W. R. Co. *v.* Forest County, 95 Wis. 80. The court held, therefore, that statutory provisions in general terms authorizing the levy of special assessments have no application to such property. Chicago, M. & St. P. R. Co. *v.* Milwaukee, 89 Wis. 506; Chicago, M. & St. P. R. Co. *v.* Janesville, 137 Wis. 7. But the legislature may, by specific provision, subject such property to special assessment. Chicago, M. & St. P. R. Co. *v.* Janesville, 137 Wis. 7.

[1] *California*. In Southern Cal. R. Co. *v.* Workman, 146 Cal. 80, 84, a railroad company sought an injunction to restrain a threatened sale of its roadbed for a special assessment for a street improvement. The assessment was imposed according to frontage. In holding that the railroad company was entitled to an injunction, *Cooper*, Commissioner, said: "There is no authority for making an assessment upon a right of way or for selling the same. A railroad company is a quasi-public corporation in which the public is interested. It holds a franchise from the State and must operate its road or forfeit its franchise.

courts hold that benefit to the property for its present use is the proper basis of assessment, and that such benefit must be established as a fact before the assessment can be sustained.[1]

A part of its right of way cannot be sold on execution or for a street assessment. The decisions are not in harmony on the question, but we think the best considered cases hold that such right of way cannot be sold to satisfy a street assessment."

Connecticut. "To justify an assessment of the kind here in question, the benefits accruing to the land by the improvement must be direct, immediate, appreciable, and certain, and not contingent, remote, and uncertain. Railroad land abutting upon a street or highway, when the land is necessary for railroad purposes, is used exclusively and solely for such purposes, and is permanently devoted to such uses and purposes, is not so benefited by paving the street in front of said land as to justify an assessment of benefits." *Per Torrance*, C. J., in Naugatuck R. Co. *v.* Waterbury, 78 Conn. 193, 197. To the same effect, Bridgeport *v.* New York & N. H. R. Co., 36 Conn. 255; New York & N. H. R. Co. *v.* New Haven, 42 Conn. 279; New York, N. H. & H. R. Co. *v.* New Britain, 49 Conn. 40. But in this State *tracks of a street railway* are property which may be benefited by, and assessed for, the cost of paving of a street. New Haven *v.* Fair Haven & W. R. Co., 38 Conn. 422. A city laid out a new street running parallel with a railroad, and appropriated throughout its whole extent some portion of the land embraced in the charter of the railroad. The railroad was assessed for benefits arising from the construction of the new street, upon the ground that by reason of the improvement the lines of sight would be extended, and the company would be enabled to run their trains faster with less danger of casualties, and would not be put to the inconvenience of keeping gates and flagmen at the crossings. It was held, in the absence of proof of an existing necessity, that the city had no right to appropriate the land included in the charter of the railroad company as a highway; that the benefits could not be assessed upon the "franchises" of the company; and that the benefits were too contingent and remote to be assessed on the "corporation" or any of its property. Bridgeport *v.* New York & N. H. R. Co., 36 Conn. 258.

Massachusetts. In Boston *v.* Boston & A. R. Co., 170 Mass. 95, 101, referred to *supra*, *Knowlton*, J., in addition to expressing the opinion that a railroad should be treated as public property and subjected to special assessment only upon similar principles, said: "Another vital objection is that taxes of this kind can only be assessed on the ground of special benefit to the property, and then only to the amount of the benefit. It has been held in different jurisdictions that to land used for railroad purposes within the location of a railroad there is no benefit of the kind contemplated by the laws relating to such assessments. In the case at bar it is difficult to see how the construction of the sidewalk in the public street can benefit the land of the defendant for the purposes for which it is held and used."

Michigan. In Detroit, G. H. & M. R. Co. *v.* Grand Rapids, 106 Mich. 13, the court in an action by the company to enjoin a sale for non-payment of a special assessment held (1) that a part of the roadbed of a railroad cannot be sold for a special assessment for street paving (citing Lake Shore & M. S. R. Co. *v.* Grand Rapids, 102 Mich. 374); (2) the roadbed cannot be benefited by the paving of a street which crosses the railroad at a point which is neither at nor near any depot grounds.

Pennsylvania. In this State it is held that paving laws are a means of compulsory contribution among the common sharers in a common benefit; and as a railroad roadbed cannot, from its very nature, derive any benefit from the paving, while all the rest of the neighborhood may, a special assessment cannot be imposed upon the railroad in respect of the improvement of the street. Philadelphia *v.* Philadelphia, W. & B. R. Co., 33 Pa. 41; Philadelphia *v.* Eastwick, 35 Pa. 75; Junction R. Co. *v.* Philadelphia, 88 Pa. 424; Mt. Pleasant *v.* Baltimore & O. R. Co., 138 Pa. 365; Allegheny City *v.* Western Pa. R. Co.,

[1] *New Jersey.* Land which is in use for railroad purposes may, under the *New Jersey* rule, be assessed for street improvements to the extent of the *special*

§ 1452. **Special Assessments against Railways in Streets.** — It is almost uniformly held that the rails, ties, and other appliances of

138 Pa. 375; Erie *v.* Piece of Land, 175 Pa. 523; Philadelphia *v.* Philadelphia & R. R. Co., 177 Pa. 292. The rule is the same whether the company has only an easement, or has the fee to the land occupied and used as a roadbed. Junction R. Co. *v.* Philadelphia, 88 Pa. 424. When the property is not susceptible of any benefit from the improvement, *e. g.*, a roadbed from a street improvement, the legislature cannot declare that it is benefited. The courts can review such a legislative declaration, and if there be no benefit, the assessment will be regarded as confiscation. Allegheny City *v.* Western Pa. R. Co., 138 Pa. 375. But the paving of a street may be a benefit to a passenger depot, and an assessment upon the depot for that purpose may be sustained. Mt. Pleasant *v.* Baltimore & O. R. Co., 138 Pa. 365. It is also to be noted that "It is settled in this State that the words 'real estate' in our taxing statutes do not include lands or appurtenances essential and necessary to the exercise of the franchise of a public corporation." *Per Elkin*, J. in Conoy Tp. *v.* York Haven E. P. P. Co., 222 Pa. 319. To the same effect, Coatesville Gas Co. *v.* Chester County, 97 Pa. 476; Pittsburgh's Appeal, 123 Pa. 374; Roaring Creek Water Co. *v.* Girton, 142 Pa. 92; Northampton County *v.* Easton Passenger R. Co., 148 Pa. 282; Southern Elect. L. & P. Co. *v.* Philadelphia, 191 Pa. 170; St. Mary's Gas Co. *v.* Elk County, 191 Pa. 458; Philadelphia *v.* Electric Trac. Co., 208 Pa. 157; Spring Brook Water Co. *v.* Kelly, 17 Pa. Super. Ct. 347; Philadelphia *v.* Philadelphia & R. R. Co., 38 Pa. Super. Ct. 529.

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benefit which it sustains. New Jersey R. & T. Co. *v.* Elizabeth, 37 N. J. L. 330, 333; Jersey City *v.* New Jersey Midland R. Co., 42 N. J. L. 97; Paterson & H. R. R. Co. *v.* Passaic, 54 N. J. L. 340; Erie R. Co. *v.* Paterson, 72 N. J. L. 83. Index — *New Jersey*. In the assessment of lands so circumstanced, the enhancement of the market value is not the proper basis. Morris & E. R. Co. *v.* Jersey City, 36 N. J. L. 56. The benefit to the property for its present use is the proper basis of assessment, and if such benefit is not shown to exist, the assessment cannot be sustained. New Jersey R. & T. Co. *v.* Elizabeth, 37 N. J. L. 330; Erie R. Co. *v.* Paterson, 72 N. J. L. 83; New York Bay R. Co. *v.* Newark, 77 N. J. L. 270; 72 Atl. Rep. 455.

New York. In an early case it was held that a lot owned by a public service corporation, *e. g.* a water company, is not liable to be assessed for benefit, if, by the terms of the grant by which the lot is held, it can be appropriated only to a specific use, and cannot possibly be rendered more advantageous by the opening of a street or square in its neighborhood; but the company may be assessed for benefit to adjoining grounds not thus restricted. Owners of Ground *v.* Albany, 15 Wend. (N. Y.) 374. In another case, the court held that a railroad right of way cannot be benefited by laying a street across the tracks, and an assessment therefor is void. New York & H. R. R. Co. *v.* Morrisania, 7 Hun (N. Y.), 652. So, too, when property owners objected to an assessment on the ground that the roadbed of a steam railroad which lay within the area of assessment, had not been assessed, the court declared that the land could only be used for the purposes of the railway; that, as such, no benefit whatever was derived from the improvement; and therefore that the omission of the roadbed was not erroneous. Matter of Public Park, 47 Hun (N. Y.), 302. In a later case where a strip of land held for roadbed purposes was assessed, the court held the assessment erroneous, saying, "Its value for the purposes to which it is devoted is not enhanced by the improvement, for which reason an assessment for only nominal damages should have been imposed." Matter of New York City, 127 N. Y. App. Div. 672.

In *Illinois*, a State in which "special assessments" and "special taxes" against the right of way of railroads have been many times sustained, the court held that a special assessment for street paving against the right of way of a railroad was not sufficient, sustained by the evidence, which was

street railways and other railroads, which are constructed in and along the streets of a municipality, constitute property of such a nature that it may be, and usually is, benefited by the paving of a street, or by otherwise improving it; and that the legislature may impose, or authorize a municipality to impose, a special assessment upon such railways for the cost of the improvement.[1] But in keep-

too vague and speculative. River Forest v. Chicago & N. W. R. Co., 197 Ill. 344. The facts were that two streets had been paved, one of which crossed, while the other ran parallel, to the railroad tracks. The court made a distinction between the land used for right of way only, and that used for depot grounds. *Wilkin*, J., said: "It must be borne in mind that railroad right of way cannot be put upon the market by a railroad company for general business purposes, as can private property. Circumstances may arise under which railroad right of way can be said to be benefited by a local improvement, but as a general rule it cannot be. Here, however, the question whether this right of way will be benefited is purely one of fact."

Iowa. In this State the decisions do not appear to enunciate any definite general rule. In Burlington & M. R. R. Co. v. Spearman, 12 Iowa, 112, the company was held liable for a sidewalk assessment against its depot grounds. In Muscatine v. Chicago, R. I. & P. R. Co., 79 Iowa, 645, a grading assessment against the right of way appears to have been sustained, *Beck*, J., saying, "The defendant, the perpetual possessor of the land, is the owner who must respond to all demands made in the exercise of the authority of taxation." But on a second appeal in the same case (Muscatine v. Chicago, R. I. & P. R. Co., 88 Iowa, 291), a judgment in favor of the railroad company was sustained as to part of the roadbed in which the company had an easement only, and it was held that the company was not liable for the assessment. This decision appears to have been made upon the ground that the company did not own the fee, but only had an easement, *Robinson*, C. J., saying, "The charter of the plaintiff (city) authorizes it to require the owner of the lots adjacent to the land to pave it and not the owner of a mere easement in the lots." Chicago, R. I. & P. R. Co. v. Ottumwa, 112 Iowa, 300, was a suit to enjoin the collection of a paving and curbing assessment against the lessee's interest in a right of way in which the lessor company only had an easement. The statute authorized an assessment against "lots and parcels of land fronting on the highway." The court distinguished the earlier cases and held that the statute only authorized a levy on lots, and not on a mere easement therein. It supported this view by saying that the municipal authorities could not sell a fraction of an easement. The court was also inclined to hold that there could be no benefit to the right of way from the paving of the street, but it declined to express any decided opinion on that point. In Minneapolis & St. L. R. Co. v. Linquist, 119 Iowa, 144, the court construed the pleadings and judgment as showing that the railroad company owned the fee of the roadbed, and held that the roadbed might be assessed as "property abutting." Oskaloosa v. Oskaloosa Traction & T. Co., 141 Iowa, 236; 119 N. W. Rep. 736, was an action by the city, pursuant to statute, to recover from a street railway company the cost of paving. The right to a recovery was denied under the peculiar facts of the case. *McClain*, J., said, with reference to the general rule, "Neither steam railway companies nor street railway companies enjoying easements in a street are assessable as abutting property owners for the improvement of the street."

[1] Appeal of North Beach & M. St. R. Co., 32 Cal. 499; New Haven v. Fair Haven & W. R. Co., 38 Conn. 422; Fair Haven & W. R. Co. v. New Haven, 75 Conn. 442; Chicago v. Baer, 41 Ill. 306; Parmelee v. Chicago, 60 Ill. 267; Chicago City R. Co. v. Chicago, 90 Ill. 573; Kuehner v. Freeport, 143 Ill. 92; Lightner v. Peoria, 150 Ill. 80; Freeport St. R. Co. v. Freeport, 151 Ill. 451; Rich v. Chicago, 152 Ill. 18, 36; Billings v. Chicago, 167 Ill. 337; Cicero & P. St. R. Co. v. Chicago, 176 Ill. 501; Lake St. El. R. Co. v. Chicago, 183 Ill. 75 (elevated railroad); South

ing with the principle which requires the power of taxation to be expressly delegated, a special assessment against the tracks and

Chicago City R. Co. *v.* Chicago, 196 Ill. 490; Shreveport *v.* Prescott, 51 La. An. 1895; Shreveport *v.* Shreveport City R. Co., 104 La. 260; Lincoln St. R. Co. *v.* Lincoln, 61 Neb. 109; Troy & L. R. Co. *v.* Kane, 9 Hun (N. Y.), 506, aff'd on other grounds, 72 N. Y. 614.

A *paving assessment* upon the property of a railway company sustained; and it was held that the special remedy by lien and foreclosure was not exclusive, and that an action of debt would lie to recover the assessment. It was also held that the company was estopped by its conduct in seeing the paving done without objection, to set up that its charter required it to pave the road covered by the track at its own expense. New Haven *v.* Fair Haven & W. R. Co., 38 Conn. 422; followed in Columbus *v.* Street R. R. Co., 45 Ohio St. 98; *supra*, § 1141, note.

A stipulation of an ordinance extending a street railway franchise, which had been accepted by the company and which required it to grade, pave, and otherwise improve the part of a street occupied by its tracks at the time and in the manner adopted by the city for the rest of the street, has been held to be a contract fixing the equivalent for special assessments for these purposes and precluding further assessments therefor. West Chicago R. Co. *v.* Chicago, 178 Ill. 339. See also Chicago *v.* Sheldon, 9 Wall. (U. S.) 50. But a mere stipulation in such an ordinance by which the company was required to "restore" the streets is not sufficient to fix such an equivalent, or to import such a contract. Lake St. El. R. Co. *v.* Chicago, 183 Ill. 75, 80. A street railway company, although it is bound by its franchise to pave at its own cost the space between tracks in streets in which its rails are laid, cannot be assessed for paving a street in which it has a franchise, but in which it has not laid any rails. Harris *v.* Macomb, 213 Ill. 47. In People *v.* Gilon, 126 N. Y. 147, *Ruger*, C. J., said: "It cannot be said, we think, as a matter of course, that street railroads are benefited by repavement of the streets through which they are laid, and if they are not so, in fact, it would be contrary to the general policy of the law to tax them with the expense of such improvements. It is the general custom of municipal corporations, in granting privileges to railroad companies to occupy streets, to impose terms as a condition to the exercise of such rights, and such conditions are, undoubtedly, lawful, and may be enforced in some form for the benefit of municipal corporations making such grants. These conditions frequently refer to repairs upon the streets or contributions to the public treasury in lieu thereof, and when imposed usually define the right of the corporation to levy taxes, and the limits of the liability of the railroad corporation to pay them."

New York. In this State, the construction of statutes under which it is sought to subject street railways to special assessment is affected, and to a certain extent controlled, by the fact that the property of the railway company in the streets derives its value to a great extent from the exercise of the franchise or right to use the street. See remarks of *Vann*, J., in People *v.* Tax Commissioners, 174 N. Y. 417, 441, where he says that the tangible properties in the streets of street railway companies "have no assessable value worthy of notice, except through the actual and constant use made of them as incidental to the special franchises. The value of either resides in the union of both, and can be practically ascertained only by treating them as a unit." By reason of this characteristic, it was held in Matter of Anthony Avenue, 46 N. Y. Misc. 525, aff'd on opinion below, 124 N. Y. App. Div. 940, that in a proceeding to widen a street, inasmuch as the tangible right to maintain and operate a street railway or other public utility in the street is precisely of the same value whether the street be wide or narrow, and is from its nature incapable of a direct enhancement in value as a result of the improvement, and as its value cannot be ascertained with reasonable exactness because it is only a fraction of a system, the company operating the railway or other public utility is not subject to assessment for benefit.

other appliances of a street railway must be authorized by language appropriate to include property of that nature; and authority conferred by statute to levy a special assessment for the improvement of the street upon the lots and property abutting on the street, has been held not sufficient to support an assessment against a street railway.[1]

§ 1453. **Special Assessments; Personal Liability of Property Owner.** — That the owner of property against which a special assessment is made for benefits resulting from an improvement *may be personally charged with liability for the assessment* appears to have been assumed in a number of cases in which judgment was rendered against the property owner without any discussion as to the legislative power.[2] In other cases, however, some courts have expressly sustained the power of the legislature to declare by statute that the owner of property shall be personally liable for the amount of the assessment, or for any deficiency which may result upon a sale of the property.[3] But a remedy by personal judgment against the property owner must be expressly conferred and will not be implied from authority to impose a special assessment.[4] But in a number

[1] South Park Com'rs *v.* Chicago, R. & Q. R. Co., 107 Ill. 105 ("abutting"); Maysville *v.* Maysville St. R. T. Co., 128 Ky. 673 (lots in each square in proportion to area); Boehme *v.* Monroe, 106 Mich. 401; King *v.* Duryea, 45 N. J. L. 258; Dean *v.* Paterson, 67 N. J. L. 199 (land and real estate bordering on street); O'Reilly *v.* Kingston, 114 N. Y. 439 (proviso that no part of expense should be "assessed upon any lands not bordering on or touching said street"); People *v.* Gilon, 126 N. Y. 147, rev'g 58 Hun, 6 ("owners or occupants of all houses and lots intended to be benefited hereby"); Seattle *v.* Seattle Elect. Co., 18 Wash. 599 (lots, blocks, or parcels of lands that may be benefited); *In re* Third, etc. Avenues, 49 Wash. 109, 19; Oshkosh City R. Co. *v.* Winnebago County, 89 Wis. 435 (lots fronting or abutting on street). Street railway held not to be "real estate" within the meaning of a statute authorizing special assessments for street paving. State *v.* Ramsey County Dist. Ct., 31 Minn. 354.

[2] Waterbury *v.* Schmitz, 58 Conn. 22; Hazzard *v.* Heacock, 39 Ind. 172; Gladon *v.* Shank, 37 Iowa, 82; Burlington *v.* Quick, 47 Iowa, 222, 226; Muscatine *v.* Chicago, R. I. & P. R. Co., 79 Iowa, 645, 651; Farwell *v.* Des Moines Brick Mfg. Co., 97 Iowa, 286; Dewey *v.* Des Moines, 101 Iowa, 416; Dashiell *v.* Baltimore, 45 Md. 615; Gould *v.* Baltimore, 58 Md. 46; s. c. 59 Md. 378; Handy *v.* Collins, 60 Md. 229; Moale *v.* Baltimore, 61 Md. 224, 236; Ithaca *v.* Babcock, 72 N. Y. App. Div. 260; Allen *v.* Drew, 44 Vt. 174; Evans *v.* Sharp, 29 Wis. 564. Index — *Personal Liability.*

[3] Atchison, T. & S. F. R. Co. *v.* Peterson, 5 Kan. App. 103; New York, L. E. & W. R. Co. *v.* Dunkirk, 65 Hun (N. Y.), 494, 501, aff'd 143 N. Y. 659; Hill *v.* Higdon, 5 Ohio St. 243; Gest *v.* Cincinnati, 26 Ohio St. 275; Davis *v.* Cincinnati, 36 Ohio St. 24; Centre St., *In re* Vacation, 115 Pa. 247; Vacation of Howard Street, 142 Pa. 601; Franklin *v.* Hancock, 204 Pa. 110; Storrie *v.* Cortes, 90 Tex. 283; Bennison *v.* Galveston, 18 Tex. Civ. App. 20.

[4] State *v.* Ætna Life Ins. Co., 117 Ind. 251; Leeds *v.* Defrees, 157 Ind. 392; Barber Asphalt Pav. Co. *v.* Watt, 51 La. An. 1345, 1354; Moody *v.* Chadwick, 52 La. An. 1888; Mogg *v.* Hall, 83 Mich. 576; McKeesport *v.* Fidler, 147 Pa. 532; Philadelphia *v.* Merklee, 159 Pa. 515; Franklin *v.*

of jurisdictions it has been held that personal liability on the part of the owner is inconsistent with the theory of benefits upon which special assessments are founded; that benefit to the property necessarily implies that liability shall be limited to the property; and that no personal responsibility can rest upon the owner. It is also to be observed that in some of these jurisdictions the court has said that if the owner be made personally liable for the assessment, such liability is inconsistent with constitutional provisions requiring taxation to be equal and uniform, because if the tax be exacted from the owner in person it may result in a contribution by him in excess of the value of the property, thus selecting certain individual members of the community and imposing a tax upon them without subjecting other individual members of the community to contribute to the same tax upon the principle of uniformity and equality which is required by some Constitutions.[1]

Hancock, 204 Pa. 110; Harriott Ave., 24 Pa. Super. Ct. 597, 600. See also Wolf *v.* Philadelphia, 105 Pa. 25.

In *Texas*, a provision not simply that suit might be brought to enforce or foreclose the lien, which might be done by sale, but that the assessment might be collected and suit brought for the "recovery" of the "amount due" "against the owner," was held to mean that the city was entitled to maintain a suit for the recovery of a personal judgment. Lovenberg *v.* Galveston, 17 Tex. Civ. App. 162; distinguishing Galveston *v.* Heard, 54 Tex. 420, where a sidewalk was constructed under a statute providing that the cost should be defrayed by the owners of fronting lots, to be collected by the sale of the lots as provided by ordinance, and the ordinance provided merely for suits to enforce the liens by sale of the property, no provision being made for any other mode of collection.

In Ivanhoe *v.* Enterprise, 29 Oreg. 245, the court said it was doubtful whether a statute creating or authorizing a personal liability against a property owner for local improvements could be upheld on constitutional grounds, but it was clear that, in the absence of express legislative authority, personal judgment could not be obtained against the property owner; and general power to levy and collect taxes for city purposes was not sufficient to authorize a municipality to recover a personal judgment. Statute construed as not imposing any personal liability. Creighton *v.* Manson, 27 Cal. 613; Brown *v.* Joliet, 22 Ill. 123; Mix *v.* Ross, 57 Ill. 121. In Corry *v.* Gaynor, 21 Ohio St. 277, it was held that personal liability under the statute was confined to the person who owned the property at the time when the assessment was imposed. In Davis *v.* Cincinnati, 36 Ohio St. 24, the court declared that the liability was *statutory only*, and that the lessee of the premises was not liable to the city, although he might have covenanted with the owner to pay all assessments. In *Michigan*, it has been held that a statute *authorizing a reassessment* cannot impose personal liability upon the owner, if the owner was not personally responsible under the original assessment. Such a statute was said to be retrospective legislation and unconstitutional. Mogg *v.* Hall, 83 Mich. 576; Grand Rapids *v.* Lake Shore & M. S. R. Co., 130 Mich. 238. An offer by a non-resident in his petition for the cancellation of paving assessments to pay "any and all legal assessments of taxes for city and other purposes" upon his land, justifies a personal judgment against him for the amount found to be legally due, regardless of any statute providing for a personal liability. Farwell *v.* Des Moines Brick Mfg. Co., 97 Iowa, 286.

[1] Taylor *v.* Palmer, 31 Cal. 240; Beaudry *v.* Valdez, 32 Cal. 269; Guerin *v.* Reese, 33 Cal. 292; Gaffney *v.* Gough, 36 Cal. 104; Coniff *v.* Hastings

§ 1454 (800). **Assent of Abutters, when required, is jurisdictional.** – Where the *power* to pave or to improve depends absolutely upon *he assent or petition of a given number or proportion* of the proprie- ors to be affected, this fact is *jurisdictional*, and the finding of the ity authorities or council that the requisite number had assented r petitioned is not, in the absence of legislative provision to that fect, conclusive; the want of such assent makes the whole pro- eding void, and the non-assent may be shown, in the absence of toppel, as a defence to an action to collect the assessment,[1] or may,

Cal. 292; Randolph *v.* Bayne, 44 l. 366; Gillis *v.* Cleveland, 87 Cal. 4, 217; Manning *v.* Den, 90 Cal. 0; Santa Cruz Rock Pav. Co. *v.* wie, 104 Cal. 286, 288; Williams Rowell, 145 Cal. 259, 261; Craw *v.* lono, 96 Ill. 255; People *v.* Drags- n, 100 Ill. 286; McLean County *v.* oomington, 106 Ill. 209, 215; Demp- r *v.* People, 158 Ill. 36; Illinois nt. R. Co. *v.* People, 161 Ill. 244; inois Cent. R. Co. *v.* People, 170 . 224, 232; Hoover *v.* People, 171 . 182, 185; Hudson *v.* People, 188 Ill. 3, 105; Lemont *v.* Jenks, 197 Ill. 3; Gage *v.* Chicago, 225 Ill. 218, 2; Meyer *v.* Covington, 103 Ky. 3; Pfaffinger *v.* Kremer, 115 Ky. 3, 505; Orth *v.* Park, 117 Ky. 779, 1; Macon *v.* Patty, 57 Miss. 378, 5; Neenan *v.* Smith, 50 Mo. 525 erruling St. Louis *v.* Clemens, 36 . 467); St. Louis *v.* Allen, 53 Mo. Carlin *v.* Cavender, 56 Mo. 286; bert *v.* Copp, 62 Mo. 182, 187; isiana *v.* Miller, 66 Mo. 467; nton *v.* Henry County, 115 Mo. 7, 569; Pleasant Hill *v.* Dasher, 120 . 675, 680; State *v.* Angert, 127 . 456; Moberly *v.* Hogan, 131 Mo. 25; Heman Const. Co. *v.* Loevy, Mo. 455, 471; McGuire *v.* Brock- n, 58 Mo. App. 307; Raleigh *v.* ace, 110 N. Car. 32, 46 (distinguish- Yopp *v.* Wilmington, 71 N. Car. ; Asberry *v.* Roanoke, 91 Va. 562; hmond *v.* Williams, 102 Va. 733, 1. See also Barber Asphalt Pav. . *v.* Watt, 51 La. An. 1345, 1354; nhoe *v.* Enterprise, 29 Oreg. 245, 7; Green *v.* Ward, 82 Va. 324. In- t — *Personal Liability.* The question ether there can be a remedy *in onam* under the Constitution and tutes of a State is for the determi- ion of the courts of the State, and ir determination will be accepted l followed by the Federal courts. Wood *v.* Brady, 150 U. S. 18, 23. Personal liability of a *non-resident* of a city for an assessment rests upon the same ground as a judgment against him; and the *State has no power* to enact a statute authorizing an assessment upon real estate for a local improvement and imposing upon its owner, a non-resident of the State, a personal liability to pay such assessment. Dewey *v.* Des Moines, 173 U. S. 193, 202, rev'g 101 Iowa, 416. Mr. Justice *Peckham* said: "The State may provide for the sale of the property upon which the assessment is laid, but it cannot under any guise or pretence proceed farther and impose a personal liability upon a non-resident to pay the assessment or any part of it. To enforce an assessment of such a nature against a non-resident, so far as his personal responsibility is concerned, would amount to the taking of property without due process of law, and would be a violation of the Federal Constitution."

[1] Zeigler *v.* Hopkins, 117 U. S. 683; Ogden City *v.* Armstrong, 168 U. S. 224, 235, quoting text; Liebman *v.* San Francisco, 24 Fed. Rep. 705; Miller *v.* Mobile (injunction), 47 Ala. 163; James *v.* Pine Bluff, 49 Ark. 199; Burnett *v.* Sacramento, 12 Cal. 76; Turrill *v.* Grattan, 52 Cal. 97; Dyer *v.* Miller, 58 Cal. 585; Mulligan *v.* Smith, 59 Cal. 206; Gately *v.* Leviston, 63 Cal. 365; Kahn *v.* San Francisco, 79 Cal. 388; Keese *v.* Denver, 10 Colo. 112, quoting text; Bloomington *v.* Reeves, 177 Ill. 161; Patterson *v.* Macomb, 179 Ill. 163; Whaples *v.* Waukegan, 179 Ill. 310; Hammond *v.* Leavit, 181 Ill. 416; Taylor *v.* Bloomington, 186 Ill. 497; Vennum *v.* Milford, 202 Ill. 423, 425; Brookfield *v.* Sterling, 214 Ill. 100; Kyle *v.* Malin, 8 Ind. 34; Delphi *v.* Evans, 36 Ind. 90; Moberry *v.* Jeffersonville, 38 Ind. 198; Forsyth *v.* Kreuter, 100 Ind. 27;

it has been held, be made, in cases proper for equitable relief, the basis for a bill in equity to restrain a sale of the owners' property

Ely *v.* Morgan County, 112 Ind. 361; Burris *v.* Baxter, 25 Ind. App. 536; Hager *v.* Burlington, 42 Iowa, 661; Richman *v.* Muscatine County, 70 Iowa, 627; Farraher *v.* Keokuk, 111 Iowa, 310; Welsford *v.* Weidlein, 23 Kan. 601, citing text; Shaffer *v.* Weech, 34 Kan. 595; Wyandotte County *v.* Barker, 45 Kan. 699 (injunction); Steinmuller *v.* Kansas City, 3 Kan. App. 45; Louisville *v.* Hyatt, 2 B. Mon. (Ky.) 177; Covington *v.* Casey, 3 Bush (Ky.), 698; Lexington *v.* Headley, 5 Bush (Ky.), 508; McGuinn *v.* Peri, 16 La. An. 326; Royal Street, *In re*, 16 La. An. 393; McKee *v.* Brown, 23 La. An. 306; Daniel *v.* New Orleans, 26 La. An. 1; Barber Asphalt Pav. Co. *v.* Watt, 51 La. An. 1345, 1352; Kidson *v.* Bangor, 99 Me. 139, 146 (collateral attack), citing text; Henderson *v.* Baltimore, 8 Md. 352; Holland *v.* Baltimore, 11 Md. 186; Bouldin *v.* Baltimore, 15 Md. 18; Baltimore *v.* Eschbach, 18 Md. 276; Henry *v.* Thomas, 119 Mass. 583; Auditor General *v.* Fisher, 84 Mich. 128, citing text; Collins *v.* Grand Rapids, 108 Mich. 675; St. Louis *v.* Clemmens, 36 Mo. 467; Jefferson Co. *v.* Cowan, 54 Mo. 234; Zimmerman *v.* Snouden, 88 Mo. 218; Louisville *v.* Hyatt, 2 B. Mon. 117; Von Steen *v.* Beatrice, 36 Neb. 421; State *v.* Birkhauser, 37 Neb. 521; Harmon *v.* Omaha, 53 Neb. 164, 167; Leavitt *v.* Bell, 55 Neb. 57, 63; Grant *v.* Bartholomew, 58 Neb. 839, 841; Henderson *v.* South Omaha, 60 Neb. 125; Batty *v.* Hastings, 63 Neb. 26; Orr *v.* Omaha (Neb.), 90 N. W. Rep. 301; Portsmouth Sav. Bank *v.* Omaha, 67 Neb. 50; McCaffrey *v.* Omaha, 72 Neb. 583; Omaha *v.* Gsanter (Neb.), 93 N. W. Rep. 407; Morse *v.* Omaha, 67 Neb. 426 (injunction), quoting text; South Omaha *v.* Tighe, 67 Neb. 572; Jones *v.* South Omaha (Neb.), 94 N. W. Rep. 957; Roswell *v.* Dominice, 9 N. Mex. 624, citing text; Camden *v.* Mulford, 26 N. J. L. 49; Carron *v.* Martin, 26 N. J. L. 594; State *v.* Elizabeth, 30 N. J. L. 176; Woodruff *v.* Elizabeth, 30 N. J. L. 176; State *v.* Hand, 31 N. J. L. 547; State *v.* Orange, 32 N. J. L. 49; Agens *v.* Newark, 37 N. J. L. 415, rev'g s. c. 35 N. J. L. 168; App *v.* Stockton, 61 N. J. L. 520, citing text; People *v.* Rochester, 21 Barb. (N. Y.) 656; Swift *v.* Williamsburg, 24 Barb. (N. Y.) 427; Sharp *v.* Spear, 4 Hill (N. Y.), 76; Sharp *v.* Johnson, 4 Hill (N. Y.), 92; Litchfield *v.* Vernon, 41 N. Y. 123, distinguished; Sharp, *In re*, 56 N. Y. 257; Matter of Banta, 60 N. Y. 165; Kiernan, *In re*, 62 N. Y. 457; Boyle *v.* Brooklyn, 71 N. Y. 1 (bill to vacate assessment as a cloud on title); People *v.* Brooklyn, 71 N. Y. 495 (*certiorari*); Matter of Garvey, 77 N. Y. 523; Matter of Smith, 99 N. Y. 421; Jex *v.* New York City, 103 N. Y. 536; Miller *v.* Amsterdam, 149 N. Y. 288, quoting text; Corry *v.* Gaynor, 22 Ohio St. 584; Hays *v.* Cincinnati, 62 Ohio St. 116; Smith *v.* Minto, 30 Oreg. 351, citing text; Allen *v.* Portland, 35 Ore. 420, quoting text; Pittsburgh *v.* Walter, 69 Pa. 365; Dancer *v.* Mannington, 50 W. Va. 322; Wells *v.* Burnham, 20 Wis. 112; State *v.* Nelson, 57 Wis. 147.

In the absence of a constitutional restriction, the *power of the legislature* to authorize a street or other improvement at the cost of the property owners without any petition of the property owners is plenary. Londoner *v.* Denver, 210 U. S. 373, rev'g 33 Colo. 104; Givens *v.* Chicago, 186 Ill. 399; Googin *v.* Lewiston, 103 Me. 119; Dennison *v.* Kansas City, 95 Mo. 416; Farrar *v.* St. Louis, 80 Mo. 379. When the petition limits the assessment to a certain rate per running foot, the property owners cannot be assessed in excess of the amount so limited. Barber Asphalt Pav. Co. *v.* Watt, 51 La. An. 1345. Where a petition has been presented and acted on with reference to *an established grade*, the city can only change the grade thereafter by repealing the ordinance, and permitting the commencement of a new proceeding by petition. Whaples *v.* Waukegan, 179 Ill. 310. In order to justify an assessment the work must be done in accordance with the petition. Hutchinson *v.* Omaha, 52 Neb. 345.

Signing the petition. It is *not* necessary that all the petitioners for a municipal improvement should *sign the same petition.* Campbell *v.* Park, 32 Ohio St. 544. *Signature by agent.* See Los Angeles Lighting Co. *v.* Los Angeles, 106 Cal. 156, 161; Tibbetts

to pay it.[1] Accordingly, where a charter provided that "the city council should have full power to procure all streets to be improved

v. West & S. T. R. Co., 153 Ill. 147; McVey v. Danville, 188 Ill. 428; Gleason v. Barnett (Ky.), 61 S. W. Rep. 20; Allen v. Portland, 35 Oreg. 120. Signature by *one of two partners.* See Earl v. Morrilton, 70 Ark. 211. Signature by *corporation.* See Day v. Fairview, 62 N. J. L. 621. *Lessee in possession* under lease for ninety-nine years renewable forever, held to be owner of property and proper person to sign petition. St. Bernard v. Kemper, 60 Ohio St. 244. See also Baltimore v. Boyd, 64 Md. 10, where the lessee was by statute made the owner for the purpose of a petition for street improvements. Where some of the property owners inserted a condition before signature "that grade is satisfactory and trees are not mosted," it was held that the *conditional signatures must be rejected* and only unconditional signatures considered. Von Steen v. Beatrice, 36 Neb. 421, 429.

The case of Pittsburgh v. Walter, 69 Pa. 365, holds that where the right of the city to collect the assessment is put in issue by a general denial, the *onus on the city* to prove everything necessary to support the assessment, including the fact of the application by the requisite number of lot-owners, as such application is jurisdictional. *Ante*, § 792, and note. Same point as to *opening* streets. Zeigler v. Hopkins, 117 U. S. 683, noted *ante*, § 1041, note. Lewis Em. Dom. chap. xiv. §§ 342-362, devoted to the consideration of the petition, its necessity and requisites, and the numerous cases on this subject are industriously collected. Mills Em. Dom. chap. xxx. Proceedings void from insufficient signature may be cured by a curative statute. Nottage v. Portland, 35 Or. 539. Index — *Curative Acts.*

Under the Municipal Act of *Canada* it is provided that local improvements of a certain character "shall not be undertaken by the council of any city, except under a by-law passed in pursuance of the fourth sub-section of the preceding section, otherwise than on the petition of two-thirds in number and one-half in value of real property to be directly benefited thereby, of the owners of such real property, — the number of such owners and the value of such real property having been *first ascertained and finally determined* in the manner and by the means provided by by-law in that behalf." Harr. Munic. Man. (2d ed.) 244. It will be observed that the number of the owners as well as the value of the real property is to be first ascertained and finally determined in the manner and by the means provided by by-law in that behalf. The court in one case refused to entertain an application to set aside a by-law for local improvements, on the ground that the petition on which the by-law was based was not signed by three-fourths in number and one-half in value of the owners of real property to be benefited by the local improvement, contrary to the determination of the officer of the corporation in that behalf. *In re* Michie, 11 Up. Can. C. P. 379. As to local improvements under the Municipal Act of *Ontario* of 1897, see Biggar's Municipal Manual, (Canada, 1900) p. 893 *et seq.*

Where the power to make a local improvement is dependent upon a petition in writing of a majority of the owners of land fronting on the improvement, one who signs such a petition, making therein no representations that the signers constitute a majority, *is not estopped* to deny that the required number did not sign, or to question the validity of the assessment. Sharp, *In re*, 56 N. Y. 257, questioning Burlington v. Gilbert, 31 Iowa, 356, and commenting on People v. Goodwin, 5 N. Y. 568, and Kellogg v. Ely, 15 Ohio St. 64. As to *estoppel*, see more fully §§ 1455, 1456.

[1] In Holland v. Baltimore, 11 Md. 186, the city was authorized to pave streets when the proprietors of the *majority* of the feet of ground fronting on any street should apply, in writing, therefor. Supposing that a majority of the proprietors had united in the application, a supposition which afterwards turned out not to be true, in consequence of one of the signers not being, in law, a proprietor, the city paved a certain street, and, among others, paved in front of the plaintiff's lot, he not having signed the application. After the work had been done, the city sought to enforce the collection

in any manner they may deem advisable at the ex
property owners; and that a petition in writing to t
the owners of the larger part of the ground between th
improved should be sufficient to authorize the counc
for such improvements: provided, further, that the
vote of all the members elect, may cause such improv
made without petition or consent," it was held that
authorizing such work, not enacted at the instance of
holders, nor on the unanimous vote of the council, w
to fix the liability of the lot owners.[1] A proviso in a pa
made with the city, requiring the contractor to obtai
consent of the owners of the property fronting or abut
said sidewalks to the laying down of the said paveme
in view of other special provisions of the contract, to h
to the kind of materials to be used, and not to the ex
work itself.[2]

When the record shows that the required numbe
owners have petitioned for the improvement, and wh
that the city council has so found, *the burden* is on a p
ing the assessment to show that the petition was no
fact to confer jurisdiction.[3] But the determination of
officers that the petition is sufficient is not conclusive
of a statutory provision so declaring it.[4] And it has
authority to municipal officers to determine the suf
petition must be expressly conferred.[5] But the l

of the amount. Plaintiff applied for an injunction to restrain the sale of his lot to pay the assessment. The Court of Appeals held: 1. That if the requisite majority of owners did not apply, the whole proceedings were null and void. 2. That a non-assenting owner might (notwithstanding he did not apply for the writ until after the work was done) have an injunction to prevent the sale of his property to pay the unauthorized assessment. S. P. Bouldin *v.* Baltimore, 15 Md. 18; Miller *v.* Mobile, 47 Ala. 163.

[1] Covington *v.* Casey, 3 Bush, 698; *ante*, § 470; Tallant *v.* Burlington, 39 Iowa, 543. See Merrill *v.* Abbott, 62 Ind. 549; Smith *v.* Duncan, 77 Ind. 92.

[2] Hitchcock *v.* Galveston, 96 U. S. 341.

The power of a city council in the matter of street improvements is a *specially delegated authority*, and the acts of the city g under are legal only *formity* with its di Passaic, 41 N. J. Landman, 28 Ohi *v.* Farr, 22 N. J. Abbott, 62 Ind. 5 tin, 26 N. J. L. 5 29 N. J. L. 104.

[3] Merritt *v.* K Bloomington *v.* J Cummings *v.* Com'rs, 181 Ill. *v.* People, 183 Ill ville, 188 Ill. 42 ville, 214 Ill. 6 Bayonne, 54 N Portland, 35 O son, 57 Wis. 14

[4] Auditor G 128; Collins *v.* 675.

[5] Miller *v.* 288; Allen *v.*

provide by statute that the determination of the council or other municipal body that the requisite number of owners has signed the petition shall be final and conclusive; and in that event the validity of the assessment cannot be attacked on the ground that the decision of the council was erroneous and the petition was not in fact signed by the prescribed number of property owners, in the absence of evidence of fraud or bad faith.[1]

§ 1455. **Special Assessments; Estoppel by Silence and Acquiescence.** — It is within the power of the legislature to enact that no action or proceeding to set aside, cancel, or annul any special assessment shall be maintained by any person *unless such action shall have been commenced within a prescribed period, e. g.,* thirty days after the delivery of the assessment roll and warrant to the city treasurer; and an action to vacate and set aside the special assessment and to enjoin the collection thereof will be barred, if not begun within the time prescribed by the statute.[2] Although there may be no such statutory provision, it is very often held *that if a property owner is given notice of a proposed assessment* and is afforded an opportunity to be heard on the question of the validity of the proceedings, he cannot collaterally attack the validity of the assessment in a suit

432. Index — *Estoppel; Municipal Bonds.*

[1] Spaulding *v.* North San Francisco Homestead Assoc., 87 Cal. 40; German Sav. & Loan Soc. *v.* Ramish, 138 Cal. 120, 130; *In re* Kiernan, 62 N. Y. 457; Dolan *v.* New York City, 62 N. Y. 472; People *v.* Buffalo Board of Assessors, 193 N. Y. 248.

[2] Loomis *v.* Little Falls, 176 N. Y. 31, aff'g 66 N. Y. App. Div. 299. To the same effect, Wahlgren *v.* Kansas City, 42 Kan. 243; Marshall *v.* Leavenworth, 44 Kan. 459. See also Lennon *v.* New York City, 55 N. Y. 361; Mayer *v.* New York City, 101 N. Y. 284; Matter of Bridgford, 65 Hun (N. Y.), 227. The legislature may declare that the tacit acquiescence of the parties interested, and their failure to challenge proceedings while in progress, will estop them from questioning them after they are completed. Lent *v.* Tillson, 72 Cal. 404, 433.

In *Kansas*, it is provided by statute that "no suit to set aside special assessments, or to enjoin the making of the same, shall be brought, nor any defence to the validity thereof be allowed, after the expiration of thirty days from the time the amount due on each lot or piece of ground liable for such assessment is ascertained." This statute is constitutional and valid. Wahlgren *v.* Kansas City, 42 Kan. 243; Marshall *v.* Leavenworth, 44 Kan. 459. The statutory bar applies although the petition has not been signed by the required majority, if non-conformity to the statutory requirements does not appear on its face. Doran *v.* Barnes, 54 Kan. 238; Kansas City *v.* Kimball, 60 Kan. 224; Kansas City *v.* Gray, 62 Kan. 198. The determination of the mayor and council that the petition is sufficiently signed is final and conclusive, if suit is not brought within the prescribed period. Union Pacific R. Co. *v.* Kansas City, 73 Kan. 571. The statute makes no exception of fraud, and relief claimed on that ground is barred. Topeka *v.* Gage, 44 Kan. 87. See also, as to the construction of this statute, Lynch *v.* Kansas City, 44 Kan. 452; Hammerslough *v.* Kansas City, 46 Kan. 37; Kansas City *v.* Gibson, 66 Kan. 501; Leavenworth *v.* Jones, 69 Kan. 857.

or proceeding brought for that purpose, in so far as the errors a omissions complained of do not affect the jurisdiction or power the local authorities to make the assessment.[1] Independently any statute or statutory limitation, and independently of any pri ciple which bars a property owner from relief because he has h an opportunity to present the question before some other tribun the courts of some jurisdictions recognize the fact that *silence a acquiescence* on the part of a property owner, who stands by a permits the improvement to be made, knowing of its progre knowing that it is intended to pay for the improvement by a spec assessment upon his property, and knowing also of the defect the proceedings, will estop him from attacking the validity of assessment by a suit to restrain the collection of the same or vacate or cancel it, or to maintain *certiorari* for these purposes, the ground of any defect or irregularity which *does not affect jurisdiction or power* of the municipality.[2] But it is also held,

[1] Fenwick Hall Co. *v.* Old Saybrook, 69 Conn. 32; Nixon *v.* Burlington, 141 Iowa, 316; 115 N. W. Rep. 239; Brown *v.* Grand Rapids, 83 Mich. 101; Nelson *v.* Saginaw, 106 Mich. 659; Jones *v.* Gable, 150 Mich. 30, 33; Kerker *v.* Bocher, 20 Okla. 729; Wilson *v.* Salem, 24 Oreg. 504; Wingate *v.* Astoria, 39 Oreg. 603; Annie Wright Seminary *v.* Tacoma, 23 Wash. 109; McNamee *v.* Tacoma, 24 Wash. 591; Potter *v.* Whatcom, 25 Wash. 207; Lewis *v.* Seattle, 28 Wash. 639; Ferry *v.* Tacoma, 34 Wash. 652, 659; Alexander *v.* Tacoma, 35 Wash. 366, 372; Aberdeen *v.* Lucas, 37 Wash. 190; Spokane *v.* Preston, 46 Wash. 98. See also Barkley *v.* Oregon City, 24 Oreg. 515.

In *Illinois*, a lot owner may appear on the application to confirm an assessment and prove that the petition is not sufficiently signed; and, if he has received notice of the application to confirm and has failed to appear and object to confirmation, he cannot attack the sufficiency of the petition for lack of sufficient signatures upon application for judgment of sale. Fisher *v.* People, 157 Ill. 85; Kimball *v.* Kochersperger, 160 Ill. 653; Pipher *v.* People, 183 Ill. 436; Leitch *v.* People, 183 Ill. 569; Conlin *v.* People, 190 Ill. 400; Fischbach *v.* People, 191 Ill. 171; Givins *v.* People, 194 Ill. 150; Sumner *v.* Milford, 214 Ill. 388; Harman *v.* People, 214 Ill. 454. Requisites of estoppel where the property owner has been benefited by improvement, see O'Brien *v.* Wh ock, 184 U. S. 450.

A landowner who was served w notice of proceedings preliminary the establishment of a drainage d trict, had actual knowledge of t construction of the drain therein, a without objection has paid instalmen of a tax assessed for the improvemen is *estopped from seeking relief in equ* from his obligation to pay the remai ing taxes on the ground that the st ute under which the improvement w made did not provide for notice landowners of the proposed impro ment and therefore was unconsti tional, nor will the fact that oth might successfully raise the quest of constitutionality aid him. Thon son *v.* Mitchell, 133 Iowa, 527. Wh a property owner appears before council and only remonstrates agai the cost of the improvements, he is topped to object on any other grou *e. g.*, the lack of power or jurisdict because no notice was given. Bar *v.* Tacoma, 12 Wash. 32. But in N *York* it has been held that appeara before the board of assessors at time fixed for a hearing as to amount or apportionment of the sessment and objection to the app tionment, does not estop the prope owner from objecting to the proce ings on *jurisdictional* grounds. Mi *v.* Amsterdam, 149 N. Y. 288, 299.

[2] Patterson *v.* Baumer, 43 Io

many jurisdictions, that there is *no estoppel if the defect goes to the jurisdiction or power* of the municipality, and is not a mere irregu-

477; Bacas *v.* Adler, 112 La. 806; New Iberia *v.* Fontelieu, 108 La. 460; State *v.* La Crosse, 101 Wis. 208, 214; Beaser *v.* Barber Asphalt Pav. Co., 120 Wis. 599; Lawton *v.* Racine, 137 Wis. 593.

In Tone *v.* Columbus, 39 Ohio St. 281, 303, which may be regarded as the leading case on the subject, the court discussed *the question of estoppel by silence and acquiescence* at great length, and it held that, to sustain an estoppel by mere silence on the part of the property owner, or by failure to object, there must be both the opportunity and the duty to speak; the party maintaining silence must be in a situation to know that some one was relying thereon and acting or about to act as he would not have done had he spoken and asserted his right. The doctrine under such circumstances has been laid down as follows by *Doyle*, J.; "When the improvement is of a public street upon which the owner's property abuts, before the duty to speak can be said to exist, which is so imperative that if he keep silent then he shall not afterwards be heard, it must be shown: *first*, that he knew the improvement was being made; *second*, that he had knowledge that the public authorities intended and were making the improvement upon the faith that the cost thereof was to be paid by the abutting property owners and that an assessment for that purpose was contemplated. Because cities may improve the public streets out of the general fund and without a special assessment; *third*, that he knew of the infirmity or defect in the proceedings under which the improvement was being made which would render such assessment invalid, and which he is to be estopped from asserting; *fourth*, some special benefit must have accrued to the owner's property distinct from the benefits enjoyed by the citizens generally." But in a later case it was held that a property owner within an assessment district created by an *unconstitutional* statute, who has not promoted the making of the improvement, may enjoin the collection of an assessment to pay for the improvement in a suit for that purpose begun when an attempt is made to enforce the assessment. He is not required to begin such suit at an earlier day though he may know of the improvement and of the intention to make the assessment. Lewis *v.* Symmes, 61 Ohio St. 471, following Columbus *v.* Agler, 44 Ohio St. 485.

New Jersey. The granting of a writ of *certiorari* is discretionary with the court, and the writ will be denied when the applicant is guilty of laches. Zabriskie *v.* Hudson City, 29 N. J. L. 115. Index — *Certiorari.* Where the city has been permitted to incur the expense of an improvement without objection to the validity of the improvement ordinance, and has then proceeded to assess the benefits, it is too late for a party thus assessed to object to the assessment on the ground of invalidity of the original ordinance. Vanatta *v.* Morristown, 34 N. J. L. 445; Ropes *v.* Essex Public Road Board, 37 N. J. L. 335; Bogart *v.* Passaic, 38 N. J. L. 57; Ryerson *v.* Passaic, 38 N. J. L. 171; Youngster *v.* Paterson, 40 N. J. L. 244; Bowne *v.* Logan, 43 N. J. L. 421; Provident Inst. for Sav. *v.* Jersey City, 52 N. J. L. 490; Meday *v.* Rutherford, 52 N. J. L. 499; Simmons *v.* Passaic, 55 N. J. L. 485; Van Wagoner *v.* Paterson, 67 N. J. L. 455; Rosell *v.* Neptune City, 68 N. J. L. 509; Doughten *v.* Camden, 71 N. J. L. 426; Sears *v.* Atlantic City, 72 N. J. L. 435; Tusting *v.* Asbury Park, 73 N. J. L. 102; Durrell *v.* Woodbury, 74 N. J. L. 206, aff'd 75 N. J. L. 939. So, too, an owner who has stood by with knowledge of the progress of a street improvement and has the benefit of the work done, cannot be permitted to take advantage of a want of regularity in the proceedings for the assessment and by *certiorari* cast the cost of the work upon the taxpayers. Zabriskie *v.* Hudson City, 29 N. J. L. 115; Charlier *v.* Woodruff, 36 N. J. L. 204; Hoboken Land & Imp. Co. *v.* Hoboken, 36 N. J. L. 540; Wilkinson *v.* Trenton, 36 N. J. L. 499; Stetler *v.* East Rutherford, 65 N. J. L. 528; Borton *v.* Camden, 65 N. J. L. 511.

In *Nebraska*, mere delay in proceeding against a void tax does not estop the party assessed. Casey *v.*

larity in procedure.[1] Nor is there any estoppel if the property owner did not have knowledge or notice that the improvement was

Burt County, 59 Neb. 624. Nor does the mere fact that he had knowledge of the commencement and progress of the work estop him from enjoining the assessment *for lack of the necessary petition* in the absence of any other ground of estoppel. Harmon *v.* Omaha, 53 Neb. 164. Protest to the members of the governing board of the city and to the contractor, and notice that the property owner would resist the collection of the assessment, held sufficient to relieve the property owner from the defence of estoppel. Moss *v.* Fairbury, 66 Neb. 671.

Michigan. In this State, it has been many times held that an owner who stands by until the completion of a local improvement, knowing that he will be specially assessed therefor, and who is benefited to the extent of the assessment, *is estopped to apply for relief in equity* by injunction restraining the collection of the assessment. Byram *v.* Detroit, 50 Mich. 56; Lundbom *v.* Manistee, 93 Mich. 170; Goodwillie *v.* Detroit, 103 Mich. 283; Atwell *v.* Barnes, 109 Mich. 10; Fitzhugh *v.* Bay City, 109 Mich. 581; Moore *v.* McIntyre, 110 Mich. 237; Walker *v.* Thomas, 123 Mich. 290; Tuller *v.* Detroit, 126 Mich. 606; Gates *v.* Grand Rapids, 134 Mich. 96; Nowlen *v.* Benton Harbor, 134 Mich. 401; Farr *v.* Detroit, 136 Mich. 200; Stewart *v.* Detroit, 137 Mich. 381; Shaw *v.* Ypsilanti, 146 Mich. 712; Stewart Co. *v.* Flint, 147 Mich. 697; Constantine *v.* Albion, 148 Mich. 403; Jones *v.* Gable, 150 Mich. 30. And the court has said that this estoppel exists independently of failure on the part of the property owner to avail himself of a statutory remedy. Jones *v.* Gable, 150 Mich. 30. But there is no estoppel if objection is interposed at the first meeting of the council and notice served on the city authorities that the property owner will resist the assessment, and the proceeding is for the sale of the land, and is not a suit in equity to enjoin the collection of the assessment. Auditor-General *v.* Stoddard, 147 Mich. 329. A property owner was held to be estopped to maintain an action in equity to enjoin the collection of an assessment, *although the petition was not signed* by the frontage required to give the city council jurisdiction, and although the complainant did not acquire the property until the work was partly done. Farr *v.* Detroit, 136 Mich. 200. But it has been said that there is no estoppel by silence and acquiescence if the assessment is of such a nature that in law it cannot be regarded as a benefit to the property. Stevens *v.* Port Huron, 149 Mich. 536, 550.

[1] Starr *v.* Burlington, 45 Iowa, 87; Coggeshall *v.* Des Moines, 78 Iowa, 235 (failure to let contract by competition); Comstock *v.* Eagle Grove, 133 Iowa, 589; Bradley *v.* Centerville, 139 Iowa, 599; Fox *v.* Middlesborough Town Co., 96 Ky. 262 (statutory notice); Verdin *v.* St. Louis, 131 Mo. 26; App *v.* Stockton, 61 N. J. L. 520; Burnett *v.* Boonton, 73 N. J. L. 453; Strout *v.* Portland, 26 Oreg. 294; Seattle & P. S. Packing Co. *v.* Seattle, 51 Wash. 49; Jorgensen *v.* Superior, 111 Wis. 561; McGowan *v.* Paul, 141 Wis. 388; 123 N. W. Rep. 253.

Oregon. In Strout *v.* Portland, 26 Oreg. 294, 300, *Moore*, J., said on the question of estoppel: "While there is quite a conflict of opinion upon this subject, we think the trend of modern decisions, as well as the weight of authority and better reason, serves to establish the following rules as applicable thereto: (1) When, in proceedings for the levy of an assessment, the common council *is without jurisdiction from the beginning*, a person whose property is benefited by a local improvement is not estopped to deny the validity of the proceedings on the ground that he made no objection thereto while the improvement was in progress [citing cases]. (2) But if, *after jurisdiction has been acquired*, the owner of property benefited by a local improvement with knowledge of its progress, permitted its completion without objection, he will be estopped from questioning mere irregularities occurring in the subsequent proceedings" [citing authorities]. In Winegate *v.* Astoria, 39 Oreg. 603, the court said, "It is the settled law of [Oregon], supported by the weight of authority, that where the municipal authorities have jurisdiction to improve a street, a property owner, who, with knowledge of such improvement, makes no objec-

to be made by special assessment, and not by general taxation.[1] And some decisions also hold that it is essential to estoppel that the

tion until after the work has been completed, cannot enjoin the collection of the assessment on the ground that the proceedings have been irregular," citing Wilson *v.* Salem, 24 Oreg. 504; Barkley *v.* Oregon City, 24 Oreg. 515; Strout *v.* Portland, 26 Oreg. 294. Property owners who did not sign the petition are *not estopped* by silence or apparent acquiescence while the improvement was in progress from questioning proceedings which are *void for lack of jurisdiction*. Strout *v.* Portland, 28 Oreg. 294, 301. The doctrine of estoppel by silence and non-objection to the improvement while it is in progress does not apply where the council is without jurisdiction *ab initio* by reason of the absence of any petition as required by statute. Smith *v.* Minto, 30 Oreg. 351.

Washington. Where a statute not only forbade city officers to become interested in city contracts, but *also made such contracts void*, it was held that the fact that an owner stood by and allowed the improvement to be made without objection did not estop him from asserting in an action to enforce the assessment the invalidity of the contract on the ground of interest of a member of the council. Northport *v.* Northport Townsite Co., 27 Wash. 543. A statutory exemption goes to the jurisdiction of the council to assess the property, and failure to appear and object to the assessment does not estop the owner from claiming that his property is exempt. Seattle & P. S. Packing Co. *v.* Seattle, 51 Wash. 49.

Indiana. In this State many declarations by the court are to be found to the effect that merely standing by and permitting improvements to be made without objection estops the property owner who is specially benefited by the improvement from denying the authority of the municipality to make the improvement. Thus in Powers *v.* New Haven, 120 Ind. 185, *Coffey*, J., said, "It is now quite well settled that if the owner of property in a city stands by and permits an improvement to be made which benefits such property, and makes no objection to such improvement, he will be estopped from denying the authority of such city to make the improvement." Citing Evansville *v.* Pfisterer, 34 Ind. 36; Johnson *v.* Allen, 62 Ind. 57; Taber *v.* Ferguson, 109 Ind. 227; Ross *v.* Stackhouse, 114 Ind. 200; Jenkins *v.* Stetler, 118 Ind. 275. See also McCoy *v.* Able, 131 Ind. 417. "A landowner who has full knowledge that officers and parties are in good faith acting upon the assumption that proceedings in which a special assessment was made are valid, is estopped to deny the effectiveness of such proceedings on the ground that he had no notice, if he lies silently by without objection until the improvement is completed or considerable sums of money are expended upon it." Scudder *v.* Jones, 134 Ind. 547, 552, *per Elliott*, J. Where, in a drainage proceeding, there is an attempt to comply with the requirements of the statute as to notice and some notice is given, though insufficient, *parties who have actual knowledge* of the petition and proceedings under it and that money has been expended on the faith that the proceedings are valid and make no objection, will be presumed to have acquiesced in their validity. Peters *v.* Griffee, 108 Ind. 121. "It is a general rule now fully accepted in this State that where the owner of property subject to assessment for public improvements stands by and makes no objection to such improvements which benefit his property, he may not deny the authority by which the improvements are made, nor defeat the assessment made against his property for the benefits derived. And this is true both where the proceedings for the improvements are attacked for irregularity, and where their validity is denied, but color of law exists for the proceedings." Cass County *v.* Plotner, 149 Ind. 116, 119, *per Hackney*, J. In Vickery *v.* Hendricks County, 134 Ind. 554, the proceedings were attacked upon the ground that the statute under which they were had was *unconstitutional*,

[1] Hager *v.* Burlington, 42 Iowa, 661; Bennett *v.* Emmetsburgh, 138 Iowa, 67; Spaulding *v.* Baxter, 25 Ind. App. 485; Ogden *v.* Hudson City, 29 N. J. L. 475; Walsh *v.* Newark, 77 N. J. L. 181; 71 Atl. Rep. 39; Groel *v.* Newark (N. J. L.), 73 Atl. Rep. 522; Tone *v.* Columbus, 39 Ohio St. 281, 303.

property owner should have knowledge or *notice of the particu defect* affecting the validity of the assessment.[1]

§ 1456. **Special Assessment; Estoppel by Signing Petition for I provement.** — That a property owner whose property is s jected to a special assessment for the cost of a local improvem *may be estopped by his conduct* from objecting to the validity of assessment, is generally held by the decisions, although the co are not agreed as to what facts shall be deemed sufficient to cre an estoppel.[2] When, however, the improvement has been initia by a petition of property owners intended to be assessed, numer decisions declare that by signing the petition and thereby par pating in the proceedings resulting in the assessment, persons signing are estopped to deny the power of the municipality public officers, to make the improvement, and to impose a spe assessment therefor,[3] and some decisions so hold although

but the court held that one who receives benefits under an unconstitutional law cannot deny the constitutionality of such law. See further as to the rule in *Indiana*, Taylor *v.* Patton, 160 Ind. 4; Cluggish *v.* Koons, 15 Ind. App. 599; Busenbark *v.* Clements, 22 Ind. App. 557; Lewis *v.* Albertson, 23 Ind. App. 147; Willard *v.* Albertson, 23 Ind. App. 162; Menzie *v.* Greensburg, 42 Ind. App. 657. But it is to be noted that in *Indiana*, an assessment for improvements is, under the statute of that State, in the nature of a judgment. See Hibben *v.* Smith, 191 U. S. 310, 324, citing Bradley *v.* Frankfort, 99 Ind. 417; Jackson *v.* Smith, 120 Ind. 520; Carroll County *v.* Justice, 133 Ind. 89.

[1] Barker *v.* Wyandotte County, 45 Kan. 681; Wyandotte County *v.* Barker, 45 Kan. 699; Tone *v.* Columbus, 39 Ohio St. 281; Lear *v.* Halstead, 41 Ohio St. 566. Payment of general taxes against property which is erroneously described and one instalment of a special assessment against the property by the same description held not to estop the owner from resisting the compulsory payment of further instalments of the assessment. People *v.* Owens, 231 Ill. 311. Grantor in deed stipulating to pay special assessment held to be estopped from questioning validity of assessment. Jebb *v.* Sexton, 84 Ill. App. 45.

[2] But in *California* it has been held that in an action to foreclose a lien upon land for the cost of a public imp ment, in which there is no persona bility, and where the proceeding purely statutory, and the lien e only by virtue of a strict compli with the provisions of the statute doctrine of estoppel *in pais* has n plication. Heft *v.* Payne, 97 Cal. Union Paving & Cont. Co. *v.* Mc ern, 127 Cal. 638.

[3] Shepard *v.* Barron, 194 U. S. Stewart *v.* Wyandotte County, Kan. 708; Wyandotte County *v.* H 48 Kan. 413; Downs *v.* Wyand County, 48 Kan. 640; Wyand County *v.* Arnold, 49 Kan. 279; Ho *v.* Jefferson Southern Pond Drai Co., 119 Ky. 824, 834; Hellen *v.* M ford, 188 Mass. 42; Moran *v.* Hud 34 N. J. L. 25; s. c. 34 N. J. L. Loomis *v.* Little Falls, 66 N. Y. A Div. 299, 303, aff'd 176 N. Y. Erickson *v.* Cass County, 11 N. I 494, 511; Turnquist *v.* Cass Cou Drain Com'rs, 11 N. Dak. 514; Br *v.* Gibson, 29 Ohio Cir. Ct. R. Harrisburg *v.* Baptist, 156 Pa. Moore *v.* Barry, 30 S. Car. 530; Tr *v.* Ward, 2 Wash. 30; Wingate *v.* coma, 13 Wash. 603; Tacoma L Co. *v.* Tacoma, 15 Wash. 133; Se *v.* Hill, 23 Wash. 92; Cotzhause Dick, 138 Wis. 127.

Person signing petition and fai to object until after improvement made, held estopped to enjoin sal lot for assessment. Sexsmith *v.* Sm 32 Wis. 299. A person who prom

ground of invalidity alleged by the property owner is that the statute under which the improvement is made is void because it vio-

an improvement held, under the circumstances of the case, to be estopped o assert *lack of notice* of proceedings efore the common council. English . Arizona, 214 U. S. 359, 365. Petitioners for the creation of an *improvement district* are estopped to attack the rganization of the district or to assert hat their land is not within the district when an assessment against this and is sought to be enforced. Mathews *v.* Kimball, 70 Ark. 451. But in Collier's Estate *v.* Western Pav. & Supply Co., 180 Mo. 362, it was held hat a property owner was *not estopped* to dispute the validity of the ormation of the taxing district, when he had no opportunity to object thereto prior to an action on the tax bills, the owner not having petitioned for the improvement. If the petition asked that the city council enter into a contract for the improvement, *property owners signing the petition are estopped* to claim that they are entitled by statute to an opportunity to make the improvement before the municipality should contract therefor. People *v.* Clarke, 110 N. Y. App. Div. 28. When he petition specifies the character of he street pavement desired, a petitioner is estopped to object that a specied pavement adopted therefor is atented. Gurley *v.* New Orleans, 124 a. 390; 50 So. Rep. 411. A church, hich petitions that an improvement be ade, is estopped to claim a statutory xemption from liability to assessment erefor. Broad Street, 165 Pa. 475. petitioner for the opening of a street ill not be allowed to dispute on *certiari* the validity of the ordinance to pen the street which was obtained by is aid, and in which others are largely terested and have incurred expenses. Moran *v.* Hudson, 34 N. J. L. 25, aff'd 4 N. J. L. 531.

Signing petition to modify contract or street paving, the petition being ranted by the city authorities, held to stop the owner from questioning the alidity of the ordinance for the improvement, and the giving of the notice f letting the contract. Johnson *v.* Allen, 62 Ind. 57. To the same effect, Lux & T. Stone Co. *v.* Donaldson, 162 Ind. 481. A person who petitions for a change in the improvement is estopped to object that the improvement was not made according to the original ordinance. Hill-O'Meara Const. Co. *v.* Hutchinson, 100 Mo. App. 294. A property owner who stated in the petition for the improvement the number of feet his property abutted on the street held to be estopped from asserting after the improvement had been ordered and the work done, that he had a less number of feet subject to assessment. Cincinnati *v.* Manss, 54 Ohio St. 257. Persons who *petition for a change of grade* are estopped to claim damages resulting from a change made in conformity with the petition. Vaile *v.* Independence, 116 Mo. 333. A person *petitioning for an election* to determine whether a subscription should be made and bonds issued in aid of a railroad, is estopped to question the validity of the bonds, and cannot dispute the legality of a tax sanctioned by the same statute to pay the bonds. State *v.* Mastin, 103 Mo. 508. Where the prosecutor was present at, and participated in, an election in a street lighting district, and, without objection or protest, voted upon the question of the sum to be raised for street lighting purposes in the district for the ensuing year, he was held to be *estopped from questioning the regularity of the election* for lack of sufficient notice. Brown *v.* Woodbridge St. Lighting Dist., 69 N. J. L. 485, aff'd 70 N. J. L. 762. Where the city adopted *a material for street paving* other than that specified in the petition, an owner who signed the petition is not estopped to object to the assessment. Winnebago Furniture Mfg. Co. *v.* Fond du Lac County, 113 Wis. 72. There *is no estoppel* if the city has exercised its statutory power to make the improvement without a petition, and is proceeding without regard to the limitations contained in the petition presented. Schuchard *v.* Seattle, 51 Wash. 41. Where a property owner *signed a petition* to the board of public works to designate a day for considering the improvement of a street and to recommend an ordinance to the city council for the improvement and a hearing was had, and a recommendation was made for the passage of an ordinance under an *unconstitutional statute*, it was held that

lates the provisions of the *Constitution*.[1] But a person who signs a petition does *not waive compliance with the statutory requirements* as to any proceedings *subsequent* to the presentation of the petition; and is not estopped thereby to object to the validity of the assessment for defects subsequently arising.[2]

the property owner was not estopped to deny the validity of the statute in an action against him on the tax bill. Perkinson *v.* Hoolan, 182 Mo. 169.

[1] Wight *v.* Davidson, 181 U. S. 371, 377; Shepard *v.* Barron, 194 U. S. 553; Hellen *v.* Medford, 188 Mass. 42; Tone *v.* Columbus, 39 Ohio St. 281, 296; State *v.* Mitchell, 31 Ohio St. 592, 609; Columbus *v.* Sohl, 44 Ohio St. 479; Brown County *v.* Martin, 50 Ohio St. 197, 208; Mott *v.* Hubbard, 59 Ohio St. 199, 212; Bidwell *v.* Pittsburgh, 85 Pa. 412. See also Ferguson *v.* Landram, 1 Bush (Ky.), 548; s. c. 5 Bush (Ky.), 230. Compare O'Brien *v.* Wheelock, 184 U. S. 450.

A petition that a street improvement be made pursuant to statute necessarily implies that the work be done under the rule prescribed by the statute for the imposition of the special assessment, and the petitioner thereby waives the right to object to the rule of assessment so prescribed on the ground that it constitutes a taking of property without due process of law. Conde *v.* Schenectady, 164 N. Y. 258. Where an improvement is made under a void statute and the assessments are collected, the municipality holds the money as trustee or agent for the certificate holders, and both the municipality and the property owners are estopped in a question with the contractor to deny the liability of the municipality therefor. Willis *v.* Wyandotte County, 86 Fed. Rep. 872. See also Akron *v.* Barber Asphalt Pav. Co., 171 Fed. Rep. 29.

[2] Steckert *v.* East Saginaw, 22 Mich. 104; Shoenberg *v.* Field, 95 Mo. App. 241; Hutchinson *v.* Omaha, 52 Neb. 345; Wakeley *v.* Omaha, 58 Neb. 245; Grant *v.* Bartholomew, 58 Neb. 839; Batty *v.* Hastings, 63 Neb. 26; Tone *v.* Columbus, 39 Ohio St. 281; Carlisle *v.* Cincinnati, 29 Ohio Cir. Ct. R. 81; Strout *v.* Portland, 26 Oreg. 294; Dallas *v.* Ellison, 10 Tex. Civ. App. 28; Dallas *v.* Atkins (Tex Civ. App.), 32 S. W. Rep. 780. Where a city charter required a petition of not less than two-thirds of the abutting owners, it was held that a person who signed the petition was estopped from afterwards claiming that the special assessment for the improvement petitioned for was unauthorized and illegal on the ground that two-thirds of the abutting owners did not join in the petition. Burlington *v.* Gilbert, 31 Iowa, 356. See to the same effect Cross *v.* Kansas City, 90 Mo. 13. But in the Matter of Sharpe, 56 N. Y. 257, this view was disapproved and it was held that a person signing a petition is not estopped from questioning the sufficiency in number of the signatures to the petition. It is the duty of the municipal officers before taking action upon the petition to ascertain whether a sufficient number have signed it to confer jurisdiction, and persons signing have the right to rely upon the performance of that duty. An estoppel only applies as to the property owned by the person estopped at the time when he signed the petition, and does not prevent him from objecting as subsequent grantee of another parcel when his grantor had no notice of the proceeding. Hoy *v.* Hubbell, 125 N. Y. App. Div. 60.

An owner who has petitioned for an improvement is not estopped to enjoin the collection of an assessment in excess of the statutory limit, *e. g.*, twenty-five per cent of the assessed value of the property. By petitioning he binds his property for the payment of its proper share of a legal assessment for the cost of the improvement, but no further. Birdseye *v.* Clyde, 61 Ohio St. 27. *Williams*, J., said: "The record shows that all of the plaintiffs knew of the progress of the improvement and made no objection to its construction, or to any of the proceedings under which it was constructed. This acquiescence on their part would be sufficient to estop them from attacking the validity of these proceedings. But they had no knowledge of the amount of the assessment charged against their lots, and could have none, until the assessing ordinance was passed; and they promptly interposed with their injunction as soon as they learned the assess-

§ 1457 (803, 804). **When Notice to Abutter is necessary.** — We have elsewhere discussed[1] the subject of the constitutional right of a property owner to notice and a hearing on the imposition of a special assessment against his property. Irrespective of constitutional requirements of a hearing on that question, the *statutes frequently provide that notice* of various steps in the proceedings shall be given by publication or otherwise to the property owners intended to be assessed. These statutory requirements are generally regarded as mandatory, being intended for the benefit and protection of the persons whose lands are to be subjected to assessment; and, in the absence of notice as required by such provisions, the local authorities have no power to levy the special assessment.[2]

ment exceeded twenty-five per centum of the taxable valuation of their lots. Silence or assent to the making of the improvement could not operate as an estoppel to challenge the correctness of the assessment, for until the plaintiffs had knowledge of the assessment it was their right to assume that it would be made in conformity with the law, and not in violation of the positive prohibitive provisions of the statute. To hold otherwise would require them, not only to take notice at their peril of the illegal action of the public authorities, but to anticipate that in their official action they would disregard their legal duties. Their silence or acquiescence bound them no further than to submission to a proper assessment against their property, legally imposed." Signing a petition for street paving will not estop the person signing from objecting that paving was done outside the boundaries of the street. Quinn *v.* Paterson, 27 N. J. L. 35. Further as to *signing* of the petition and its effect as an *estoppel*, see *ante*, §§ 1454, 1455.

[1] *Ante*, § 1365. Index — *Due Process of Law.*

[2] Dumars *v.* Denver, 16 Colo. App. 375; Cleghorn *v.* Postlewaite, 43 Ill. 428; Darling *v.* Gunn, 50 Ill. 424; Butler *v.* Chicago, 56 Ill. 341; Yaggy *v.* Chicago, 194 Ill. 88; Tucker *v.* Sellers, 130 Ind. 514; Stephenson *v.* Salem, 14 Ind. App. 386; Starr *v.* Burlington, 45 Iowa, 87; Henderson *v.* Lambert, 14 Bush (Ky.), 24; Lowell *v.* Wentworth, 6 Cush. (Mass.) 221; Sewall *v.* St. Paul, 20 Minn. 511; St. Louis *v.* Ranken, 96 Mo. 497; Leonard *v.* Sparks, 63 Mo. App. 585; State *v.* Newark, 25 N. J. L. 399; State *v.* Jersey City, 27 N. J. L. 536; Matter of Ford, 6 Lans. (N. Y.) 92; State *v.* Seattle, 42 Wash. 370, 374. But in *Pennsylvania*, it was held that a provision in a statute that notice of the approval of an ordinance for a street improvement should be given within ten days, setting forth the fact and date of approval and that the petition for the improvement was duly signed and providing that any one in interest denying that it was so signed might appeal to the court of common pleas for a determination of the question whether the improvement was petitioned for by the requisite majority, was a special provision for raising, before the expense of the improvement had been incurred, the objection that the requisite majority of the property owners did not sign the petition, and that the failure to give such notice did not invalidate the ordinance and all proceedings under it. The statute merely regulated the method of procedure for the determination of a particular question, and failure to give the prescribed notice made the assessment non-conclusive, but did not make it invalid. Duquesne Borough *v.* Keeler, 213 Pa. 518. To the same effect, Pittsburg *v.* Coursin, 74 Pa. 400; Erie City *v.* Willis, 26 Pa. Super. Ct. 459.

An ordinance directing the city engineer to make repairs upon streets at the expense of the adjacent owners without previously notifying them held not unconstitutional, the owner when sued upon the special tax bill then having his day in court and an opportunity to make his defence. Kansas City *v.* Huling, 87 Mo. 203. To the same effect, Saxton National Bank *v.* Carswell, 126 Mo. 436.

When, for instance, the municipality is authorized by statute to direct a sidewalk to be laid, or other work to be done by the abutting property owner, and, in the event of his failure to do so, to do the work and assess or charge the cost thereof against the abutting property, the municipality is without power to assess or charge the cost against the property if *it has failed to give notice* to the property owner, either personally or in such manner as may be prescribed, that he is required to do the work.[1] When notice of the intention of the municipality to make the improvement or of other steps antecedent to the ordering or contracting for the improvement is required by statute to be given, special assessments attempted to be levied without such notice have frequently been held to be invalid.[2] It is also generally held that when the legislature has prescribed *in what manner the notice* shall be given, the

[1] Weld *v.* People, 149 Ill. 257; Hawley *v.* Fort Dodge, 103 Iowa, 573; Tufts *v.* Charlestown, 98 Mass. 583; Horbach *v.* Omaha, 54 Neb. 83; Brewster *v.* Newark, 11 N. J. Eq. 114; Rathbun *v.* Acker, 18 Barb. (N. Y.) 393; Cowen *v.* West Troy, 43 Barb. (N. Y.) 48; Williams *v.* Dunkirk, 3 Lans. (N. Y.) 44; Washington *v.* Nashville, 1 Swan (Tenn.), 177; Whyte *v.* Nashville, 2 Swan (Tenn.), 364; Johnston *v.* Oshkosh, 21 Wis. 184, 186. See also Myrick *v.* La Crosse, 17 Wis. 442. *Adjournment of hearing* ordered by city council *before* the hearing was held, without notice of such adjournment to property owners, held to deprive council of jurisdiction to proceed on adjourned date, and to require new notice. Gill *v.* Oakland, 124 Cal. 335.

[2] Thomason *v.* Carroll, 132 Cal. 148; Dumars *v.* Denver, 16 Colo. App. 375; McLauren *v.* Grand Forks, 6 Dak. 397; Clarke *v.* Chicago, 185 Ill. 354; Chicago *v.* Walsh, 203 Ill. 318; Daly *v.* Gubbins, 35 Ind. App. 86; Bennett *v.* Emmetsburg, 138 Iowa, 67; Auditor-General *v.* Calkins, 136 Mich. 1; State *v.* Foster, 94 Minn. 412; State *v.* Jersey City, 25 N. J. L. 309; Brinley *v.* Perth Amboy, 29 N. J. L. 259; Ogden *v.* Hudson, 29 N. J. L. 475, rev'g 29 N. J. L. 104; Matter of Phillips, 60 N. Y. 16; Matter of Little, 60 N. Y. 343; Matter of Anderson, 60 N. Y. 457; Matter of De Pierris, 82 N. Y. 243; Weeks *v.* Middletown, 107 N. Y. App. Div. 587; People *v.* Brooklyn, 21 Barb. (N. Y.) 484; Ireland *v.* Rochester, 51 Barb. (N. Y.) 414; Welker *v.* Potter, 18 Ohio St. 85; Stephan *v.* Daniels, 27 Ohio St. 527; Joyce *v.* Barron, 67 Ohio St. 264. See also Carlyle *v.* Clinton County, 140 Ill. 512.

In the *absence of statutory requirement* therefor, notice of intention to make a public improvement is not necessary. Barber Asphalt Pav. Co. *v.* Edgerton, 125 Ind. 455, 464; Bozarth *v.* McGillicuddy, 19 Ind. App. 26, 35; Holt *v.* Somerville, 127 Mass. 408, 410; Matter of Zborowski, 68 N. Y. 88; Jones *v.* Seattle, 19 Wash. 669. See also Finnell *v.* Kates, 19 Ohio St. 405. *Publication of ordinance* providing for improvement held essential. Fox *v.* Middlesborough Town Co., 96 Ky. 262. Index — *Ordinances.*

Notice of the *determination of the district* within which property shall be subjected to the assessment held to be essential. Payson *v.* People, 175 Ill. 267; State *v.* Otis, 53 Minn. 318; State *v.* Ramsey County Dist. Ct., 90 Minn. 294; State *v.* Ramsey County Dist. Ct., 95 Minn. 503. Notice that the local authorities *will proceed to make the assessment* held to be essential. Spring Steel Fence & Wire Co. *v.* Anderson, 32 Ind. App. 138. Assessment held to be invalid for *failure to advertise contract* for the work. Matter of Pennie, 108 N. Y. 364; Breath *v.* Galveston, 92 Tex. 454. See also Matter of Robbins, 82 N. Y. 131; Matter of Lange, 85 N. Y. 307. Failure to give notice of *award of contract* for street improvement as required by statute, held to invalidate assessment. Reis *v.* Graff, 51 Cal. 86.

method must be substantially pursued.[1] Where the ovides for a notice by advertisement, or otherwise, a publication is sufficient.[2] Where, by charter, a city is to levy a special tax on lots for grading, &c., and "to same under such regulations as may be prescribed *by* ' and the ordinance passed in pursuance thereof pro- the resolution of the council levying such tax should be

v. Reis, 40 Cal. 255; Du- ıver, 16 Colo. App. 375; abbett, 93 Ga. 266; Perry 5 Ill. 307; White *v.* Chi- . 392; Starr *v.* Burlington, ; Fox *v.* Middlesborough, ; Leonard *v.* Sparks, 63 585; Leavitt *v.* Bell, 55 Equitable Trust Co. *v.* Neb. 735; Medland *v.* Neb. 10; Wakeley *v.* Neb. 245; Grant *v.* Bar- 8 Neb. 839, 842; Cook *v.* y, 65 Neb. 611; 91 N. W. Poillon *v.* Rutherford, 65 ; Joyce *v.* Barron, 67 Ohio ckley *v.* Tacoma, 9 Wash. ing text.

ersey, notice of intention to , when required by statute, such reasonable certainty owners of property whether be affected or not by the the street. Clark *v.* Eliz- . J. L. 357. To the same s *v.* Newark, 31 N. J. L. . Jersey City, 35 N. J. L. to *repave* held not suffi- the assessment was for he work being different. ey City, 27 N. J. L. 536, converse, *quære?* Where lid not prescribe the mode, hat notice might be verbal nd might be given by any d in the assessment, or by al officer charged with a nection with the assess- *v.* Van Natta, 164 Ind. that village trustees will ons to a proposed improve- "usual" place of meeting iently designate the place the municipality being a y village having a council which the trustees usually vanda *v.* Price, 171 N. Y. ce which requires property esent their objections to an n writing is not a sufficient with a statutory require- ment that notice be published of the time and place where the parties will be heard. Merritt *v.* Portchester, 71 N. Y. 309. See also Brinley *v.* Perth Amboy, 29 N. L. J. 259, 262.

Sufficiency of notice. See Ottawa *v.* Macey, 20 Ill. 413; Butler *v.* Chicago, 56 Ill. 341; Gordon *v.* People, 154 Ill. 664; Rasmussen *v.* People, 155 Ill. 70; Aldis *v.* South Park Com'rs, 171 Ill. 424; Yaggy *v.* Chicago, 194 Ill. 88; Gage *v.* Chicago, 196 Ill. 512; West Chicago St. R. Co. *v.* People, 156 Ill. 18; Field *v.* Chicago, 198 Ill. 224; Walker *v.* Chicago, 202 Ill. 531; Bass *v.* People, 203 Ill. 206; Security Co. *v.* Arbuckle, 123 Ind. 518; Klein *v.* Tuhey, 13 Ind. App. 74; Baltimore *v.* Bouldin, 23 Md. 328, 329; Tufts *v.* Charlestown, 98 Mass. 583; Quinn *v.* James, 174 Mass. 23; State *v.* Pillsbury, 82 Minn. 359; 85 N. W. Rep. 175; St. Louis *v.* Ranken, 96 Mo. 497; Buddecke *v.* Ziegenhein, 122 Mo. 239; Kansas City *v.* Ward, 134 Mo. 172; Matter of Bassford, 50 N. Y. 509; Matter of Rochester, 137 N. Y. 243; Tonawanda *v.* Price, 171 N. Y. 415; People *v.* McCue, 74 N. Y. App. Div. 40; Simmons *v.* Gardiner, 6 R. I. 255; Adams *v.* Roanoke, 102 Va. 53; New Whatcom *v.* Bellingham Bay, 16 Wash. 131; Felker *v.* New Whatcom, 16 Wash. 178; Jones *v.* Seattle, 19 Wash. 669, 672; North Yakima *v.* Scudder, 41 Wash. 15. As to what is a reasonable time of notice under *Illinois* statutes, see Perry *v.* People, 155 Ill. 307.

[2] State *v.* Jersey City, 24 N. J. L. 662; State *v.* Plainfield, 38 N. J. L. 95; *ante*, § 1042; State *v.* Pat. Av. R. Com'rs, 41 N. J. L. 83; Vantilburgh *v.* Shann, 24 N. J. L. 740; State *v.* Trenton, 36 N. J. L. 499. Where the city charter did not make notice by publication the exclusive mode, it was held that *personal notice* to a property owner was sufficient to sustain the assessment. Peck *v.* Bridgeport, 75 Conn. 417. See also Tumwater *v.* Pix, 15 Wash. 324.

published in the official paper of the city, and that thereupon the tax should be due and payable, such publication is necessary to the validity of the tax, and without it the corporation cannot enforce the payment thereof.[1] The notice to proprietors to make a local improvement, if there be no charter provision to the contrary, may, it has been held in Missouri, be contained in an ordinance directing the work to be done, of which ordinance the proprietors are bound to take notice.[2] In a case in Connecticut, the charter of a city in effect provided that the council might order the adjoining "proprietor" to build a sidewalk, failing to do which, the city might build it at his expense, and the same should be a "lien upon the property and foreclosed as a mortgage"; and it was held that a *prior mortgagee* of the lot-owner was not entitled to *notice* to build the sidewalk; that his interest in such a proceeding was necessarily connected with the interest of the mortgagor; and that he was liable to be foreclosed of his right to redeem unless he paid the expenses of making the sidewalk.[3] If proper notice is not given, *certiorari* lies to remove the record of the proceedings from before the city council into the proper court, where, if they are substantially defective, they will be quashed.[4]

[1] Dubuque *v.* Wooten, 28 Iowa, 571; Burmeister, *In re*, 56 How. Pr. 416.

[2] Palmyra *v.* Morton, 25 Mo. 593, 597.

As to *notice and mode of giving the same, by publication or otherwise*, see Simmons *v.* Gardner, 6 R. I. 255; Scammon *v.* Chicago, 40 Ill. 146; Risley *v.* St. Louis, 34 Mo. 404; Hildreth *v.* Lowell (sewer), 11 Gray (Mass.), 345; Williams *v.* Detroit, 2 Mich. 560; State *v.* Elizabeth, 30 N. J. L. 365; Durant *v.* Jersey City, 25 N. J. L. 309; State *v.* Jersey City, 24 N. J. L. 662, in which, on *certiorari*, it was held that where a municipal corporation exercises the power to make improvements, and assess the expenses thereof upon the lands benefited thereby, the owners of lands assessed for such improvements, if accessible by reasonable diligence, are entitled to reasonable notice of the meeting of the commissioners for assessing the expenses, and this although the charter is silent on the subject of notice. This principle has been repeatedly reaffirmed in *New Jersey*. Hudson Co. Frech. *v.* State, 24 N. J. L. 716, 718; State *v.* Jersey City, 34 N. J. L. 33, 39; State *v.* Plainfield, 38 N. J. L. 95; State *v.* Guttenberg, *Ib.* 419; Brewster *v.* Newark, 11 N. J. Eq. 114; State *v.* Bayonne, 35 N. J. L. 335; *ante*, § 266, note.

Sufficiency of publication of notice. See Hawes *v.* Fliegler, 87 Minn. 319; St. Louis *v.* Koch, 169 Mo. 587; Portsmouth Savings Bank *v.* Omaha, 67 Neb. 50; John *v.* Connell, 71 Neb. 10.

[3] Norwich *v.* Hubbard, 22 Conn. 587; Whiting *v.* New Haven, 45 Conn. 303. See also Richmond *v.* Williams, 102 Va. 733. If an abutting owner fails to remove an unsafe sidewalk after due notice by the city to do so, the city may remove and rebuild it in its own way, and cannot be enjoined by such owner from removing it because the material for the new one is not at hand. Emporia *v.* Gilchrist, 37 Kan. 532. See also Winter *v.* Montgomery, 83 Ala. 589.

[4] Ottawa *v.* Chicago & R. I. R. R. Co., 25 Ill. 43. Failure, after notice, *to object to an assessment* before the city council, when it has the power to revise and correct, or annul it and direct a new assessment, may be held in equity, when the party applies for an injunction to restrain the collection of the assessment, as a waiver of all irregularities

§ 1458. **Sewers; Construction by Special Assessment.** — It is fully recognized that the *construction of sewers* for the use of property abutting thereon or adjacent thereto *is a local improvement of a public character*, and that the cost thereof may, pursuant to statutory authority, be raised by special assessment on the abut-

in the exercise of the power. *Ib.*; State v. Paterson, 36 N. J. L. 159; *post*, §§ 1590, note, 1591, 1595, note. Under a statute providing that the proceedings shall not fail on account of any technical or clerical error unless the party complaining thereof shall show affirmatively that he has been injured thereby, it was held that failure to record proof of publication of the notice of hearing is immaterial where it is shown that such publication was made. Shimmons v. Saginaw, 104 Mich. 511.

Illinois decisions as to notice and hearing. In Illinois Cent. R. Co. v. People, 189 Ill. 119, 120, application was made for the sale of the lands assessed. The owner appeared specially in opposition, and alleged that notice of the final hearing of the petition for the confirmation of the assessment was not given in the manner prescribed by statute. The affidavits of the publishers were offered to support the objection. It was held that the attack on the validity of the assessment was collateral only, and that the determination of the county court confirming the assessment and finding that due notice was given could not be so attacked. *Cartwright*, J., thus summarized the decisions of the court: "In several cases where there was no finding that notice had been given and the notices or evidence of publication found in the record were insufficient, it was held that the court had no jurisdiction to confirm the assessment. McChesney v. People, 145 Ill. 614; McChesney v. People, 148 Ill. 221; Boynton v. People, 55 Ill. 66. In other cases where the court has found and recited that notice was duly given, it has been held that the finding cannot be overcome by the production of the publisher's certificate or affidavit showing insufficient notice. Ertig v. People, 159 Ill. 237; Dickey v. People, 160 Ill. 633; Casey v. People, 165 Ill. 49; Young v. People, 171 Ill. 19. Such a finding, like any other judicial determination, can never be contradicted, varied, or explained in a collateral proceeding by parol or other evidence beyond or outside the record itself. The question must be tried by the record, and while the finding may be rebutted by other portions of the same record, it cannot be overcome by other means. If, by an inspection of the whole record, it is seen that there was no jurisdiction, the finding is overcome. Harris v. Lester, 80 Ill. 307; Botsford v. O'Conner, 57 Ill. 72; Osgood v. Blackmore, 59 Ill. 261; Field v. Peeples, 180 Ill. 376. The reason that a finding of the court is not defeated by a publisher's certificate or other evidence as to posting and mailing of notices is, that they are evidence on which the court may or may not have acted in arriving at its finding of the fact that notice was given. While service of summons can only be shown by an officer's return, the publication and mailing of notices may be proved by any competent evidence. The finding of the jurisdictional fact in this case is not overcome by the publisher's certificate or evidence in the record. They are not allowed on collateral attack to overthrow the judgment of the court." See also Glover v. People, 188 Ill. 576.

Appearance at the proper time and place held to be *a waiver of defects* in the contents of the notice. Townsend v. Jersey City, 26 N. J. L. 444; Hand v. Elizabeth, 31 N. J. L. 47. See also Gregory v. Ann Arbor, 127 Mich. 454; Barlow v. Tacoma, 12 Wash. 32. Waiver of lack of notice by failure to take prompt steps *to arrest progress of the work* after commencement. See Hampson v. Paterson, 36 N. J. L. 159. Further as to *waiver* of objections to validity of assessment. Nashville v. Weiser, 54 Ill. 245; Gardner v. Boston, 106 Mass. 549; Hopkins v. Mason, 61 Barb. 469; State v. Perth Amboy, 29 N. J. L. 259; State v. Paterson (knowledge and estoppel), 36 N. J. L. 159; State v. Jersey City, 26 N. J. L. 444; State v. Paterson, 40 N. J. L. 244, 250. As to remedy by *certiorari* and injunction, see chapter on Remedies against Illegal Corporate Acts, *post*, § 1570 *et seq.*

ting property or upon the property specially benefited thereby.[1] In the absence of any constitutional provision, the question whether

[1] Philadelphia *v.* Tryon, 35 Pa. 401; Lipp *v.* Philadelphia, 38 Pa. 503; Stroud *v.* Philadelphia, 61 Pa. 255; Oil City *v.* Oil City Boiler Works, 152 Pa. 348. See also the cases cited in this and the succeeding sections. The legislature has not only the power to appropriate the money of the State to pay for the cost of providing a system for the disposal of the sewage of a number of cities and other municipalities, but may also provide that the whole, or a portion, of the cost of such system shall ultimately be borne by the cities and towns, which avail themselves of the system. Kingman, Petitioner, 153 Mass. 566. As to the legislative power to authorize a city to direct and control the sewage in a neighboring incorporated village in which the water shed of its water supply is situated, see Mead *v.* Turner, 134 N. Y. App. Div. 691.

Statutory authority to construct "*drains*, ditches, levees, and dykes" construed to confer power to construct sewers. Charleston *v.* Johnston, 170 Ill. 336. See to the same effect, Valparaiso *v.* Parker, 148 Ind. 379. A town in *Massachusetts may purchase a sewer* constructed by private owners in a private road which is subsequently taken over by the town and may assess abutting property owners for special benefit derived therefrom. Slocum *v.* Brookline, 163 Mass. 23. In Clay *v.* Grand Rapids, 60 Mich. 451, a city replaced an old timbered race, which had been covered over as the growth of the city required, and was used for the discharge of water, &c., needing an outlet, by a brick sewer, and made an assessment for its cost as "for the grading, levelling, repairing, amending, and gravelling of" a street. In an action to set aside the proceedings, whereby the city had sold adjoining land for the assessment, it was held that the improvement was the *building of a sewer*, and not the *repairing of a street*, and that its cost should have been provided for by a method of taxation appropriate to it, and not assessed upon merely a part of the property benefited by it.

"Laying out" of sewer defined; what property liable to assessment of benefits; defence to assessment because sewer is a nuisance. See Cone *v.* Hartford, 28 Conn. 363. Where cities which had "established a system of sewerage" were invested by statute with power to levy a sewer tax, a city which had created a department having charge of sewers, and had accepted plans and estimates for the extension of existing sewers, was held to have established a sewerage system within the meaning of the statute: it is not necessary that such system shall extend to all parts of the city. St. Louis Bridge Co. *v.* People, 125 Ill. 226.

A property owner cannot urge against a drainage system for the District of Columbia provided for by act of Congress, the non-existence of a necessity for drainage, or the fact that he had adopted a sewer system of his own which is sufficient. Such a contention would deny to Congress the right to create a system of drainage for the District of Columbia, to which a lot owner must conform. District of Columbia *v.* Brooke, 214 U. S. 138.

Where by statute municipal authorities are required to serve a resolution ordering the construction of a sewer upon the property owners and are only authorized to construct the sewer in the event that the work is not done by the property owners within a prescribed time, the municipality has no power to construct the sewer and assess the cost thereof on the property owners without service of the ordinance or resolution. State *v.* Foster, 94 Minn. 412.

Express power to a municipality to construct sewers and regulate their use, and to assess the cost of construction against adjacent lots and lands is not sufficient to authorize a grant, by ordinance, to a private person or corporation of the *exclusive right or privilege of constructing and operating a system of sewers* within the municipal limits and of collecting compensation from property owners for the use thereof. Weaver *v.* Canon Sewer Co., 18 Colo. App. 242. Statutory authority to sewer corporation to construct sewers in city streets held not to be exclusive. Olyphant Sewage-Drainage Co. *v.* Olyphant, 211 Pa. 526, cited *ante*, § 1148, note.

A municipal corporation authorized to construct sewers cannot be restrained from removing a street railway from the street for that purpose if it is neces-

a sewer shall be paid from general taxation or by special assessment rests in the legislative discretion.[1] Although possibly a sewer may be of such an exclusively public character that it cannot confer any special and peculiar benefit upon particular lots or premises, and therefore cannot, in some jurisdictions at least, be the basis of a special assessment,[2] the courts elsewhere have, under a variety of circumstances, refused to invalidate assessments on that ground.[3]

ary. Kirby *v.* Citizens' R. Co., 48 Md. 168. As to removing or changing the location of railway tracks and the pipes, mains, and appliances of public service corporations in the city streets for the purpose of constructing sewers therein, see *ante*, § 1271.

New Jersey. Under the rules appertaining in New Jersey to taxation and local assessments, a surface tax on a drainage district for the purpose of defraying the expense of running and maintaining engines which are part of a sewerage system, cannot be sustained as an assessment, because it is not graduated by the benefit imparted to the land to be assessed; nor can it be maintained under the taxing power, where the drainage district is not co-extensive with the political or municipal district of which it is a part. In New Jersey a general tax must be made to fall upon the entire political district. A taxing act was held to be totally defective, if the legislature does not designate the property out of which the tax is to be made, and prescribe a mode for enforcing it. State *v.* Chamberlain, 37 N. J. L. 388. See further as to the rules (somewhat peculiar) governing taxation and special assessment in New Jersey, *ante*, §§ 1434, 1435.

[1] Prior *v.* Buehler & C. Const. Co., 70 Mo. 439, 448. The size, location, and capacity of a sewer rest in the discretion of the municipal authorities. Kansas City *v.* Richards, 34 Mo. App. 21.

Missouri. In the statutory provisions of this State, sewers are divided into "public sewers," which are constructed at the cost of the general treasury, and "district sewers," which are constructed by special assessment on property within the district. As to when sewers are to be regarded as "public" and when "district" sewers, see Hill *v.* Swingley, 159 Mo. 45; Myers *v.* Kolkmeyer, 97 Mo. App. 520; South Highland L. & Imp. Co. *v.* Kansas City, 172 Mo. 523; State *v.* Wilder, 217 Mo. 261; Heman *v.* Handlan, 59 Mo. App. 490. See also Heman *v.* Allen, 156 Mo. 534.

[2] See *ante*, § 1440. In *Massachusetts* it has been held that the improvement of the *sanitary condition* of the neighborhood by the construction of a sewer may be considered as a benefit if the property assessed is thereby made more healthful. Beals *v.* Brookline, 174 Mass. 1. But in *Pennsylvania* the court held that the general improvement of the healthfulness of the district was not such a benefit as justified the assessment of non-abutting property. Beechwood Avenue Sewer, 179 Pa. 490.

[3] That a sewer was carried to a point where its discharge into a river would least affect the public health, does not necessarily show that it was built for the protecting a public health in such sense as to make it a public charge, and to preclude a special assessment for its cost. Stewart Co. *v.* Flint, 147 Mich. 697, 701. A *pumping station for sewage* and a system of sewers in connection therewith covering only a small part of the city, are a local improvement for which a special assessment may be imposed. Fisher *v.* Chicago, 213 Ill. 268. A *system of relief sewers* covering part only of a village is a local improvement which may be made by special assessment. Northwestern University *v.* Wilmette, 230 Ill. 80, 86.

House connections. In *Illinois* it is held that lateral sewer connections to abutting property are a public improvement, for which a special tax may be levied on the abutting property. Palmer *v.* Danville, 154 Ill. 156. But the special tax must be levied on the contiguous property at a uniform rate. The cost of each connection cannot be charged to each property connected, although the lots on one side of the street may be further from the sewer than the lots on the other side. Palmer *v.* Danville, 154 Ill. 156. *Ordinances* have been held to be invalid and un-

Statutory *authority to construct sewers is continuing* in its nature unless otherwise expressly limited and restricted,[1] and the cost of reconstructing, rebuilding, or enlarging a sewer may be raised by assessment against property which has already been assessed for the cost of constructing the original sewer.[2] The fact that the sewer is constructed on land the title of which is vested in private ownership does not affect the power of the municipality to impose a special assessment for the cost, if the sewer has been constructed with the consent, express or implied, of the owner,[3] or if the mu

reasonable when they provided for the construction of house slants or connections at intervals of twenty feet along the line of the sewer and the property was unimproved and undivided. Bickerdike *v.* Chicago, 185 Ill. 280; Gage *v.* Chicago, 191 Ill. 210. But the ordinance is not unreasonable when it merely makes provision for openings in the sewer at intervals of twenty feet, without requiring the actual construction of house slants or connections to the street or curb line. Vandersyde *v.* People, 195 Ill. 200, 201. See also Walker *v.* Chicago, 202 Ill. 531; Washington Park Club *v.* Chicago, 219 Ill. 323; East St. Louis *v.* Davis, 233 Ill. 553, 559. The ordinance may reasonably provide for the construction of a house slant to each lot. Gage *v.* Chicago, 195 Ill. 490. See also Duane *v.* Chicago, 198 Ill. 471.

The construction of a *main sewer and branches* is a *single improvement*, which may be provided for by one ordinance. Payne *v.* South Springfield, 161 Ill. 285. A connected system of drains and sewers along various streets is a single improvement and may be made under one ordinance providing for a *special assessment*. Walker *v.* People, 170 Ill. 410.

[1] See *ante*, § 1148, and cases cited.

[2] Shannon *v.* Omaha, 73 Neb. 507; State *v.* Jersey City, 29 N. J. L. 441, 453. See also South Highland L. & Imp. Co. *v.* Kansas City, 172 Mo. 523, 531.

Where a sewer, as originally constructed, created a nuisance, its continuation to a river was held to be a necessity which *justified a second assessment* upon the property previously assessed for its construction. Green *v.* Hotaling, 44 N. J. L. 347. Where a new sewer becomes necessary to furnish a proper outlet for an existing sewer, land assessed for the old sewer may be further assessed for the new one. Bayonne *v.* Morris, 61 N. J. L. 127. But in *Pennsylvania*, under the rule of decision adopted in that State (see *ante*, § 1438), the cost of reconstructing a sewer is a public charge which must be met from the general revenues of the city and cannot be raised by special assessment of the abutting property. Erie *v.* Russell, 148 Pa. 384; West Third St. Sewer, 187 Pa. 565; Philadelphia *v.* Meighan, 27 Pa. Super. Ct. 160.

A *corner lot* may be specially assessed for the construction of a sewer in one of the streets upon which it fronts, although it drains into a sewer upon the other street, for which an assessment has already been imposed and paid. McGarvey *v.* Swan, 17 Wyo. 120. To the same effect, Rich *v.* Woodson, 118 Ky. 865. The fact that an owner has, with the consent of the municipality, constructed a private sewer sufficient for his property does not relieve him from assessments for a public sewer subsequently constructed in the street. Philadelphia *v.* Odd Fellows Hall Assoc., 168 Pa. 105.

In *Massachusetts*, it is held that after property owners have been assessed for the construction of sewers they cannot be assessed for the *expense of maintaining the sewer*. They can only be called upon to contribute as general taxpayers their proper share of the expense of operating the sewer, and a statute authorizing a special assessment for such purpose was held to be unconstitutional. Sears *v.* Boston Street Com'rs, 173 Mass. 350.

[3] Kramer *v.* Los Angeles, 147 Cal. 668; Cone *v.* Hartford, 28 Conn. 362; Hyde Park *v.* Borden, 94 Ill. 2[illegible]; Leeds *v.* Richmond, 102 Ind. 372; St. Joseph *v.* Landis, 54 Mo. App. 31[illegible]; Matter of McGown, 18 Hun (N. Y.) 434; Matter of Lent, 47 N. Y. App.

nicipality has the power to acquire the property or an easement or right of way therein, by eminent domain.[1]

§ 1459. **Sewer Assessments; Proportion to Benefits; Frontage; Area.** — We have already discussed the principles which are regarded in different jurisdictions as fundamentally controlling the power to impose special assessments, and have referred to the divergence in the views of the courts, some holding that special benefit actually accruing and determined after a hearing or notice is essential to the validity of a special assessment, whilst other courts hold that a presumption of special benefit founded upon a legislative declaration thereof is sufficient to justify an assessment in proportion to frontage or area.[2] The same divergence in the views of the courts is to be found in the case of *sewer assessments*. In some jurisdictions, an assessment for the construction of a sewer can only be imposed upon land which is found to be actually benefited in respect of benefits which exist in fact; the amount of the assessment cannot exceed the amount of the special and peculiar benefit, and the property owner is entitled to a hearing upon the question whether his property is benefited and the extent

Div. 349, 355. It is not a valid objection to a sewer assessment that ground on which it is constructed is not a regularly laid out street. So held where the public had for a long time used the *locus* for highway or street purposes. Vanderbeck *v.* Jersey City, 29 N. J. L. 441.

[1] Maywood Co. *v.* Maywood, 140 Ill. 216; Dempster *v.* Chicago, 175 Ill. 278, 281. See also Matter of Fowler, 53 N. Y. 60. It will be presumed that the municipality will exercise its power of eminent domain. Dempster *v.* Chicago, 175 Ill. 278, 281. But a special assessment cannot be imposed for the construction of a sewer on private lands against the wish of the owner, and without compensation to him. The city is without authority to so construct the sewer, and is a *mere trespasser*. Matter of Rhinelander, 68 N. Y. 105; Matter of Cheesebrough, 78 N. Y. 232. When the location of a sewer in private property made the sewer *inaccessible* to the property assessed, it was held that the assessment could not be sustained. State *v.* Ramsey County Dist. Ct., 90 Minn. 540. But see *contra*, Heman *v.* Schulte, 166 Mo. 409, aff'd 189 U. S. 507.

Outlet. The fact that no outlet to the sewer has been provided is not sufficient to invalidate the sewer assessment; Harney *v.* Benson, 113 Cal. 314; Ryder's Estate *v.* Alton, 175 Ill. 94; nor will the fact that the outlet provided is on private property, and that the right to construct it thereon has not yet been acquired; Burhans *v.* Norwood Park, 138 Ill. 147; Maywood Co. *v.* Maywood, 140 Ill. 216; Payne *v.* South Springfield, 161 Ill. 285; or that the outlet is a proposed sewer which has not yet been constructed; Ryder Estate *v.* Alton, 175 Ill. 94. It is the duty of the municipality to dispose of the sewage, and the fact that it has not yet provided an outlet does not affect its power to construct the sewer. Harney *v.* Benson, 113 Cal. 314. See also Burhans *v.* Norwood Park, 138 Ill. 147; Payne *v.* South Springfield, 161 Ill. 285, 291; Bickerdike *v.* Chicago, 185 Ill. 280. The duty to furnish an adequate outlet is continuing in its nature, and the exercise of the power after the original construction of the sewer will justify an additional assessment. South Highland L. & Imp. Co. *v.* Kansas City, 172 Mo. 523, 531.

[2] *Ante*, §§ 1436–1440.

of the benefit.[1] On the other hand in many jurisdictions, following the lines of divergence which have been referred to above,[2] it is

[1] Clapp *v.* Hartford, 35 Conn. 66 (assessment by frontage held to be arbitrary and invalid); Hungerford *v.* Hartford, 39 Conn. 279; Title Guarantee & Trust Co. *v.* Chicago, 162 Ill. 505; Chicago *v.* Adcock, 168 Ill. 221; Bickerdike *v.* Chicago, 185 Ill. 280; Crawfordsville Music Hall Assoc. *v.* Clements, 12 Ind. App. 464; Weed *v.* Boston, 172 Mass. 28; Sears *v.* Boston Street Com'rs, 173 Mass. 350; Dexter *v.* Boston, 176 Mass. 247; White *v.* Gove, 183 Mass. 333; Harwood *v.* Boston Street Com'rs, 183 Mass. 348; Smith *v.* Boston, 194 Mass. 31, 33; State *v.* Pillsbury, 82 Minn. 359; State *v.* Ramsey County Dist. Ct., 90 Minn. 540; Hanscom *v.* Omaha, 11 Neb. 37; Kellogg *v.* Elizabeth, 4 N. J. L. 274; King *v.* Reed, 43 N. J. L. 186, 192; De Witt *v.* Elizabeth, 56 N. J. L. 119; Vreeland *v.* Bayonne, 58 N. J. L. 126; Frevert *v.* Bayonne, 63 N. J. L. 202; Brown *v.* Union, 65 N. J. L. 601; Butler *v.* Montclair, 67 N. J. L. 426; Park Avenue Sewers, 169 Pa. 433; West Third St. Sewer, 187 Pa. 565.

In *Pennsylvania*, a sewer assessment must be founded on and limited to special benefit. Park Avenue Sewers, 169 Pa. 433; West Third St. Sewer, 187 Pa. 565. An assessment by frontage is regarded as a convenient method by which the benefit can be ascertained when the property is compactly built, similarly situated, and the benefit uniform. Witman *v.* Reading, 169 Pa. 375, 389; Anderson *v.* Lower Merion Twp., 217 Pa. 369. See also Lipp *v.* Philadelphia, 38 Pa. 503. Being dependent for validity on the existence of special benefit, the courts hold that the assessment can only be imposed upon abutting property. Witman *v.* Reading, 169 Pa. 375, 391; Park Avenue Sewers, 169 Pa. 433; Beechwood Avenue Sewer, 179 Pa. 490; Mill Creek Sewer, 196 Pa. 183. Property cannot be assessed for a fifteen-inch sewer when a ten-inch sewer is sufficient; such an assessment violates the rule of benefit. Park Avenue Sewers, 169 Pa. 433. In Michener *v.* Philadelphia, 118 Pa. 535, it was held that the fact that the owner had paid his part of the cost of sewers previously constructed did not prevent an assessment for a new sewer. But although the courts do not appear to have expressly overruled this decision, they have since held that when a sewer has been constructed and paid for by a special assessment, it must be maintained, and, if necessary, reconstructed by the city from general taxation. Erie *v.* Russell, 148 Pa. 384; West Third St. Sewer, 187 Pa. 565; Philadelphia *v.* Meighan, 27 Pa. Super. Ct. 160. As to the special rules applicable to special assessments in *Pennsylvania*, see *ante*, §§ 1438, 1441.

Michigan. In Warren *v.* Grand Haven, 30 Mich. 24, the court held that it could not say, as matter of law, that an assessment for a sewer estimated in proportion to the frontage of abutting property was not made in proportion to actual or probable benefits. But in Thomas *v.* Gain, 35 Mich. 156, an assessment for a sewer according to the superficial area of the land, and apparently without regard to benefits, actual or probable, was held to be invalid. The assessment was made equally upon lots remote from the sewer and only slightly benefited, with no provision securing the right to connect with it, and upon lands fronting upon the sewer and greatly benefited. The court considered the mode so arbitrary, so certain to work injustice, so flagrantly opposed to the principle of contribution in proportion to benefits, as to be unconstitutional. But in Sheley *v.* Detroit, 45 Mich. 431, a paving assessment in proportion to frontage was sustained. Thomas *v.* Gain, *supra*, was referred to, and it was said that the ruling therein was not inconsistent with an assessment in proportion to frontage. In Walker *v.* Detroit, 138 Mich. 639, it was held that when the proceedings showed that the benefit was in fact considered and determined, the fact that the assessment was also in proportion to area did not invalidate it. But in Auditor-General *v.* O'Neill, 143 Mich. 343, where the proceedings purported to show that the assessment was made by benefit, it was held it could not be sustained when it conclusively ap-

[2] *Ante*, § 1437.

held in the case of sewer assessments that the legislature has the power to create or to provide for the creation of a special taxing district, to determine that the property within the district is specially benefited, and to impose an assessment for the cost of constructing the sewer in proportion to frontage or area without notice or a hearing on the question of benefit in fact.[1] But the fact that the special assessment is required by law to be in proportion

peared that it was made by area and that the rule of benefits was not complied with. As to the general rule applicable to special assessments in *Michigan*, see *ante*, § 1438.

Where a statute of *Massachusetts* provided that sewer assessments imposed pursuant to its provisions should be proportional, the enactment was construed as by implication requiring that they should not exceed the benefits, and so construed the act was held to be constitutional. Hall *v.* Boston Street Com'rs, 177 Mass. 434; Cheney *v.* Beverly, 188 Mass. 81. See also Ferguson *v.* Stamford, 60 Conn. 432.

In *England*, assessments for sewers are generally laid in proportion to benefits, estimated according to the yearly value of the lands in the sewer district. Per *Cooley*, C. J., in Thomas *v.* Gain, 35 Mich. 156, where the English cases on the point are cited.

[1] *Frontage assessments valid.* Shumate *v.* Heman, 181 U. S. 403, aff'g s. c. *sub nom.* Heman *v.* Allen, 156 Mo. 534; White *v.* Harris, 103 Cal. 528; English *v.* Wilmington, 2 Marv. (Del.) 63; Hatch *v.* Des Moines, 63 Iowa, 718; Minneapolis & St. L. R. Co. *v.* Lindquist, 119 Iowa, 144; Mason *v.* Spencer, Kan. 512; Kansas City *v.* Gibson, Kan. 501; Rutherford *v.* Hamilton, Mo. 543; Prior *v.* Buehler & C. Inst. Co., 170 Mo. 439, 448; People *v.* Pitt, 169 N. Y. 521, aff'd 64 N. Y. App. Div. 316; People *v.* Desmond, 186 N. Y. 232, 236; Parkersburg *v.* Tavener, 42 W. Va. 486; Meggett *v.* Eau Claire, 81 Wis. 326.

Area assessments valid. Gillette *v.* Denver, 21 Fed. Rep. 822; Hildreth *v.* Longmont, 47 Colo. 79; 105 Pac. Rep. 107; Andre *v.* Burlington, 141 Iowa, ; 117 N. W. Rep. 1082; Johnson *v.* Bauer, 115 Mo. 366; Perry *v.* Davis, 18 Kan. 427; McGarvey *v.* Swan, 17 Wyo. 120.

We have referred elsewhere (*ante*, § 1439) to the provisions of the Constitution of *Illinois* creating or recognizing a distinction between "special assessments" and "special taxation," and have pointed out that in that State special assessments must be founded upon and cannot exceed the actual benefit. But a "special tax" in proportion to frontage may be imposed upon the property abutting upon the line of a sewer. See Galesburg *v.* Searles, 114 Ill. 217; Payne *v.* Springfield, 161 Ill. 285.

In *Kansas* it has been held that a sewer tax apportioned on the value of the real estate in the municipality or in the sewer district is valid. Gilmore *v.* Henti 33 Kan. 156; Mason *v.* Spencer, Kan. 512; Douglass *v.* Craig, 4 Kan. App. 99, 108. An assessment upon the value of the land, exclusive of buildings, was sustained in Brewer *v.* Springfield, 97 Mass. 152. See also Snow *v.* Fitchburg, 136 Mass. 179, 183.

Railroad property. The right of way of a railway company, although in a public street, held liable to special assessment for the construction of a sewer. Rich *v.* Chicago, 152 Ill. 18. Special assessment for sewer in proportion to frontage against lands used for side-tracks, yards, and stations held valid. Atchison, T. & S. F. R. Co. *v.* Peterson, 5 Kan. App. 103, aff'd 58 Kan. 818. See to the same effect, Minneapolis & St. L. R. Co. *v.* Lindquist, 119 Iowa, 144. As to the liability generally of railroad property to special assessments for local improvements, see *ante*, §§ 1451, 1452. The fact that as a result of drainage from the construction of a sewer the adjacent country would probably be improved and the revenues of a railway company increased thereby is not a benefit for which the railway company may be assessed. The measure of benefits is the present increased market value of the property upon which the assessment is imposed. Rich *v.* Chicago, 152 Ill. 18.

to benefits does not preclude an assessment which is in *proportion to frontage or area,* if it appears that that basis is adopted because it is a fair and reasonable method of determining the benefit.[1] The fact that the lands are unimproved and have no occasion to make immediate use of the sewer does not preclude the existence of special benefit which will sustain an assessment.[2]

§ 1460. **Sewer Assessments; Non-abutting Property.** — In the case of property which does not abut upon the line of a sewer, and which is not immediately connected therewith, it has been held in some jurisdictions that under statutory authority authorizing an assessment in proportion to benefits, such property may be subjected to a special assessment for the construction of the sewer, if the land be susceptible of drainage by the sewer. The

[1] Reed *v.* Cedar Rapids, 137 Iowa, 107; Ithaca *v.* Babcock, 72 N. Y. App. Div. 260. Assessment in *proportion to area* held to be a reasonable means of securing an assessment in proportion to benefits, as nearly as practicable, in the case of a storm sewer. Denver *v.* Dumars, 33 Colo. 94, 97; Spalding *v.* Denver, 33 Colo. 172. In Bassett *v.* New Haven, 76 Conn. 70, the court held that the adoption and application of *the front foot rule* in the laying of a sewer assessment was not in violation of a statutory requirement that the assessments be laid with regard to special benefits, if that rule was, in the discretion and judgment of the assessing authority, chosen for the reason that it led to the required result. An assessment for a sewer based upon *the cost of constructing in front* of the premises assessed, held invalid under a statute requiring the assessment to be made according to benefits, when it did not appear from the evidence that all the lots were equally benefited. Duluth *v.* Davidson, 97 Minn. 378.

In *New Jersey,* a sewer assessment in proportion to frontage is not valid, unless it appears affirmatively that that method is in proportion to the benefit, and not in excess thereof. Essen *v.* Cape May, 77 N. J. L. 361; 72 Atl. Rep. 49. New Jersey rule, *ante,* §§ 1434, 1435.

A statutory provision that the assessment for constructing a sewer shall be "in proportion to the front feet of such lands, . . . and in proportion to the benefits derived by said sewerage improvement," construed as *requiring both frontage and benefit* to be considered in making the assessment. Blackwell *v.* Cœur D'Alene, 13 Idaho, 357, 36[illegible].

Where the statute required the cost of constructing sewers to be assessed "upon lands benefited by the local improvement in proportion to such benefit," and a sewer had previously been constructed which provided adequate drainage for the premises on the west side of the street and had been paid by a special assessment upon the property on that side of the street, it was held that the cost of constructing a sewer upon the east side of the street for the benefit of the property on that side of the street could not be assessed on the property owners on the west side of the street at the same rate per foot as those on the east side, since the assessment ignored the radical difference in the benefit conferred upon the west side property which was already supplied with an adequate sewer paid for solely out of an assessment on the west side, and the benefit conferred upon the east side property which was wholly without any sewer until the construction of the sewer on that side of the street. People *v.* Desmond, 186 N. Y. 232.

[2] District of Columbia *v.* Brooke, 214 U. S. 138; Clapp *v.* Hartford, 35 Conn. 66; Leitch *v.* La Grange, 138 Ill. 291 (farming lands adaptable to suburban residences); Wright *v.* Boston, 9 Cush. (Mass.) 233; Ford *v.* Toledo, 64 Ohio St. 92.

of the extent of the benefit received is regarded as one for rmination of the assessing authorities and their action be interfered with by the courts if it be not unjust and 'e.[1] But in other cases where the statute required that ssment be founded upon, and imposed in proportion to the courts have refused to sustain an assessment upon ich are not connected with the sewer and do not drain

lvery *v.* Lewiston, 13 Idaho, Beckett *v.* Portland, 53 See also Stewart *v.* Chehalis, 13. In Rich *v.* Chicago, 152 was held that in a special for a sewer it is not essential property assessed should be to or abutting upon the nt, if it be presently and benefited. Evidence that t value of the property will d in consequence of the im- is sufficient to establish the nefit. In the case before branch sewer connections n at the various street in- into which the side and ad- et sewers could, when con- e discharged. The court n so far as the opportunity ed for drainage increased the rket value of the outlying improvement was a special statute authorized a special on all contiguous and ap- lands. The court held that ands as could drain into the e contiguous and approxi- the meaning of the statute, nds could not be deemed to ximate" within its meaning re no street or alley or other by or through which such be connected with the sewer, sewer in question in some forded the property, on ac- location, a peculiar advan- ecial benefit not shared in er property not so situated. Ballard, 42 Wash. 35, 42. statute required that the should be in proportion it was held that in the case sewer which is maintained not only for the premises pon its route, but also for rritory susceptible of drain- by laterals the cost of a supply the abutting lands ssessed thereon, and the more remote territory might be assessed for such sum as would pay for the enlargement of the sewer to meet the needs of the outlying lands. McKee Land & Improvement Co. *v.* Williams, 63 N. Y. App. Div. 553, aff'd 173 N. Y. 630.

[2] Where the authority conferred was to assess the cost of a sewer "against the property immediately benefited thereby," it was held that an assessment could not be made on property on a parallel street which could only be connected with the sewer by the construction of a connecting sewer 350 feet long. People *v.* Kingston, 53 N. Y. App. Div. 58. Under statutes requiring that the assessment should be imposed upon property benefited, it has been held that the assessment cannot be sustained if private property intervenes so that the owner of the property assessed cannot make use of the sewer. State *v.* Ramsey County Dist. Ct., 90 Minn. 540. See also Clark *v.* Dunkirk, 12 Hun (N. Y.), 181; affirmed 75 N. Y. 612. Construction of statutory provision that no lands shall be assessed for sewers "that do not need local drainage, or which are then provided therewith." Wewell *v.* Cincinnati, 45 Ohio St. 407; Ford *v.* Toledo, 64 Ohio St. 92.

In *New Jersey*, it was held by the Supreme Court that the special and peculiar benefit justifying a sewer assessment is a present benefit immediately accruing from the construction of the work, and that intended benefits which may never be realized were not sufficient, mere speculative benefit not being a benefit which can be recognized. Hence, it was held that land which cannot be drained into a trunk sewer until connecting laterals are built cannot be assessed for the cost of the trunk sewer until the laterals are constructed. Kellogg *v.* Elizabeth, 40 N. J. L. 274; King *v.* Reed, 43 N. J. L. 186, 192; McKevitt *v.* Hoboken, 45

§ 1461. **Sewers; Construction under Police Power; Service Charges.** — In some cases the power of the legislature, or of a municipality acting under legislative authority, to construct sewers at the expense of abutting property has been regarded as an exercise of the police power and not of the power of taxation, and assessments in proportion to area, frontage or other basis, have been sustained without regard to the benefits received by the abutting property.[1]

N. J. L. 482; Morris *v.* Bayonne, 53 N. J. L. 299; Vreeland *v.* Bayonne, 58 N. J. L. 126; modified 60 N. J. L. 168. But it was also held that present surface drainage by a main or trunk sewer on another street was a sufficient benefit to sustain the assessment. Henderson *v.* Jersey City, 41 N. J. L. 489, distinguishing Kellogg *v.* Elizabeth, 40 N. J. L. 274, *supra*. But under the rule so adopted it was also held that when the outlying lands were connected by laterals with the main or trunk sewer, they were then benefited by the main sewer, and might then be assessed for the construction thereof. Kellogg *v.* Elizabeth, 40 N. J. L. 274; Schlapfer *v.* Union, 53 N. J. L. 67; Morris *v.* Bayonne, 53 N. J. L. 299, 302; De Witt *v.* Elizabeth, 56 N. J. L. 119. But the Court of Errors and Appeals of New Jersey sustained and applied a statute which declared that in assessing for the construction of trunk sewers the assessment might be imposed on all property benefited and to be benefited within the entire drainage; that assessments on property therein draining into the main sewer should immediately become collectible, but that when the benefit is prospective and depends upon the construction of lateral and connecting sewers not yet built, the assessment should become a lien only from the time the connecting sewers should be built and should draw interest only from the date of the confirmation of an assessment for the lateral sewer. Central Land Co. *v.* Bayonne, 56 N. J. L. 297; Vreeland *v.* Bayonne, 60 N. J. L. 168, modifying 58 N. J. L. 126; Brown *v.* Union, 62 N. J. L. 142; aff'd 65 N. J. L. 601; Seaman *v.* Camden, 66 N. J. L. 516. Consequently, in the case of outlying property the amount of prospective benefit to be derived from the construction of a main or trunk sewer may be immediately ascertained, although the payment of the assessment therefor and the attaching of the lien are postponed.

In *Illinois* the rule has been adopted that before property which is not on the line of the sewer can be assessed for its construction, a drainage district must be formed and provision must be made securing to such property the privilege of draining into the sewer in the future development of the system. Edwards *v.* Chicago, 140 Ill. 440; Chicago *v.* Adcock, 168 Ill. 221; Title Guarantee & Trust Co. *v.* Chicago, 162 Ill. 505; Bickerdike *v.* Chicago, 185 Ill. 280, 281; Clark *v.* Chicago, 214 Ill. 318; Snydacker *v.* West Hammond, 225 Ill. 154. Property which does not front upon the sewer may be assessed if it is within the drainage district, and if provision is made securing to the lands the right to drain into the sewer. Mason *v.* Chicago, 178 Ill. 499. In Walker *v.* Chicago, 202 Ill. 531, it was held that if the ordinance provided that all the property within the district might drain into the sewer, it is not a valid objection to the special assessment that future legislation was necessary before the non-abutting property could exercise the right.

[1] Keese *v.* Denver, 10 Colo. 112, 123; Pueblo *v.* Robinson, 12 Colo. 593; Wolff *v.* Denver, 20 Colo. App. 135; Chicago, M. & St. P. R. Co. *v.* Janesville, 137 Wis. 7. In District of Columbia *v.* Brook, 214 U. S. 138, 149, Mr. Justice *McKenna*, who delivered the opinion of the court, referred the power to compel the construction of a sewer to the exercise of the police power.

It is within the power of the legislature, or of a municipality acting under legislative authority, to compel connection to be made between houses and sewers at the expense of the abutting owner and to cause the removal of cesspools and the like from abutting premises. This is an exercise of the police power. The assessment of the whole cost of the connection upon the premises connected is not an exercise of the power of eminent domain, or the taking of private property for public use without just compensation. Van

§ 1462 (807). **Same Subject; Scope of Incidental Power.** — Where the *power to make sewers* was held to be derived as an incident to the power of repairing highways, the court expressed the opinion that the common council were not authorized to construct sewers for the mere private convenience or benefit of particular individuals; and that they could (under such circumstances) "be lawfully made only when the commodiousness of the highway for its proper purposes, and its safety and the healthfulness of the vicinity, require them." [1]

§ 1463 (806). **Same Subject; Contribution to Expense of making.** — It has been decided, in Massachusetts, that authority to make needful and salutary by-laws, or perhaps authority to make regulations for the public health, will, in the absence of more specific power, authorize a city to construct a *common sewer*, and to subject the owners of the lots or land abutting, and who use the sewer, to contribute for the expenditure. But this contribution must be apportioned equally and fairly, or it cannot be recovered by the city, either by virtue of the ordinance which imposes it, or on an *indebitatus* count in the absence of express promise. The apportionment should be made upon the value of the *land, independently of the buildings*, and should be settled at the time of the transaction; and an ordinance contravening these principles and requiring every person connecting with the common sewer to pay his just proportion of the expense of making the sewer, having reference always to the last valuation of such person's estate in the assessor's books, previous to the expenditure, is void for inequality and unreasonableness.[2]

Wagoner *v.* Paterson, 67 N. J. L. 455, 459. In Hunter's Appeal, 71 Conn. 89, *Baldwin*, J., remarked that a payment for the privilege of using a sewer not a tax on property, but is a license fee or excise. Where a city, which had power to assess the cost of a sewer upon abutting property, instead of doing so, passed an ordinance which provided that connection might be made on a specified payment for each house, it was held that a person who connected a house with the sewer after the enactment of the ordinance, waived the irregular action of the council, accepted the terms and conditions imposed by the ordinance, and, by implication, promised to pay the amount fixed therein. Fergus Falls *v.* Boen, 78 Minn. 186.

[1] Cone *v.* Hartford, 28 Conn. 363, 375. In Hitchcock *v.* Galveston, 96 U. S. 341, the various provisions of the charter of the city are collated, and the effect of them stated to be to authorize the city itself to construct sidewalks; and though the cost of construction is to be defrayed by the abutting lot-owners, the city may collect from them the cost, and in case of the sale of any lot made to enforce the collection, the city must pay to the owner the surplus of any proceeds of sale remaining after payment of the amount due to it. The resort to the lot-owners is to be after the work has been done, after the expense has been incurred, and it is to be for reimbursement to the city.

[2] Boston *v.* Shaw, 1 Met. (Mass.)

§ 1464. **Payment of Assessments in Instalments.** — To lighten the burden upon property benefited by an improvement statutes are frequently enacted making *assessments payable in instalments* over a term of years. There seems to be no general constitutional objection to this course, for the practice simply amounts to an extension of the time within which the assessment may be paid; the property owner has no fundamental or constitutional right to have the payment of benefits conferred upon his property by the improvement deferred until a future period, and in the absence of special constitutional restriction, it is within legislative discretion to say whether the privilege shall be secured to him.[1] The statute conferring the privilege sometimes limits it to assessments exceeding a certain amount, and denies it to assessments below that amount. It has been held that such a course is not unconstitutional and void *for want of uniformity* on the ground that it denies to the property owner whose assessment is less than the prescribed amount the same privilege accorded to the property owner whose assessment is over that amount. The legislature may divide prop-

130. After this decision the legislature of *Massachusetts* passed an act (Stat. 1841, ch. cxv. Gen. Stats. 1860, p. 254, § 4) giving general authority to cities to construct drains or common sewers, and providing "that every person who enters his particular drain into the main drain or common sewer, or who, by more *remote* means, receives a benefit thereby for draining his cellar or land, shall pay to the city or town his proportional part of the charge of making or repairing the same," &c. A by-law apportioning the assessment for building a drain according to the value of the lands benefited, independently of improvements thereon, was held valid; and the "remote benefit" spoken of by the statute was considered to "mean the increased value given to vacant and unimproved lots by this *privilege* of letting in drains from them in case buildings should subsequently be erected. An assessment upon the proprietors of land so situated that it is, or may be, benefited by the sewer is just and equal," although it is at the time vacant territory. The proprietor of the land is liable to be charged, "although he never actually uses the drain; perhaps not, if there is no prospect of the possibility of benefit." But it does not invalidate an assessment that the greater part of one lot assessed is lower than the bottom of the sewer, as it might, and probably would, be graded so as to receive as much benefit as other lots. Downer *v.* Boston, 6 Cush. (Mass.) 277; S. P., and affirming the validity of the act of 1841, above cited, see Wright *v.* Boston, 9 Cush. (Mass.) 233, and note reference to People, &c. *v.* Brooklyn, 6 Barb. (N. Y.) 209, which was overruled, 4 N. Y. 419; Patton *v.* Springfield, 99 Mass. 627.

Sewer taxes apportioned upon the value of lots without the improvements upon them held valid. Mason *v.* Spencer, 35 Kan. 512; Snow *v.* Fitchburg, 136 Mass. 179, 183; Gilmore *v.* Hentig, 33 Kan. 156; Douglass *v.* Craig, 4 Kan. App. 99. Where a sewer tax is to be borne by the adjacent property owners, it should be imposed only upon those individuals who can use the sewer, and in proportion to the benefit received from its construction. Gilmore *v.* Hentig, *supra;* see also Hentig *v.* Gilmore, 33 Kan. 234 (special tax for grading alleys).

[1] Gage *v.* Chicago, 216 Ill. 107. See also Hellman *v.* Shoulters, 114 Cal. 136, 144; Sisson *v.* Buena Vista County, 128 Iowa, 442, 461; Boehme *v.* Monroe, 106 Mich. 401; Morrison *v.* Morey, 146 Mo. 543; Erickson *v.* Cass County, 11 N. Dak. 494, 505.

rs into classes according to the amount of their respective ts, and provide a method of payment equal and uniform e several classes.[1] There is no implied authority in a ty to make the assessment payable in instalments or to nent thereof. The power so to do must be conferred by ture.[2] It is within the power of the legislature to fix the

. Gambell, 35 Oreg. 393. lman *v.* Shoulters, 114 Cal. on *v.* Oregon City, 35 Oreg.

titutionality of the "Bar- of *Indiana*, providing for nt of assessments in in- nd the issue of improve- payable from the assess- een sustained against vari- ns. Adams *v.* Shelbyville, ; McKee *v.* Pendleton, 154 artin *v.* Wills, 157 Ind. 153; frees, 157 Ind. 392; Shank 57 Ind. 401; Wray *v.* Fry, Hibben *v.* Smith, 158 Ind. Pittsburg Plate Glass Co., 9; Pittsburgh, C., C. & St. Taber, 168 Ind. 419.

v. People, 161 Ill. 89; Vest Chicago, 162 Ill. 280; Vest Chicago, 162 Ill. 287; est Chicago, 164 Ill. 196; *v.* Cadle, 166 Ill. 487; *v.* Johnston, 170 Ill. 336; People, 173 Ill. 123; Mason 178 Ill. 499; Corliss *v.* ark, 132 Mich. 152.

ngton, it is held that legis- sion may be made for the an assessment in instal- out issuing bonds. Heath 20 Wash. 342.

authorizing the extension for the payment of local construed as permissive not mandatory. State *v.* , 65 Minn. 298. The power e whether an assessment paid in instalments or in be vested under the statute mon council. Conde *v.* , 164 N. Y. 258. Where e has divided a special into a certain number of the county court con- assessment has no power that it be paid in fewer Phelps *v.* Mattoon, 177 ichael *v.* Mattoon, 172 Ill.

s, the objection that the s improperly divided into a greater number of instalments than the statute authorizes must be taken on the application to confirm the assessment. It cannot be urged in opposition to an application for judgment of sale. Harman *v.* People, 214 Ill. 454. As to the method of division into instalments under the requirements of the *Illinois* statute that the division shall be so made that the first instalment shall include all fractional amounts, leaving each of the remaining instalments equal in amount and multiples of $100, see Delameter *v.* Chicago, 158 Ill. 575; Latham *v.* Wilmette, 168 Ill. 153; Walker *v.* People, 170 Ill. 410; Parker *v.* LaGrange, 171 Ill. 344; Gross *v.* Grossdale, 176 Ill. 572; Danforth *v.* Hinsdale, 177 Ill. 579; Hinsdale *v.* Shannon, 182 Ill. 312; Gage *v.* Chicago, 195 Ill. 490. Purchaser held *to take subject* to an assessment payable in instalments, and to the agreement of his vendor's predecessor in title to pay in instalments and waiving objection to legality in consideration of a forbearance to demand payment at once. Talcott *v.* Noel, 107 Iowa, 470. As to *when lien attaches* for successive instalments under the practice in *Ohio* and the rights of a purchaser of the property, see Makley *v.* Whitmore, 61 Ohio St. 587. An ordinance levying an assessment payable in five annual instalments held defective because it did not fix the time when the instalments fell due. Dallas *v.* Emerson (Tex. Civ. App.), 36 S. W. Rep. 304. It is sufficiently definite to fix the time of payment of the deferred instalments from the confirmation of the assessment. Davis *v.* Litchfield, 155 Ill. 384. A holder of an assessment certificate, or voucher, *takes it subject* to the statutory right of a property owner to pay deferred instalments in advance, without interest; Wilmette *v.* People, 214 Ill. 107; and also subject to an agreement or right conferred by ordinance and the certificate on the property owner to postpone the payment of the assessment. Talcott *v.* Noel,

rate of interest upon the deferred instalments,[1] and the postpon instalments do not bear interest, at least before maturity, unl the statute expressly provides that they shall.[2] For the purp of precluding the property owner from attacking the validity the assessments, or of such instalments as may be owing, in so States the right to pay in deferred instalments is conferred as matter of favor upon the application of the property owner and up his promise in writing, in consideration of the right to make t deferred payments, that he will not make any objection to the leg ity or regularity of the assessment and will pay the same with inter thereon.[3] In other cases the right to question the validity of t

107 Iowa, 470. Where the statute authorized the city council to direct that the assessment be paid in instalments, it was held that the property owner might anticipate the maturity of the deferred payments and pay in gross, with accrued interest to the date of payment. McGilvery *v.* Lewiston, 13 Idaho, 338; Blackwell *v.* Cœur D'Alene, 13 Idaho, 357. Where a statute limited the amount of the special assessment which might be levied against any property owner in any one year to five per cent of the value of the lands assessed, it was held that the gross amount of an assessment payable in instalments could not exceed the prescribed limit. The fact that the statute authorized payments in annual instalments, and that each annual payment was within the limit, was held to be immaterial. Corliss *v.* Highland Park, 146 Mich. 597. Where a city is authorized on the petition of the property owners to assess on the ten year plan and makes a levy at the credit rate by an ordinance reciting that a petition had been presented, when, in fact, no petition was presented, the court held that the assessment was not void, but merely an excessive levy so far as it exceeded the cash rate, which was also set out in the ordinance. Thompson *v.* Lexington, 104 Ky. 165.

[1] Hulbert *v.* Chicago, 213 Ill. 452; Hulbert *v.* Chicago, 217 Ill. 286. See also Gage *v.* Chicago, 216 Ill. 107.

[2] Matter of Hagemeyer, 113 N. Y. App. Div. 472; Mall *v.* Portland, 35 Oreg. 89. Interest does not begin to run before the maturity of the instalment, in the absence of a statutory direction to the contrary. Connor *v.* Paris, 87 Tex. 32. Docketing the aggregate of the instalments against the property and thereby creatin lien having priority over other li and incumbrances does not make assessment due and payable when statute provides for payment in ins ments. Mall *v.* Portland, 35 Oreg. The property owner is not aggrie by the levy of less than the amo of interest fixed by statute, and can object to the assessment on that grou Bradford *v.* Pontiac, 165 Ill. 612, 6

Where a statute authorizes the lection of interest on deferred p ments, but fails to prescribe the t or manner of payment of interest, city council may, by ordinance, quire the interest to be paid annu McGilvery *v.* Lewiston, 13 Idaho, 351. Assessment vouchers issued to contractor for the portion of the of the improvement which is pay by the city in instalments draw terest in the same manner as ins ments payable by individual prop owners. Chicago *v.* People, 215 235. Under a statute directing ass ments to be divided into twenty an instalments, and one instalment be assessed yearly against the "with interest," the interest to added to the assessment in each is only the interest on the assessn payable in that year, and not on whole assessments then remaining paid. Matter of Hagemeyer, 113 N App. Div. 472. For statute provi for the payment of interest on the stalments of an assessment from time of the confirmation of the ass ment, see People *v.* Weber, 164 Ill. 4

[3] This is the method adopted the *Barrett Law of Indiana*. See S *v.* Hayes, 162 Ind. 548. It is *cons tional*. Quill *v.* Indianapolis, 124 292; Sisson *v.* Buena Vista Cou

assessment is subject to special limitations, *e. g.*, a period of three months after the making of the assessment or the issuance of improvement certificates,[1] and under the Illinois statute the voluntary payment of an instalment is an assent to the confirmation of the assessment and estops further attack by the property owner.[2] Under the practice usually adopted the completion of the improvement is followed by the issuance of an improvement certificate, voucher, or bond to the contractor representing the cost of the improvement, or that part thereof which is payable from property benefited. After the issuance of this certificate or bond, the municipality becomes simply a statutory trustee for collection of the money for the benefit of the holder. For his benefit the right is frequently conferred to foreclose the lien of the assessment in the event of a default in the payment of one of the instalments.[3]

128 Iowa, 442. If the property owner fails to file the agreement, the assessment may be collected in gross. Pittsburgh, C., C. & St. L. R. Co. *v.* Taber, 168 Ind. 419. The person signing the agreement is estopped to challenge the authority of the city council to order the improvement. Richcreek *v.* Moorman, 14 Ind. App. 370. The stipulation is binding on the property owner although the city may not have the power to make the assessment payable in instalments. Talcott *v.* Noel, 107 Iowa, 470, 473. By the charter of the city of Denver, Colorado, a person who fails to pay the entire assessment within thirty days after it is levied is conclusively presumed to have elected to pay the same by instalments. The charter also provides that all persons electing to pay an assessment by instalments are precluded from questioning the validity of the assessment. It has been held that these provisions are constitutional and valid. Denver *v.* Campbell, 33 Colo. 162; Jackson *v.* Denver, 41 Colo. 362. The voluntary execution, pursuant to statute, of an agreement waiving objection to all irregularity and illegality in the proceedings, and agreeing to pay the assessment, is held, in *Indiana*, to be an original undertaking, and upon the execution thereof the lot owner becomes individually liable for any deficiency arising from the sale of the property on the foreclosure of the lien, although the statute does not otherwise impose any liability on the lot owner for the cost of the improvement. Wayne County Savings Bank *v.* Gas City Land Co., 156 Ind. 662; Hayes *v.* Shirk, 167 Ind. 569, 578; Jones Co. *v.* Perry, 26 Ind. App. 554.

[1] This is the provision of § 989 of the *Iowa Code*. This provision is not retroactive and only applies to assessments made and improvement certificates or bonds issued after its adoption in 1897. Waples *v.* Dubuque, 116 Iowa, 167; Citizens' State Bank *v.* Jess, 127 Iowa, 450.

[2] Downey *v.* People, 205 Ill. 230; McDonald *v.* People, 206 Ill. 624. To the same effect, Thompson *v.* Mitchell, 133 Iowa, 527; Harwood *v.* Donovan, 188 Mass. 487, 490. But compare Robinson *v.* Burlington, 50 Iowa, 240. But not when the description of the property assessed is void. Upton *v.* People, 176 Ill. 632. *Voluntary payment* of two instalments, with other circumstances, held to estop owner from attacking validity of assessment. Lexington *v.* Bowman, 119 Ky. 840. A *judgment* determining the validity or invalidity of an instalment is *res adjudicata* and conclusive as to the validity or invalidity of instalments subsequently becoming payable. Markley *v.* People, 171 Ill. 260; Gross *v.* People, 193 Ill. 260. But compare Young *v.* People, 171 Ill. 299. See also Gage *v.* People, 213 Ill. 410. Treat *v.* Chicago, 125 Fed. Rep. 644; s. c. 130 Fed. Rep. 443.

[3] For the practice and procedure in *Indiana* in actions by the holders of improvement bonds to foreclose the lien of the special assessment, see Lewis *v.* Albertson, 23 Ind. App. 147; Pittsburg, &c. R. Co. *v.* Fish, 158 Ind. 525; Scott *v.* Hayes, 162 Ind. 548.

When, as is sometimes done, the assessment is based on an estimate of cost made in advance of the actual construction of the work, the city cannot enforce the instalments remaining unpaid after completion, if previous instalments which have been paid are sufficient to pay for the actual cost of the work, which has proved to be less than the estimate.[1] The time when the lien of the assessment accrues, and the extent thereof, the manner of enforcing payment of the entire assessment for default in the payment of an annual instalment, and the applicability and effect of statutes of limitations are necessarily dependent upon the provisions of the statutes imposing the assessment.[2]

§ 1465 (810). **Power to make Contracts for Local Improvements.**—Power to a municipal corporation to make local improvements, though the expense be directed in the constituent act to be assessed upon the property benefited, gives the corporation, in the absence

[1] People *v.* McWethy, 165 Ill. 222; Bloomington *v.* Blodgett, 24 Ill. App. 650.

[2] Where a statute provided that a special assessment shall be payable in yearly instalments of five per cent of the whole amount, together with seven per cent interest on the whole amount unpaid in any year, "which yearly instalment and interest shall be levied and collected with the annual taxes upon the property so assessed," it was held that it is not contemplated that there shall be more than one assessment entered upon the assessment roll, the right given being merely a privilege to the property owner to divide his payments, if he so desires. People *v.* Metz, 134 N. Y. App. Div. 533. Assessment, though payable in instalments, held to *be a lien* from the date of the ordinance levying the assessment. Sanders *v.* Brown, 65 Ark. 498. Although the statute provides that the entire assessment shall become due in case of default in the payment of any instalment, the *statute of limitations* only commences to run from the maturity of the last instalment according to the terms of the contract, and irrespective of previous defaults. Gilsonite Const. Co. *v.* Arkansas-McAlester Coal Co., 205 Mo. 49 (disapproving Burnes *v.* Ballinger, 76 Mo. App. 58). See also Ross *v.* Gates, 183 Mo. 338; Barber Asphalt Pav. Co. *v.* Meservey, 103 Mo. App. 186. Where an owner is given the right to request that he be allowed to pay the cost of an improvement by instalments and he has made no such request, but the city itself adopts that plan and issues instalment warrants, its action does not extend the *period of limitations* beyond five years from the completion of the work. Lexington *v.* Crosthwaite (Ky.), 78 S. W. 1130.

Time when *sale* might be had held, under the statute, to be after maturity of the final instalment, although the statute provided that the whole assessment should be immediately due and payable in case of default in any instalment. Poillon *v.* Brunner, 66 N. J. L. 116, aff'd 67 N. J. L. 353. For method of sale for past due instalments, see Clifton *v.* Schneider, 106 Ky. 605. Duration of *lien* of assessment payable in instalments in *New Jersey*, see Voorhees *v.* North Wildwood, 75 N. J. L. 463. A provision which makes the entire assessment due and payable in case of default in the payment of an instalment is waived by accepting payment of past due instalments. Reclamation District *v.* Hall, 131 Cal. 662. But see *contra*, Marion Bond Co. *v.* Blakeley, 30 Ind. App. 374. Construction of statute making entire assessment due and payable for default in payment of instalments, see Jaicks *v.* Merrill, 201 Mo. 91.

ovisions evincing a different legislative intent, the implied r to make *general contracts therefor*.[1] As to agreements made en the corporation and a contractor to do the work, the ers or property owners on whom the expense falls are not es, but are usually brought into direct relation with the pro- ng for the local improvement for the first time when the assess- is made. The assessment is a tax levied by the corporation property to defray the expense of the improvement, and the o collect it (though brought by the contractor under author- iven for that purpose) has been held, though not invari- to be *the subject of set-off or counter-claim*.[2] But although

umming *v.* Brooklyn, 11 Paige, .), 596; Mayer *v.* New York, 63 455, 459; Lutes *v.* Briggs, 64 . 404; Hitchcock *v.* Galveston, S. 341; Galveston *v.* Heard, 54 20; Jones *v.* Holzapfel, 11 Okla. 15, quoting text.

power vested in the city au- es to provide by "general or- e" for the grading and paving eets, without passing a special nce in the particular case, does npower them to grade and pave treet or part thereof, for the convenience generally, or for nefit of the whole city, without notive or purpose of special to property in the immediate y, and to assess the cost of the upon the owners of such prop- Burns *v.* Baltimore, 48 Md. Construction of statute author- *city to assume assessments* in eration of release by owner of for damages growing out of ding, see Atkinson *v.* Newton, Iass. 240; Bell *v.* Newton, 183 481. See also Green *v.* Everett, Iass. 147; Aspinwall *v.* Boston, ass. 441.

Iimmelmann *v.* Spanagel, 39 Cal. Same *v.* Cofran, 36 Cal. 411; r *v.* Risdon, *Ib.* 239; Emery *v.* rancisco Gas Co., 28 Cal. 345; *v.* Smith, 133 Cal. 102; Bur- n *v.* Palmer, 67 Iowa, 681. See m *v.* Eyermann, 5 Mo. App. Sargent *v.* Tuttle, 67 Conn. 162. defence good against the city is gainst the contractor. St. Louis mens, 36 Mo. 467, 469. See n *v.* McNamara, 77 Mo. App. 1. *ure* is no reason why real estate ing to a person under such dis- should not be assessed for its share of the cost of a street improvement. Ball *v.* Balfe, 41 Ind. 221; *ante*, §§ 793, 801, 819, 825; *post*, § 1467. Where a city contracts to pave a street and to pay the contractor by *assignment of assessment bills*, the abutting owners may make defence upon the character of the work done, although not nominal parties to the contract. Erie City *v.* Butler, 120 Pa. St. 374.

Under the Constitution of *Illinois* which gives to cities "power to make local improvements . . . by *special taxation of contiguous property* or otherwise," an act authorizing the cost of a sidewalk to be recovered of the adjacent lot-owner *by suit at law* is void. Craw *v.* Tolono, 96 Ill. 255; Virginia *v.* Hall, 96 Ill. 278; *ante*, §§ 1439, 1453.

In Bodley *v.* Finley's Ex'r, 111 Ky. 618, quoting the text, it was held that *a set-off might be pleaded against a contractor's claim* in an action to enforce the lien for the cost of a street improvement. Recognizing the imposition of special assessments to be an exercise of the sovereign power of taxation, the court said: "But is any public policy violated in permitting a set-off against the claim of a contractor in whose favor this governmental power has been exercised? In such case a contract is entered into by the municipality, on behalf of the abutting property holders, with a contractor, for the making of the improvement. Under the statute this is held to give the contractor a lien upon such property for the contract price of the work. If, when he seeks to enforce his lien, the property holder is permitted to set off a demand against him, this does not in any wise interfere with the exercise of the governmental power, nor with the progress

the property owners are not privies or parties to such contracts, yet, to a certain extent and in a substantial sense, the municipality is, *sub modo*, their representative in law; and since the burden to pay rests upon them, they have a right to insist on a faithful performance of the contract, and the corporate authorities cannot arbitrarily and without reason dispense with such performance to the prejudice of the abutter.[1]

The carrying out of a public improvement, including the making of the contract, the supervision of the work done thereunder, and the determination whether the terms of the contract have been fulfilled, unless otherwise provided by statute, of necessity devolve upon the common council, the board of public works, or other appropriate local authority having charge of the improvement. Sometimes that duty is so devolved in express terms. When the duty is expressly devolved upon the local authorities, or when it rests upon them of necessity and the statute does not otherwise provide, *the acceptance of the improvement* by the appropriate local authorities acting in good faith and within the scope of their powers after the completion of the work, is conclusive upon the property owner, so far as the character of the work done and the materials used is concerned; and *in the absence of fraud*, or possibly of plain mistake, the property owner cannot defend a suit to enforce the assessment upon the ground that the work was not done according to the contract.[2] But this principle only properly applies when

of the improvement. This claim is not one by the government, or by the municipality in the exercise of delegated governmental power. It is a private claim, for the enforcement of which a statutory lien is given. The only ground of public policy against the allowance of such a set-off would be the possibility that a prospective contractor indebted to one or more abutting property holders might either refrain from bidding or make a higher bid than he would make if such set-off were not allowed. This objection does not seem to us very forcible, for we must assume that each contractor knows of the existence of all legal demands against him, and we cannot assume that he intends to avoid their payment. We reach the conclusion, therefore, that *on proper showing a set-off may be allowed* against a claim for street improvement in such cases as it would be allowed against the assertion of other liens upon property not having their origin in the exercise of governmental power."

[1] Bond *v.* Newark, 19 N. J. Eq. 376; Liebstein *v.* Newark, 24 N. J. Eq. 200; Schumm *v.* Seymour, *Ib.* 143; Lake *v.* Williamsburg, 4 Denio (N. Y.), 520, 523; St. Louis *v.* Clemens, 36 Mo. 467; Saxton *v.* Beach, 50 Mo. 488; but see Murray *v.* Tucker, 10 Bush (Ky.), 240. As to the liability of the municipal corporation to the contractor, see chapter on Contracts, *ante*, § 825.

[2] Emery *v.* Bradford, 29 Cal. 75; Cochran *v.* Collins, 29 Cal. 129; Ricketts *v.* Hyde Park, 85 Ill. 110, 113; Haley *v.* Alton, 152 Ill. 113; Chicago *v.* Sherman, 212 Ill. 498; Lux & Talbott Stone Co. *v.* Donaldson, 162 Ind. 481, 485; Robinson *v.* Valparaiso, 36 Ind. 616, 619; McEneney *v.* Sullivan, 125 Ind. 407, 410; DePuy *v.* Wabash, 133 Ind. 336; Robinson *v.* Valparaiso, 136 Ind. 616; Bloomington *v.* Phelps, 149 Ind. 596; Cason *v.* Lebanon, 153 Ind. 567; Gorman *v.*

ıe improvement is constructed in substantial conformity to the ıprovement provided for by the ordinance and contracted for.

ate, 157 Ind. 205; Darnell *v.* Keller, Ind. App. 103; Holloran *v.* Morman, Ind. App. 309; Ferguson *v.* Coffeyle, 77 Kan. 391; Henderson *v.* ımbert, 14 Bush (Ky.), 24; Whiteld *v.* Hipple (Ky.), 12 S. W. Rep. 0; Joyes *v.* Shadburn (Ky.), 13 W. Rep. 361; Bogard *v.* O'Brien (y.), 20 S. W. Rep. 1097; Purdy *v.* rake (Ky.), 32 S. W. Rep. 939; len *v.* Woods (Ky.), 45 S. W. Rep. 6; Barker *v.* Tennessee Pav. Brick . (Ky.), 71 S. W. Rep. 877; Everle *v.* Walsh (Ky.), 76 S. W. Rep. 8; Baldrick *v.* Gast (Ky.), 79 S. W. ep. 212; Kelly *v.* Chadwick, 104 La. 9; Baltimore *v.* Raymo, 68 Md. 9; Motz *v.* Detroit, 18 Mich. 495, 5; Dixon *v.* Detroit, 86 Mich. 516; ırper *v.* Grand Rapids, 105 Mich. 1; Cass Farm Co. *v.* Detroit, 124 ich. 433, 439; State *v.* Jersey City, N. J. L. 441, 449; Chance *v.* rtland, 26 Oreg. 286; Shannon *v.* rtland, 38 Oreg. 382, 401; Duniy *v.* Portland, 47 Oreg. 103; Michv. Portland, 53 Oreg. 547; Hughes Portland, 53 Oreg. 370; Berwind *v.* lveston & H. Inv. Co., 20 Tex. Civ. p. 420; Elma *v.* Carney, 9 Wash. ; North Yakima *v.* Scudder, 41 ısh. 15, 22; Fass *v.* Seehawer, 60 s. 525 (claim that the certificate d because work not done within ıe limited by contract). See also ple *v.* Church, 192 Ill. 302.

In *Illinois*, an *injunction* will not ıe to restrain the collection of an essment on the ground that the ıtractor has not constructed the provement in compliance with the ıtract and ordinance. The property ner may have *mandamus* to compel city to perform the work in acdance with the ordinance, and an unction may issue to restrain the y from improperly paying the conctor. Callister *v.* Kochersperger, Ill. 334; Heinroth *v.* Kocherrger, 173 Ill. 205; Craft *v.* Kocherrger, 173 Ill. 617; Shannon *v.* ıedale, 180 Ill. 202; Lawrence *v.* ple, 188 Ill. 407.

In *California*, it is held that the *perty owners have no other remedy* the failure of the contractor to ıplete the work, or for misconduct he city officials in approving and accepting the work before it was completed, than by a statutory appeal; by failing to appeal, the objection is waived. Emery *v.* Bradford, 29 Cal. 75; Nolan *v.* Reese, 32 Cal. 485; Chambers *v.* Satterlee, 40 Cal. 497, 498; Himmelmann *v.* Hoadley, 44 Cal. 213; Dorland *v.* McGlynn, 47 Cal. 47; Dyer *v.* Parrott, 60 Cal. 551; Boyle *v.* Hitchcock, 66 Cal. 129; Jennings *v.* Le Breton, 80 Cal. 8, 11. As to *fraud* in the performance of contract, see McVerry *v.* Kidwell, 63 Cal. 246; Santa Cruz Rock Pav. Co. *v.* Bowie, 104 Cal. 286. *Semble*, that if the city permitted fictitious items to be included in the contractor's claim on which the assessment is based, it would operate as a fraud on the property owners, requiring a court of equity to vacate the assessment. Dixon *v.* Detroit, 86 Mich. 516, 520. See also Matter of Livingston, 121 N. Y. 94. The *fraud* which will vitiate an assessment must be fraud in the act of acceptance by the municipal authorities; the fact that the work was fraudulently done is not sufficient. Darnell *v.* Keller, 18 Ind. App. 103.

In Taylor *v.* Wapatoneka, 26 Ohio Cir. Ct. R. 285, it was held that where a street improvement was not properly completed the collection of an assessment therefor *would be enjoined* until the defect was remedied without cost to the abutting property owner. In Mason *v.* Des Moines, 108 Iowa, 658, it was held that the *fraud of a contractor* in failing to use a proper amount of cement in constructing the curbing, combined with the failure of the proper authorities to discover the defect, vitiated the acceptance of such portion of the street and rendered void the assessment of the property abutting thereon, although the authorities were not guilty of actual fraud. See also Carthan *v.* Lang, 69 Iowa, 384. A certificate signed by a clerk in the office of the city engineer of the completion of the street work held insufficient, under statutory requirements, to sustain the lien of an assessment upon the lands assessed. Rauer *v.* Lowe, 107 Cal. 229. A street assessment is *prima facie* evidence that the contractor has fulfilled his

The authorities, under the usual powers conferred upon them, cannot contract for an improvement of one kind and then accept an entirely different kind and attempt to levy an assessment therefor.[1]

§ 1466 (811). **Same Subject ; Conditions Precedent to Abutter's Liability.** — To entitle a *municipal corporation to recover* from the abutter the expense of constructing a sidewalk, or other local improvement, it *must substantially comply with all conditions precedent,*

contract to the satisfaction of the superintendent of streets in the absence of other evidence; and the *prima facie* character of this evidence is not overcome by a certificate of the city engineer that the grading was not done to the official line and grade. Buckman v. Landers, 111 Cal. 347. When a superintendent of streets has certified upon the face of the assessment that work has been done and materials furnished under his direction and to his satisfaction, he cannot thereafter qualify his certificate by subsequently endorsing on the assessment a statement that the work was accepted by the common council, and had not been under his control and supervision and was not accepted by him. Hadley v. Dague, 130 Cal. 207. In Haisch v. Seattle, 10 Wash. 435, where it appeared that a street was in a worse condition after an attempted improvement than before, and the property adjoining was therefore damaged instead of improved; that the property holders remonstrated time and time again with the authorities against the manner in which the work was being conducted, but no attention was paid to the remonstrances, and that the defects in the work were open and notorious, it was held that the city must be presumed to have taken notice of the same, and that the adjoining *property holders were not estopped* to deny the validity of the assessment even though the work had been accepted by the proper authorities.

[1] Schneider v. District of Columbia, 7 Mackey (D. C.), 252; Dougherty v. Hitchcock, 35 Cal. 512, 523; Stockton v. Whitmore, 50 Cal. 554; Pells v. People, 159 Ill. 580; Church v. People, 174 Ill. 366 (change in location of sewer); Pells v. Paxton, 176 Ill. 318 (contract changed to call for a pavement of less width); People v. Whidden, 191 Ill. 374; Gage v. People, 193 Ill. 316 (dirt roadway substituted for graded and macadamized roadway); Young v. People 196 Ill. 603, 605; Chicago v. Nodeck, 202 Ill. 257, 273; Chicago v. Ayers, 212 Ill. 59; McCain v. Des Moines, 128 Iowa, 331; Petter v. Allen (Ky.), 54 S. W. Rep. 174 (improvement made at a place other than that provided by the ordinance therefor); Scranton v. Bush, 160 Pa. 499 (grading done not according to ordinance, but according to another grade fixed by the city engineer without authority). See also Independence v. Gates, 110 Mo. 374. *Abutting owners* held to be entitled *to enjoin* the issuance of assessment certificates to contractor who has failed to perform the work in compliance with the contract. Wingert v. Tipton, 134 Iowa, 97. It has been held that although the action of a city council in accepting the work of a contractor for public municipal improvements which has not been fully executed on account of defective material used or full compliance with the plans and specifications for the work would be conclusive against collateral inquiry by a person whose property has been assessed to pay for the same in resisting the tax, when, instead of a defective construction of the work, there has been failure to do the work provided for and contracted to be done, it is quite a different matter, and where a city has contracted for a continuous line of sidewalk and accepts the construction only of a portion thereof, leaving intervening spaces between the portions of the sidewalk accepted, the contractor cannot recover even on a *quantum valebat*, or for any benefit which the abutting property owners may receive from the portion constructed. Berwind v. Galveston & H. Invt. Co., 20 Tex. Civ. App. 426. See also Texas Transportation Co. v. Boyd, 67 Tex. 153.

r prescribed by charter or ordinance.[1] Therefore, if the
the city council requires the sidewalk to be built *on the side*
tain street, the city cannot recover of the lot-owner an assess-
or building a sidewalk several feet from the side of such
And where the ordinances of the city provide that side-
all be constructed of such materials as the city council may
he city cannot recover an assessment unless the council has
ed the kind of material out of which they should be built.[3]

7 (812). **Same Subject.** — In Missouri, in actions to *recover*
unt charged against a lot for local improvements in front

ell *v.* Wentworth, 6 Cush. 221, involving validity of assessment; Same *v.* French, Finnell *v.* Kates, 19 Ohio St. rathy *v.* Chicago, 53 Ill. 79; Poole, 33 Ind. 443; Himmel- Bryne, 41 Cal. 500; Hewes 10 Cal. 255; Harper's Appeal St. 9; Sheridan *v.* Fitchburg, . 523; Hoyt *v.* East Saginaw, 39; Merritt *v.* Portchester, 309; Frosh *v.* Galveston, 73 ; Connor *v.* Paris, 87 Tex. rowell *v.* Bristol, 89 Va. 652, ng text. Construction of s to "temporary" or "per- sidewalks, and as to what s an "acceptance" thereof ity. Lowell *v.* Wheelock, 11 1. If the charter provides walks may be constructed by "at the expense of the lot- and points out no specific a civil action lies to recover nt. Lowell *v.* Wyman, 12 , 276. "The power of charg- expense of sidewalks on the the adjoining land is a high d is not to be extended by ion." *Per Metcalf*, J., in French, 6 Cush. (Mass.) 223, York Prot. E. Public School, N. Y. 556.

a statute confers the power but expressly provides that or alley *shall first be graded* bring the street or alley up tablished grade, the city has to assess for an improvement e established grade and the nt of the assessment may be Hubbell *v.* Bennett, 130 , citing Zalesky *v.* Cedar 18 Iowa, 714. Entry by the ctor of the assessment in a t for the purpose, as required rdinance, held *not a condition precedent* to liability of property owner. Bennison *v.* Galveston, 18 Tex. Civ. App. 20.

[2] Lowell *v.* Wheelock, 11 Cush. (Mass.) 391. The owner of a corner lot, who had applied to the city council for the use of water, and paid for the pipe laid along one front of his property, was held not to be liable for the cost of pipe afterwards laid without his consent along the other front. Baker *v.* Gartside, 86 Pa. St. 498. That no authority exists for the payment, out of the general revenues, of judgments against a city for work performed in the improvement of streets does not release the city from liability therefor. Slusser *v.* Burlington, 42 Iowa, 378. Under an ordinance authorizing a *plank* sidewalk, a tax assessed for one of *stone* was held void. Sloan *v.* Beebe, 24 Kan. 343.

[3] Lowell *v.* Wheelock, 11 Cush. (Mass.) 391, *supra;* McCrowell *v.* Bristol, 89 Va. 652, 670, citing text. The order should appear on the journal of their official proceedings. *Ib.*; *ante*, §§ 244, 1448. The provision of a city charter, making the abutting lot-owners liable for a street improvement, being in derogation of the common law, must be construed most strictly against the municipality. The council is the agent of the law in contracting for an improvement so as to make the cost a charge on a lot. No liability attaches until the work to be done is ascertained and prescribed in the ordinance and contract. Henderson *v.* Lambert, 14 Bush (Ky.), 24. Such abutting lot-owners were under the circumstances held not to be liable where only a part of the work contracted for had been completed by the contractor, and accepted and paid for by the city council. *Ib.*

thereof, the liberal doctrine is adopted, that a *substantial compliance* with the law is sufficient, and it is not necessary for the city to prove a strict compliance with directory ordinances on the subject, but the lot-owner or defendant may show a neglect of duty by the authorities, and if he was injured thereby, it will constitute a defence. If the work has been done in a manner satisfactory to the corporation, and has been accepted by it, a *prima facie* case is made out.[1] But the courts of Missouri have also held that, *if the time for the completion* of an improvement be fixed by the ordinance providing therefor, and if the contractor does not substantially comply with the conditions of the ordinance *as to time*, and delays the completion of the improvement, tax bills issued for the work are invalid and cannot be enforced against the abutting proprietors. The reasoning upon which these decisions proceed is that the right to create a lien upon property benefited rests on a substantial adherence to the method prescribed by the ordinance providing for the improvement; that that ordinance is the only authority of the officers to make the improvement and of the contractor to proceed therewith; that, when the ordinance fixes the time of completion, time becomes of the essence of the contract, because under the system of competitive bidding after advertisement the time within which the work is to be performed necessarily affects the price to be paid; that when the time fixed by the ordinance has expired no further authority exists on the part of the officers of the city, or on the part of the contractor to proceed with the work and to complete it; and that, therefore, the contract being at an end, there can be no basis for an assessment as for a completed improvement.[2]

[1] Risley *v.* St. Louis, 34 Mo. 404; St. Joseph *v.* Anthony, 30 Mo. 537; St. Louis *v.* De Noue, 44 Mo. 136; St. Louis *v.* Clemens, 36 Mo. 467; Neenan *v.* Smith, 60 Mo. 292; Adams *v.* Lindell, 5 Mo. App. 197; Steffen *v.* Fox, 124 Mo. 630; Porter *v.* Boyd Pav. & Const. Co., 214 Mo. 1, 21. In an action to recover local assessments, in the absence of proof of fraud, the *acceptance by the corporation* of work it was authorized to contract for is *prima facie* evidence against the defendant, so far as relates to its completion and the manner in which it was done. Municipality No. 2 *v.* Guillotte, 14 La. An. 297; Murray *v.* Tucker, 10 Bush (Ky.), 240; *ante*, §§ 464, 465.

[2] Neill *v.* Gates, 152 Mo. 585; Barber Asphalt Pav. Co. *v.* Ridge, 169 Mo. 376; Barber Asphalt Pav. Co. *v.* Munn, 185 Mo. 552; Rose *v.* Trestrail, 62 Mo. App. 352; McQuiddy *v.* Brannock, 70 Mo. App. 535; Whittemore *v.* Sills, 76 Mo. App. 248; New England, &c. Trust Co. *v.* James, 77 Mo. App. 616; Springfield *v.* Davis, 80 Mo. App. 574; Ayres *v.* Schmohl, 86 Mo. App. 349; Winfrey *v.* Linger, 89 Mo. App. 159; Wheless *v.* St. Louis, 90 Mo. App. 106; Schoenberg *v.* Heyer, 91 Mo. App. 389; Childers *v.* Holmes, 95 Mo. App. 154; Smith *v.* Westport, 105 Mo. App. 221.

The doctrine enunciated in the text was first laid down by the Kansas City Court of Appeals, in Rose *v.* Trestrail, 62 Mo. App. 352, an action to restrain the contractor and the city from curbing a street. The city ordinance directing the work to be done contained a pro-

e has been applied although the contract has contained ıs providing for a daily penalty upon the contractor for

t the work "shall be com- ıin thirty days from the time t therefor binds and takes The city and the contractor to a written contract for the aining a similar stipulation. was not begun until nearly ys after the making of the The Court of Appeals a judgment enjoining the e of the work, saying, in ı: "The ability of a city a lien on the property of landowners for street im- s made in pursuance of the of the ordinances authoriz- ıme is not founded on any g right, but rests exclu- a substantial adherence to ɔd prescribed by such or- . . . In the present case it ppear that there was a sub- ımpliance with the contract time it required. The work, ady been stated, should have leted within thirty days after g of the contract or by July ıstead of that it was not ɪ until three months later, ɔber 17. No ordinance was the board of aldermen to revive the contract. If the could defer performance months, why not for three ɔr any other length of time? ' and often do arise where the contractor is below what can be done for without him to loss. If he finds this unhappy predicament, to do, if the defendant's be correct, is to wait, be- ɔding with the execution of ɛt until the prices of labor ial are such that he can execute it. He need not ɛtention to the restriction of ɛt as to time. All he is re- lo is to perform the contract ne as is most advantageous and consequently most dis- ɔus to the property owners. owner can be protected ese injurious consequences ɛ way more effectually than ıtruing the ordinance as to stantial compliance with ɛt within the time fixed by nce. Such a construction is a shield against that injustice which otherwise would be left within the power of the contractor to inflict." The court also said of the provision of the ordinance requiring the work to be done within thirty days: "It operates as a limitation upon the authority of officers of the city who were ordered to contract for the work. The ordinance conferred no express or implied authority to make a contract for the work which was not to be completed within thirty days after it took effect. Time is, therefore, of the very essence of the ordinance and the contract made in conformity to it. It was no less than a statute of the city. The rule is that when a statute provides for doing work by contract and a time is fixed for a completion of the work, it is of the essence of the contract that the work be completed *within such time or an authorized extension thereof*. A failure to complete the work within the required time renders all further or subsequent proceedings invalid." Citing Turney *v.* Dougherty, 53 Cal. 619, 621; Beveridge *v.* Livingstone, 54 Cal. 54, 57; Owens *v.* Heydenfelt (Cal.), 6 Pac. Rep. 423.

The next case in which the question arose was McQuiddy *v.* Brannock, 70 Mo. App. 535, also in the Kansas City Court of Appeals. That was an action on tax bills issued for street grading in Kansas City. The ordinance directing the grading and under which the contract was let, provided that the work should be completed within eighty days "from the time a contract therefor binds and takes effect, and shall be paid for in special tax bills against and upon the lands that may be charged with the cost thereof according to law." On the original hearing of the case the court followed Rose *v.* Trestrail, 62 Mo. App. 352, *supra*, and merely held that the fact that the contract contained stipulations for a daily penalty upon the contractor for delay in completion did not take it out of the ruling of that case. On a motion for rehearing the court refused to depart from the views expressed. These views *were followed by the Supreme Court* in Neill *v.* Gates, 152 Mo. 585, where the court merely remarked "that the work was not completed within the time pre-

delay in excess of the specified period.[1] If, however, the ordinance is silent on the subject of the time of completion and says nothing as to when the work shall be commenced or when it shall be completed, but the contract fixes a time and stipulates for deductions in case of delay, the ordinance is complied with if the work is finished within a reasonable time, and if the deductions are made. In such cases time is not of the essence of the contract, and delay beyond the period prescribed by the contract does not affect the validity of the lien of the assessment.[2]

§ 1468. **Interest on Assessments.** — We have already seen that in the absence of an express or plain provision therefor, interest

scribed by the ordinance and contract under which it was done is not disputed, and as time was of the essence of the contract and material the tax bills issued for the work and here sued on must be held void," citing Rose *v.* Trestrail, 62 Mo. App. 352, and McQuiddy *v.* Brannock, 70 Mo. App. 535, *supra*, as authority.

[1] McQuiddy *v.* Brannock, 70 Mo. App. 535; Neill *v.* Gates, 152 Mo. 585. *Quære*, whether the *Missouri* line of decisions cited above does not unduly restrict the power of the city council? See cases cited in next note.

[2] Heman *v.* Gilliam, 171 Mo. 258; Schibel *v.* Merrill, 185 Mo. 534; Allen *v.* Labsap, 188 Mo. 692; Curtice *v.* Schmidt, 202 Mo. 703; Sedalia *v.* Smith, 206 Mo. 346; Hill-O'Meara Const. Co. *v.* Hutchinson, 100 Mo. App. 294; Hilgert *v.* Barber Asphalt Pav. Co., 107 Mo. App. 385; Brigham *v.* Hickman, 136 Mo. App. 216. See also Gilsonite Const. Co. *v.* Arkansas McAlester Coal Co., 205 Mo. 49; Jones *v.* Paul, 136 Mo. App. 524. Where the *ordinance* prescribes the time within which the work shall be completed, the city engineer cannot extend that time and a contract provision purporting to give him that power is void. McQuiddy *v.* Brannock, 70 Mo. App. 535; Ayres *v.* Schmohl, 86 Mo. App. 349; Childers *v.* Holmes, 95 Mo. App. 154; Neill *v.* Gates, 152 Mo. 585. When the time prescribed by contract for completion of the work has expired, an ordinance purporting to extend that time made after the contract has been forfeited by expiration of the period prescribed, does not have the effect of vitalizing the contract nor does it create a new liability on the part of the property owner upon tax bills issued upon such contract. Neill *v.* Gates, 152 Mo. 585. It is otherwise, however, when the ordinance and contract only require completion within a reasonable time, and such reasonable time has not expired at the time when an ordinance extending the time for completion is adopted. Sparks *v.* Villa Rosa Land Co., 99 Mo. App. 489.

In *California* it has been held that under a city charter requiring the superintendent of streets, upon failure of a contractor to complete his work before the expiration of the contract time, to notify the supervisors, and providing that the supervisors should relet the work, *the obligation of the supervisors to relet the work is mandatory*, and the supervisors or superintendent cannot extend the time for completing the work after the expiration of the contract time. Under such provision there can be no recovery upon an assessment if the work be not completed within the contract time. Turney *v.* Dougherty, 53 Cal. 619; Beveridge *v.* Livingston, 54 Cal. 54; Mahoney *v.* Braverman, 5[illegible] Cal. 565; Fanning *v.* Schammel, 6[illegible] Cal. 428; Dougherty *v.* Coffin, 69 Cal. 454; Raisch *v.* San Francisco, 80 Cal. 1; McVerry *v.* Boyd, 89 Cal. 304; Brock *v.* Luning, 89 Cal. 316. See also Ede *v.* Knight, 93 Cal. 159; Fletcher *v.* Prather, 102 Cal. 413; White *v.* Harris, 103 Cal. 528; Rauer *v.* Lowe, 107 Cal. 229; McDonald *v.* Mezes, 107 Cal. 492; Buckman *v.* Landers, 111 Cal. 347; Buckman *v.* Ferguson, 108 Cal. 33; Palmer *v.* Burnham, 120 Cal. 364; Kelso *v.* Cole, 121 Cal. 121; Dougherty *v.* Nevada Bank, 81 Cal. 162; Heft *v.* Payne, 97 Cal. 108; Brady *v.* Burke, 90 Cal. 1.

cannot be collected upon a delinquent tax.[1] In this respect there is *no distinction between general taxation and special assessments;* the latter come within the same rule, and interest or penalty for default in payment can only be collected when the statute expressly or by clear implication so provides.[2] But, by statute, provision for the collection of interest or penalty for default in payment is now usually made.[3]

§ 1469 (814). **Curative Legislation; Reassessments.** — It is well settled that in the absence of any constitutional prohibition or restriction, the legislature may, where it has antecedent power to authorize a tax or assessment, *cure by a retroactive law* any irregularity or want of authority in levying it, although thereby a cause of action which has already accrued should be defeated.[4] Statutes

[1] *Ante*, § 1417.

[2] Himmelman *v.* Oliver, 34 Cal. 246; Haskell *v.* Bartlett, 34 Cal. 281; Sargent *v.* Tuttle, 67 Conn. 162; McChesney *v.* Chicago, 213 Ill. 592; Conway *v.* Chicago, 219 Ill. 295, 301; Paterson Ave. & S. Road Com'rs *v.* Hudson County, 45 N. J. L. 173, 175; Brennert *v.* Farrier, 47 N. J. L. 75; Matter of Hagemeyer, 113 N. Y. App. Div. 472, 474; Mall *v.* Portland, 35 Oreg. 89.

In Sargent *v.* Tuttle, 67 Conn. 162, the court said that as a special assessment is a tax, and a tax at best is a burden imposed upon a taxpayer without reference to his consent, it is reasonable to hold that any increase of that burden by way of penalty or otherwise should be expressly made by the power which imposes it; and that until the legislative will to increase the burden by the addition of interest has been clearly expressed, interest should not be allowed. Unless, therefore, some public statute or the city charter *expressly or by clear implication* authorizes the collection of interest upon special assessments, it is not collectible. Where the claim of the contractor is payable solely from the assessment, *held*, that the city could not withhold from the contractor the amount of interest voluntarily paid by property owners, although the city had no authority to collect interest on the assessment. Chicago *v.* McGovern, 226 Ill. 403.

[3] For the *construction of statutes imposing interest and penalty* for nonpayment of special assessments, see Bacon *v.* Savannah, 105 Ga. 62; Des Moines Brick Mfg. Co. *v.* Smith, 108 Iowa, 307; State *v.* Norton, 63 Minn. 497; McQuiddy *v.* Gates, 69 Mo. App. 156; Barber Asph. Pav. Co. *v.* Ullman, 137 Mo. 543; Brennert *v.* Farrier, 47 N. J. L. 75; Vreeland *v.* Bayonne, 60 N. J. L. 168; Camp *v.* Neuscheler, 67 N. J. L. 21; Matter of Hatch, 74 N. Y. App. Div. 248; Matter of Gilfeather, 101 N. Y. App. Div. 150; Altoona *v.* Morrison, 24 Pa. Super. Ct. 417; Connor *v.* Paris, 87 Tex. 32; Gray, Lim. of Taxing Power, § 1215 *et seq.* and cases. Statute construed *as by implication* authorizing the city to collect interest on special assessments. Galveston *v.* Heard, 54 Tex. 420, 447. Statute construed as requiring city to pay interest at same rate and in same manner as individuals on portion of assessment payable by it. Chicago *v.* People, 215 Ill. 235. See also Gosnell *v.* Louisville, 104 Ky. 201, 209. Where a tax bill and the ordinance under which it is issued provide for the payment of interest within a certain time after its "issue and presentation," interest does not begin to run until presentation. Springfield *v.* Kirby, 73 Mo. App. 640. Where a charter provides for interest within a certain time *after demand*, to entitle the holder to penal interest, the demand must be personal. Stifel *v.* MacManus, 74 Mo. App. 558.

[4] Mattingly *v.* District of Columbia, 97 U. S. 687, 690; Williams *v.* Albany County, 122 U. S. 154; Johnson *v.* Wells County, 107 Ind. 15; Richman *v.* Muscatine County, 77

which provide for a *reassessment* because of the invalidity of the original assessment are in their nature and effect curative statutes, and are to be construed in harmony with the principles of law applicable to such legislation.[1] The *original* assessment for a local

Iowa, 513; Tuttle *v.* Polk, 84 Iowa, 12, 17; Clinton *v.* Walliker, 98 Iowa, 655; Chicago, R. I. & P. R. Co. *v.* Avoca, 99 Iowa, 556, 562; Emporia *v.* Norton, 13 Kan. 569, 586; Mason *v.* Spencer, 35 Kan. 512; Newman *v.* Emporia, 41 Kan. 583; State *v.* Ramsey County Dist. Ct., 95 Minn. 183; State *v.* Blue Earth County Dist. Ct., 102 Minn. 482, 489; Brown *v.* New York, 63 N. Y. 239; People *v.* McDonald, 69 N. Y. 362; Tifft *v.* Buffalo, 82 N. Y. 204; Terrel *v.* Wheeler, 123 N. Y. 76; People *v.* Purdy, 196 N. Y. 270, 284; People *v.* Rochester, 5 Lans. (N. Y.) 142 Nottage *v.* Portland, 35 Oreg. 539; Thomas *v.* Portland, 40 Oreg. 50, 53; Schenley *v.* Commonwealth, 36 Pa. St. 29; Grim *v.* Weissenberg School Dist., 57 Pa. 433; Commonwealth *v.* Marshall, 69 Pa. 328; Hewett's Appeal, 88 Pa. 55; Erie *v.* Reed, 113 Pa. 468; Chester City *v.* Black, 132 Pa. 568, 571; Whitney *v.* Pittsburgh, 147 Pa. 351; Bingaman *v.* Pittsburgh, 147 Pa. 353; Howell *v.* Morrisville, 212 Pa. 349, 353; Cleveland *v.* Tripp, 13 R. I. 50, 65; Smith *v.* Hard, 59 Vt. 13; Frederick *v.* Seattle, 13 Wash. 428. See also United States *v.* Heinszen & Co., 206 U. S. 370, 387.

That an action to recover a street improvement assessment was pending at the time of the passage of an act to legalize the proceeding does not affect the curative act if it was valid in other respects. Clinton *v.* Walliker, 98 Iowa, 655. The mere commencement of a suit does not affect the legislative power to ratify and cure executive acts in the imposition and collection of taxes. United States *v.* Heinszen & Co., 206 U. S. 370, 387. Where an illegal tax had been collected under protest, and after the party had brought suit to recover it back, an act legalizing the tax was passed. Held, that the curative statute defeated the cause of action. Grim *v.* Weissenberg School District, 57 Pa. 433.

In the revenue provisions of the *Charter of Memphis* was the following provision: "No error or irregularity in any assessment, land tax-book, personal tax-book, notice, advertisement, book of sale, certificate of purchase, deed, paper, or document aforesaid relating to the assessment, levy, or collection of the taxes of the city shall in any manner affect or impair the validity of any sale or other proceeding for their collection. This charter shall be taken and held to be a full and sufficient notice of all acts and proceedings for the assessment, levying and collection of the taxes of the city of Memphis." Held unconstitutional. Malone *v.* Williams, 118 Tenn. 390. The court said: "A taxing power is necessary to the life of all governments, but there are some limits even upon a sovereign state. The assessment is the foundation of the claim of the government, whether it be of the state or of a municipality, against the citizen, of the particular amount claimed by it as taxes against him for any year. A law providing that this sum shall be due no matter what error there may be in the assessment, is simply the means of placing the property of the citizen within the uncontrolled discretion of the persons who for the time being may wield the taxing power; it is therefore an instrumentality for taking the property of the citizen without due process of law, and is unconstitutional and void." But *quære* whether the opinion and decision do not unduly limit the rightful power of the legislature over the subject of taxation and the mode of its enforcement, and whether the charter provision quoted should be declared unconstitutional and void *in toto*, or whether it should only be so declared when, as applied to the facts of a particular case, it would result in depriving the owner of his property without due process of law or denying to him the equal protection of the law. As to validity of the *Charter of Memphis*, see Hunter *v.* Crump (Tenn.), decided June 25, 1910.

[1] State *v.* Blue Earth County Dist. Ct., 102 Minn. 482, 489; Thomas *v.* Portland, 40 Oreg. 50, 53; Schintgen *v.* La Crosse, 117 Wis. 158. Index — *Curative Acts.*

improvement *proving insufficient*, the legislature may, in the absence of special constitutional restriction, authorize a reassessment, and make it operate upon the property benefited, that is, upon all that was originally liable to contribute; and such a law is valid, even against a person purchasing intermediate the assessment and reassessment. Vested rights are not thereby impaired.[1]

[1] Spencer *v.* Merchant, 125 U. S. 45, aff'g 100 N. Y. 585; District of Columbia *v.* Wormley, 15 App. D. C. 8, 67; Morgan Park *v.* Gahan, 136 I. 515; East St. Louis *v.* Albrecht, 50 Ill. 506; Freeport St. R. Co. *v.* reeport, 151 Ill. 451; West Chicago ark Com'rs *v.* Farber, 171 Ill. 146; ster *v.* Alton, 173 Ill. 587; People Pontiac, 185 Ill. 437, 442; Kline *v.* untington County, 152 Ind. 321; Il *v.* Patten, 118 Iowa, 88, 90; Emria *v.* Norton, 13 Kan. 569; Emria *v.* Bates, 16 Kan, 495; Newman Emporia, 41 Kan. 583; Manley *v.* nlen, 46 Kan. 655; Kansas City *v.* lver, 74 Kan. 851; Hall *v.* Boston reet Com'rs, 177 Mass. 434, 440, ing text; Brevoort *v.* Detroit, 24 ich. 322; Whitely *v.* Lansing, 27 ich. 131; St. Paul *v.* Mullen, 27 inn. 78; Duluth, *In re*, 59 Minn. 2; State *v.* Egan, 64 Minn. 331; ate *v.* Ramsey County Dist. Ct., 95 inn. 70; State *v.* Ramsey County ist. Ct., 95 Minn. 183; State *v.* amsey County Dist. Ct., 97 Minn. 7; State *v.* Ramsey County Dist. t., 98 Minn. 63; State *v.* Blue Earth ounty Dist. Ct., 102 Minn. 482; oyle *v.* Newark, 34 N. J. L. 236; ighter *v.* Newark, 45 N. J. L. 104; izabeth, *In re*, 49 N. J. L. 488, 496; ewer *v.* Elizabeth, 66 N. J. L. 547; ayday *v.* Ocean City, 69 N. J. L. 22; king Fund Com'rs *v.* Linden, 40 J. Eq. 27; Howell *v.* Buffalo, 37 Y. 267; Van Antwerp, *In re*, 56 Y. 261; People *v.* Purdy, 196 N. Y. 0, 283; Butler *v.* Toledo, 5 Ohio 225; Thomas *v.* Portland, 40 Oreg. ; Kadderly *v.* Portland, 44 Oreg. 8, 154; Duniway *v.* Portland, 47 eg. 103; Chester City *v.* Black, 132 Pa. 568, 571, quoting text; Frederick Seattle, 13 Wash. 428; Cline *v.* attle, 13 Wash. 444; Tumwater Pix, 18 Wash. 153; McNamee *v.* coma, 24 Wash. 591; Port Angeles Lauridsen, 26 Wash. 153; Lewis Seattle, 28 Wash. 639; Johnson Seattle, 53 Wash. 564; Dean *v.* harlton, 27 Wis. 522; Mills *v.* Charlton, 29 Wis. 400; Dill *v.* Roberts, 30 Wis. 178; Dean *v.* Borchsenius, 30 Wis. 236; Sanderson *v.* Herman, 108 Wis. 662; Schintgen *v.* La Crosse, 117 Wis. 158; Dahlman *v.* Milwaukee, 130 Wis. 468, 482; Dahlman *v.* Milwaukee, 131 Wis. 427.

The fact that the *property has been sold* does not affect the power of the legislature to authorize, or the municipality to make, a reassessment. The title of the purchaser is subject to the burden whenever it may be imposed. Seattle *v.* Kelleher, 195 U. S. 351; Elizabeth, *In re*, 49 N. J. L. 488; Butler *v.* Toledo, 5 Ohio St. 225; Thomas *v.* Portland, 40 Oreg. 50, 55; Tallman *v.* Janesville, 17 Wis. 71, 73. The district reassessed need not be the same as the district of the original assessment. Cline *v.* Seattle, 13 Wash. 444, 449. Where the assessment of only a part of the assessment district was held to be invalid, it was held that the city had, under the statute, power to reassess the entire improvement district, giving credit to property owners for amounts previously paid. Johnson *v.* Seattle, 53 Wash. 564.

Whilst reassessments are usually entrusted to the officers whose duty it was to make the original assessment, yet the duty of making a reassessment *may be assigned to different and distinct bodies* or functionaries, and even the legislature itself may, in the absence of constitutional restriction, make a curative assessment. Thomas *v.* Portland, 40 Oreg. 50, 53. The *legislature may itself* make, instead of authorizing, a reassessment. *In re* Van Antwerp, 56 N. Y. 261.

Where the *original assessment has proved to be insufficient* to pay for the whole cost of the improvement, the legislature may authorize, and the city may, pursuant to such authority, levy additional assessments to pay the deficiency. Earl *v.* Morrilton, 70 Ark. 211; Dodsworth *v.* Cincinnati, 18 Ohio Cir. Ct. R. 288. See further as to additional or supplementary assessments, Gill *v.* Oakland, 124 Cal.

The power of the legislature to authorize a reassessment extends to those defects which are regarded as *jurisdictional in their nature* in so far as the lack of jurisdiction affects the power of the municipality to impose the original assessment, and not the power of the legislature to authorize it,[1] and includes the power

335; West Chicago Park Com'rs *v.* Metropolitan W. S. El. R. Co., 182 Ill. 246; Chicago *v.* Noonan, 210 Ill. 18. Under the provisions of the act of March 23, 1881, the Supreme Court of *New Jersey* may, if an original assessment be declared void, make a new assessment when, at the time of the adjudication, it may be lawfully made. Elizabeth *v.* Meeker, 45 N. J. L. 157. A statute authorizing *the court to appoint appraisers* to make a reassessment when the amount of the original assessment is shown to be excessive, held to be constitutional and valid. Indianapolis *v.* State, 172 Ind. 472; 88 N. E. Rep. 687.

Power of legislature to change mode of assessments as to uncompleted local improvements. Hines *v.* Leavenworth, 3 Kan. 186. It is essential to the validity of a reassessment for a local improvement that all the money collected under it shall have been *substantially* expended in the authorized improvement. Butler *v.* Toledo, 5 Ohio St. 225. Void assessment does not preclude a subsequent valid one. Himmelmann *v.* Cofran, 36 Cal. 411; Brevoort *v.* Detroit, 24 Mich. 322.

Further, as to new or reassessment. Overing *v.* Foote, 65 N. Y. 263; People *v.* Brooklyn, 71 N. Y. 495; Chicago *v.* Ward, 36 Ill. 9; Gurner *v.* Chicago, 40 Ill. 165; Beygeh *v.* Chicago, 65 Ill. 189; s. c. 4 Chicago Legal News, 121. See also Chicago *v.* People, 56 Ill. 327; Foss *v.* Chicago, 56 Ill. 354; Union Bldg. Asso. *v.* Chicago, 61 Ill. 439. Power of city authorities to validate proceedings invalid in the first instance, denied. Meuser *v.* Risdon, 36 Cal. 239; Municipality No. 2 *v.* Botts, 8 Rob. (La.) 198. Work was begun under a defective ordinance; a curative ordinance was passed, and all the work was done in accordance therewith, and the action of the city was sustained. St. Louis *v.* Schoenemann, 52 Mo. 348. In *California* it has been held that where the statute only authorizes a reassessment when the original assessment was defeated by reason of some infirmity in the assessment itself, no reassessment can be made, if the original assessment was defeated by reason of a defect or infirmity in some step in the proceedings, not pertaining to the assessment, *e. g.*, in the certificate of the engineer, such certificate not being a part of the assessment. Gray *v.* Lucas, 115 Cal. 430; Gray *v.* Richardson (Cal.), 55 Pac. Rep. 603; Ede *v.* Cuneo (Cal.), 55 Pac. Rep. 388. As to *laches of city*, or waiver of right to make a reassessment, see State *v.* Ramsey County Dist. Ct., 68 Minn. 242. As to the necessity of a prior adjudication of the invalidity of the original assessment in a direct proceeding, see State *v.* Ballard, 16 Wash. 418.

Interest on assessments authorized by statute to be included in amount of reassessment. Northwestern & Pac. H. Bank *v.* Spokane, 18 Wash. 456; Philadelphia M. & Trust Co. *v.* New Whatcom, 19 Wash. 225; Johnson *v.* Seattle, 53 Wash. 564.

[1] State *v.* Ramsey County Dist. Ct., 95 Minn. 183; State *v.* Ramsey County Dist. Ct., 95 Minn. 503; State *v.* Ramsey County Dist. Ct., 97 Minn. 147. The legislature has power to authorize a reassessment, although the municipality was originally without authority to make the improvement. Shepherd *v.* Kansas City, 81 Kan. 369.

With reference to the objection that a reassessment cannot be made to cure what have been termed "jurisdictional defects," *Winslow*, J., said, in Schintgen *v.* La Crosse, 117 Wis. 158: "Again it is said that a reassessment law can only be resorted to for the purpose of correcting defects in the assessment proceedings proper, and not to validate a vice in the creating of the debt or liability, such as failure to establish a grade, or to let a contract to the lowest bidder, or other material defect in the manner of ordering or constructing the improvement itself, which are said to be jurisdictional defects. The objection is a grave one, and we have felt its

to authorize a reassessment when the validity of the original assessment arises through the unconstitutionality of the statute by

force. The defects which existed in the case of Dean *v.* Borchsenius, 30 Wis. 236, were, however, just such defects, and in that case they were held to be cured by a reassessment. It must be said, however, that the exact point now made does not seem to have been considered in that case. The use of the term 'jurisdictional defects' is rather confusing than helpful. It has frequently been said, in substance, that special assessment proceedings are in their nature harsh, and should be construed strictly, and that any material omission or failure to follow the provisions of law in the proceedings will deprive the taxing officers of jurisdiction and invalidate the tax; but it was not to be claimed that defects in the assessment proceedings proper, as distinguished from the proceedings for making the improvement, though jurisdictional in the sense just referred to, could not be cured under the provisions of a proper reassessment law. So the fact that a defect may be properly termed jurisdictional is by no means a test."

In answer to an objection that a statute authorizing a reassessment when the work had been done "without authority of law" allowed a reassessment to be made for work which originally could not be lawfully made or charged against the property, *Winslow*, J., said, in Schintgen *v.* La Crosse, 117 Wis. 158: "Reassessment cannot, of course, be made to cover charges which were not authorized by law to be assessed against property under any circumstances at the time the work was done and the original assessment made. An expense which was not legally capable of being assessed against private property originally cannot be made a charge against such property by reassessment proceedings. This would be confiscation, not reassessment. Rork *v.* Smith, 55 Wis. 67. If the clause in question means this, then it is impossible to see how it could be sustained. But, on the other hand, even if this be the necessary construction of the clause, it is not seen how the fact would vitiate those parts of the law which are unquestionably constitutional, and which do not depend in any degree upon the validity of the clause referred to. They may well stand, even though the other falls. Our duty is however to give all clauses a construction which will validate them, if such a construction be possible; and under this rule, we think the clause in question, though sweeping in its terms, should be held only to refer to an assessment which is without authority of law by reason of some material defect in the proceedings rendering it invalid, rather than to an assessment which could not be legally assessed under any circumstances, by reason of the absence of any law authorizing it."

Where work was done under contract on a street without previous notice to the lot owners to do it, and was not done in accordance with the plans and specifications adopted by the city, no tax or legal charge for such work could be created against adjoining lots, and the council had no power to reassess the amount upon lots under a statute which gave the city *power to reassess and relevy a tax* which had been declared void for irregularity, "if the lands were properly assessable, and the tax was the proper amount which should have been assessed against such lots." Rork *v.* Smith, 55 Wis. 67, 82. Construing this statute, *Taylor*, J., said: "As we have said above, the city authorities have no power to charge the plaintiff's land with any amount as a special tax for doing work in grading a street in front of his lot, unless such work was done in substantial accordance with plans and specifications previously adopted by the city authorities. There is no power vested in the city authorities to charge a lot owner with the cost of work done on the street in front of his lot, except when it is done in the execution of some plan previously adopted for the improvement thereof. We are very clear that this statute was never intended to, and does not, authorize the city authorities to charge the owner of real estate with a special tax for the benefit of a contractor who has refused and neglected to perform the work contracted to be done in accordance with his contract, by way

virtue of which it was imposed.[1] The legislative power to authorize a reassessment may be exercised by conferring continuing authority upon a municipality which *will not be exhausted by a single reassessment,* nor until an assessment is made which can be enforced.[2] A reassessment under legislative authority may be

of a reassessment. When it appears that the charge sought to be enforced as a special tax is in no sense a charge upon the land of a citizen, and it has been set aside and enjoined for that cause, it cannot be converted into a lawful charge by the process of reassessment. Such a case does not come within the meaning of the reassessment act. The difficulty with this charge sought to be relevied as a special tax is something more than an irregularity or an omission to comply with the forms of law within the meaning of said statute. There is, in fact, no tax to be reassessed or relevied."

Where the original assessment levied by a city for the cost of making a local improvement has been declared void for want of compliance with a *jurisdictional requirement of proper petition* by property owners, the legislature may, in providing for a reassessment, dispense with such requirement, since it had power in the first instance to provide that the work should be done and the assessment made without such requirement. Frederick *v.* Seattle, 13 Wash. 428. The fact that the contract for the construction of the work has been declared void for failure of the city officials to comply with certain statutory requirements does not preclude the assessment of benefited property in reassessment proceedings. State *v.* Blue Earth County Dist. Ct., 102 Minn. 482. A statute which authorizes a reassessment where the original assessment was void because of "non-conformity to any law," or for any "omission or irregularity" is sufficient to authorize a *reassessment for omission to let the contract* in the manner required by law. Tuttle *v.* Polk, 84 Iowa, 12, 17.

The fact that certificates or assessment bonds have been issued to the contractor and have been sold by him and that the reassessment is levied for the benefit of the holder of the assessment certificates or bonds does not make the assessment a tax levied for the benefit of a private individual. Schintgen *v.* La Crosse, 117 Wis. 158, *supra. Winslow,* J., said: "The true criterion doubtless lies in the character of the work itself. If it be a public work, capable of assessment against private property, the assessments made to pay for it are assessments for a public purpose, and the tax when paid is paid for a public purpose, though the money paid may go to reimburse a private party by reason of the fact that he has advanced the money temporarily to meet that purpose. In this view a reassessment manifestly cannot be held to be a proceeding to collect money of a citizen for a private purpose; nor can it be held that the tax has been paid so as to prevent any steps for its collection." To the same effect, Hughes *v.* Portland, 53 Oreg. 370. It has been held that where there has been a tax sale under an invalid assessment and by law the purchaser at such tax sale cannot recover the amount of the assessment from the municipality, the assessment is to be regarded as paid, and there can be no reassessment. The power to make a reassessment is for the benefit of the municipality, and not for the benefit of the purchaser at the tax sale who takes subject to any defects. Barkley *v.* Lincoln, 82 Neb. 181; 117 N. W. Rep. 398; Budge *v.* Grand Forks, 1 N. Dak. 309. But *quære?* A statutory provision that, when property has been sold for the payment of a delinquent assessment and the sale has been declared void, the property shall be reassessed and the proceeds paid to the purchaser at the prior sale has been held to be unconstitutional, as, in effect, the taking of one man's property and giving it to another. Gaston *v.* Portland, 48 Oreg. 82; Hughes *v.* Portland, 53 Oreg. 37[illegible] But *quære?*

[1] Righter *v.* Newark, 45 N. J. L. 104; Lewis *v.* Seattle, 28 Wash. 63[illegible] Alexander *v.* Tacoma, 35 Wash. 36[illegible] 375.

[2] Aldridge *v.* Essex Public Road Board, 46 N. J. L. 126; Hughes *v.* Portland, 53 Oreg. 370. Statute construed as conferring a *continuing*

made, *notwithstanding a final decree* of a court enjoining the municipal authorities from collecting the first or original assessment.[1] But, in a few States, the Constitutions of which contain special provisions that *no law retrospective in its operation* shall be passed, it is held that the legislature cannot compel property owners, by force of a subsequent act, to pay for local improvements made under void ordinances.[2]

power which is not exhausted by a single reassessment, nor until an assessment is made which can be enforced. Brevoort *v.* Detroit, 24 Mich. 322.

[1] Doyle *v.* Newark, 34 N. J. L. 236, followed and approved in Emporia *v.* Bates, 16 Kan. 495; Sinking Fund Com'rs *v.* Linden, 40 N. J. Eq. 27; Long Branch Police, S. & I. Com'rs *v.* Dobbins, 61 N. J. L. 659; Richman *v.* Muscatine County, 77 Iowa, 513; Gill *v.* Patton, 118 Iowa, 88; Emporia *v.* Norton, 13 Kan. 569; Smith *v.* Detroit, 120 Mich. 572; State *v.* Ramsey County District Court, 77 Minn. 248; Howell *v.* Buffalo, 37 N. Y. 267; Thomas *v.* Portland, 40 Oreg. 50, citing text; Frederick *v.* Seattle, 13 Wash. 428; Fogg *v.* Hoquiam, 23 Wash. 340; Mills *v.* Charlton, 29 Wis. 400.

The *rationale* of the proposition in the text is thus expounded in Doyle *v.* Newark, 34 N. J. L. 236, *supra:* "The contention is, that this court having in 1863 set aside the assessment made against the prosecutor for the improvement in question, the judgment then pronounced cannot be nullified or rendered inoperative by act of the legislature. The legal proposition is indoubtedly correct. The judgment of a court of competent jurisdiction cannot be reversed, avoided, or set aside by the legislative power. The question here is, whether the act of 1868 properly considered has the effect ascribed to it. It must be borne in mind that the act does not revive or attempt to render valid the assessment which this court has declared illegal and set aside; it simply orders that a new and independent assessment be made to collect moneys which the city had expended for the benefit of the prosecutor and others. It leaves the judgment of the court upon the first assessment untouched. Its effect is not to nullify the judgment of this court, but to reimburse the city, by means of a subsequent assessment, for moneys expended in improving a street." Doyle *v.* Newark, 34 N. J. L. 236, and see Righter *v.* Newark, 45 N. J. L. 104; *ante*, § 1435. An act validating a void assessment for street improvement was held to validate it only from passage of the act. Reis *v.* Graff, 51 Cal. 86; San Francisco *v.* O'Neil, 51 Cal. 91; San Francisco *v.* Kinsman, 51 Cal. 92.

In *Wisconsin*, by statute, it is provided that where, in an action to set aside a special assessment for street improvements, the assessment is held invalid, it is the duty of the court to stay proceedings to order a reassessment and to make payment of the amount finally determined a condition of judgment for the plaintiff. See Kersten *v.* Milwaukee, 106 Wis. 200; Sanderson *v.* Herman, 108 Wis. 662; Haubner *v.* Milwaukee, 124 Wis. 153; Dahlman *v.* Milwaukee, 130 Wis. 468. Where the charter provisions have been followed and the only irregularities are inequalities of the assessment and the charter provides that in case of irregularity or informality in the proceedings, the council shall have power to cause a new assessment to be made, the court held that an *injunction should not issue* to restrain the paving on account of the inequality, since the injustice might be corrected without delaying the work. Bogert *v.* Jackson Cir. Ct. Judge, 118 Mich. 457; Townsend *v.* Manistee, 88 Mich. 408.

[2] Evans *v.* Denver, 26 Colo. 193, 197, citing text; Holliday *v.* Atlanta, 96 Ga. 377; St. Louis *v.* Clemens, 62 Mo. 133. See also Barton *v.* Kansas City, 110 Mo. App. 31, 39. In St. Louis *v.* Clemens, 52 Mo. 133, the court held an act authorizing the city to reassess the property benefited to be void, and distinguished the case from Howell *v.* Buffalo, 15 N. Y. 512, and Schenley *v.* Commonwealth, 36 Pa. 29. The case is perhaps more

instructive as showing how an ill-considered broad constitutional provision may become in its practical operation the means of producing the very injustice it was designed to prevent. In Evans *v.* Denver, 26 Colo. 193, the court, under the special constitutional restriction, held unconstitutional an act enabling the city to reassess abutting property for the construction of a sewer after the original assessments therefor had been declared invalid because the preliminary steps prescribed for its construction had not been observed.

CHAPTER XXIX

MANDAMUS

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§ 1480 (824). **General Nature of the Remedy; In England.**—At *common law*, the superintending jurisdiction of the King's Bench over all public bodies, including municipal corporations, and over public officers, including the officers of such corporations, is largely exercised by means of the writ of *mandamus*. It is considered in England to be a prerogative writ,[1] and is in style an order in the king's name, commanding the corporation, officer, or person to whom it is directed to perform a specific duty. *Mandamus* and informations in the nature of *quo warranto* are, in England, the principal remedies by which municipal corporations are compelled to observe the requirements of their charters and of the law; and whenever the law has not provided some other adequate or specific remedy to compel or to secure the performance of their public duties, such performance will, where this is the appropriate process, be enforced by means of the writ of *mandamus* in favor of the public or of any person having a right to insist upon such performance, and who would be injured by their non-performance.[2] It is, in substance, a civil remedy for the subject, though the name of the king be nominally used.[3]

[1] It was called a prerogative writ because the power to issue it was vested in the judges of the King's Bench, the court in which the sovereign is supposed to be personally present. Com. Digest, *Mandamus A*.

[2] Commonwealth *v.* Pittsburgh, 34 Pa. St. 496, 510; Douglas *v.* McLean, 25 Pa. Super. Ct. 9; Attorney-General *v.* Boston, 123 Mass. 460, noted *infra*, § 1585, note; 3 Black. Com. 110; Rex *v.* Barker, 3 Burr. 1265; 1 W. Black. 352; Rex *v.* St. Martin's Land Tax Com'rs, 1 T. R. 148; People *v.* Collins, 19 Wend. (N. Y.) 65; Selwyn's *Nisi Prius*, chap. xxviii. 1077–1100. "A *mandamus* is certainly a prerogative writ, flowing from the king himself, sitting in this court, superintending the police and preserving the peace of this country." Rex *v.* Barker, *supra*, *per* Lord *Mansfield*.

[3] Stephens's *Nisi Prius*, 2291. This author's treatment of the subject of *mandamus* as the remedy is applied in England, is highly satisfactory.

§ 1481 (825). **Same Subject; In this Country.** — In *this country* the functions of the writ are fully as extensive and of the same nature as in England, although we have here given more scope to other remedies which often effect practically the same ends.[1] It is to the public advantage that municipal corporations and their officers shall be made to perform the duties enjoined upon them by law, and the necessity which has been felt for affording easy remedies against them has led the legislatures and the courts in modern times to improve and liberalize the proceedings by *mandamus*, by relieving them of much of their former artificial and technical character.[2] Accordingly, "it is," says a high legal authority, "well settled that a *mandamus* in modern practice is nothing more than an action at law between the parties, and is not now considered as a prerogative writ. The right to the writ, and the power to issue it, have ceased to depend on any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It is a writ to which every one is entitled, where it is the appropriate process for asserting the right he claims."[3]

§ 1482 (826). **Mandamus and Injunction.** — These are, in their nature, different remedies, and in general are not concurrent or interchangeable.[4] A *writ of mandamus* may be likened to an in-

[1] See *post*, chaps. xxx., xxxi. "*Mandamus*," says Mr. Justice *Thompson*, in commencing his valuable opinion in the Commonwealth *v.* Allegheny County, 37 Pa. St. 277, 279, "is a high prerogative and remedial writ, the appropriate functions of which are the enforcement of duties to the public, by officers and others who either neglect or refuse to perform them. It follows, therefore, that those to whom it may be appropriately directed owe some duty to the public, and are under obligation to perform it, and for the enforcement of which there is no other specific legal remedy." *Post*, § 1570, note.

[2] Rex *v.* Barker, 3 Burr. 1265; Sikes *v.* Ransom, 6 Johns. (N. Y.) 279; Turner, *In re*, 5 Ohio, 542.

[3] *Per Taney*, C. J., in Kentucky *v.* Dennison, 24 How. (U. S.) 66, 97, 98; Kendall *v.* United States, 12 Pet. (U. S.) 524; Kendall *v.* Stokes, 3 How. (U. S.) 87, 100; Davies *v.* Corbin, 112 U. S. 36; Rosenbaum *v.* Bauer, 120 U. S. 450, 462; *post*, § 1546; Fleming, *In re*, 4 Hill (N. Y.), 581; State *v.* Bailey, 7 Iowa, 390; Bryan *v.* Cattell, 15 Iowa, 538, *per Wright*, J.; Seymour Water Co. *v.* Seymour, 163 Ind. 120; Clement *v.* Graham, 78 Vt. 290; Commonwealth *v.* Allegheny County, 32 Pa. 218; State *v.* Kirkley, 29 Md. 85; Wilkinson *v.* Providence Bank, 3 R. I. 22. It was held that a *suit in equity*, where all the rights and duties of the parties may be adjusted, *and not mandamus*, a purely legal remedy, was the proper remedy under the circumstances for compelling the bridging of the tracks of several railroad companies, where they cross streets. Burlington & C. R. R. Co. *v.* People, 20 Colo. App. 181.

[4] Walkley *v.* Muscatine, 6 Wall. (U. S.) 481; Heine *v.* Levee Com'rs, 19 Wall. (U. S.) 655; Rees *v.* Watertown, 19 Wall. (U. S.) 107. Thus *mandamus*, and *not a bill in equity*, is the proper remedy against the officers of a corporation to compel them to register a conveyance of shares. Cooper *v.* Dismal Swamp Canal Co., 2 Murphey (N. Car.), 195. So to compel, where it is a mere ministerial duty, the Commissioner of Patents to prepare a patent for execution. Butterworth *v.* United States, 112 U. S. 50.

junction at law or a mandatory writ in a *legal* proceeding, commanding in the name of the sovereign authority the performance of a specific affirmative act.[1] A *writ of injunction* belongs solely to a court of equity, and usually issues to prevent the doing of some specific act. Where *mandamus* is the appropriate remedy, it cannot be substituted by a bill in equity praying an injunction, as, for example, an injunction to compel a municipality to levy a tax to pay a judgment against it.[2] Where, *for example, bonds have been voted by a county* to pay for a stock subscription to a railway company, the legal obligation is to issue the bonds pursuant to the vote. If the county officials wrongfully refuse to issue the bonds, this will not make the county liable in damages. The only remedy is a proceeding at law by *mandamus* to compel the proper officers of the county to issue the bonds. The railroad company, or, if it be insolvent, a judgment creditor of the company cannot maintain a bill in equity to compel the issue and delivery of the bonds to be applied on the judgment. Such creditor must first acquire the right of the railroad company, and then proceed by *mandamus* against the county or its officers to compel the issue of the bonds.[3]

So to compel a municipality to perform statute duties. Attorney-General *v.* Boston, 123 Mass. 460, noted *infra*, § 1585, note. *Remedy in equity. Post*, chap. xxxi. §§ 1570–1590. *An injunction*, and not *mandamus*, was considered to be the proper remedy to prevent the erecting, by the trustees, of a school-house on a site selected in violation of law; but *mandamus* was regarded as the proper remedy to compel the trustees to carry out the decision of the superior school officer, on appeal, in relation to establishing a school-house for the district. State *v.* Custer, 11 Ind. 210. In certain cases *mandamus* and *injunction* are somewhat correlative remedies. Board of Liquidation *v.* McComb, 92 U. S. 531. But their respective functions are distinct. Butterworth *v.* United States, 112 U. S. 50; Smith *v.* Bourbon County, 127 U. S. 105; Glossop *v.* Heston & I. Local Board, L. R. 12 Ch. Div. 102; *post*, § 1739, note.

[1] State *v.* St. Paul, 104 La. 280; State *v.* McMillan, 52 S. Car. 60. If the act has already been done the writ will not lie, for if allowed it would be nugatory. Spiritual Atheneum Soc. of W. R. *v.* Randolph, 58 Vt. 192, where the application was for allotment of money to a religious society made after the amount allowed by law had been distributed. *Post*, § 1507, note.

[2] Walkley *v.* Muscatine, 6 Wall. (U. S.) 481; *infra*, §§ 1506, 1513; Heine *v.* Levee Comm'rs, 19 Wall. (U. S.) 655; Rees *v.* Watertown, 19 Wall. (U. S.) 107. See State *v.* Kirkley, 29 Md. 85, 110, in which it was held that *mandamus* was a proper remedy by a city to compel the delivery to it, by a building committee who were acting without legal authority, of the plans and specifications of the city hall, and thus to restrain them in the discharge of the duties of their supposed office.

As to *mandamus* and *injunction*. Prescott *v.* Duquesne Bor. (duty in respect to wharf), 48 Pa. 118; Bedford Bor. Sch. Dir. *v.* Anderson, 45 Pa. 388; State *v.* Graves, 19 Md. 351; Neuse River Nav. Co. *v.* Newberne, 6 Jones L. (N. Car.) 204; State *v.* Custer, 11 Ind. 210; People *v.* Salomon, 46 Ill. 415; People *v.* Salomon, 51 Ill. 37; Parker, *Re*, 120 U. S. 736; Brown, *Re*, 116 U. S. 401; Craig *v.* Leitensdorfer, 123 U. S. 209; *infra*, §§ 1485, 1513; *post*, chap. xxxi. as to legal and equitable remedies.

[3] Smith *v.* Bourbon County, 127 U. S. 105; *infra*, § 1487, note. *Mandamus* to compel issue of bonds, see

; (827). **When Mandamus lies.** — The *office of the writ of us* is to compel a corporation, an inferior court, or a public o perform some particular corporate or official act or umbent upon it or him, which is imperative in its nature, he performance of which the relator has a clear legal right. nedy is extraordinary, as distinguished from the usual of the citizen or suitor, and if the right is doubtful or the cretionary, or if there be any plain, ordinary, and adegal remedy, this writ will not, in general, be allowed.[1]

Millard, 133 N. Y. App. Millard *v.* Adams, 136 N. Y. . 669; Christie *v.* Bergen 5 N. J. L. 49, aff'd 76 N. J. ng, *In re,* 94 U. S. 14; *n re,* 14 How. (U. S.) 24; *n re,* 5 Pet. (U. S.) 190; *In re,* 6 Pet. (U. S.) 216; t, *In re,* 7 Pet. (U. S.) 634; Ins. Co. of N. Y. *v.* Wilson, . S.) 291; Life & F. Ins. Co. *v.* Adams, 9 Pet. (U. S.) 571; *re,* 13 Pet. (U. S.) 279; tates *v.* Lawrence, 3 Dallas 2; Harris, *In re,* 52 Ala. 87; Aspen Town & L. Co., 10 ; St. Clair County *v.* Keller,); People *v.* Lieb, 85 Ill. 484; Sch. Trustees, 86 Ill. 613; . Highway Com'rs, 88 Ill. le *v.* Crotty, 93 Ill. 180; . Mound City, 103 Ill. 552 license); Reddick *v.* People, pp. 85; People *v.* Chicago, pp. 72; Vincent *v.* Ellis, 116 ; Smalley *v.* Yates, 36 Kan. te *v.* Smith, 104 La. 370; Latrobe, 80 Md. 222; Gross re, 111 Md. 543; 75 Atl. Rep. e *v.* Hill, 32 Minn. 275; State n, 91 Mo. 445 (writ to compel of a certificate of election as fused to ineligible candidate); maha, 14 Neb. 265; State *v.* 1 Neb. 572; State *v.* House- Neb. 658; State *v.* McGuire, 69; Jones Co. *v.* Guttenberg, L. 659; People *v.* Board of , 104 N. Y. App. Div. 162; Chambers, 26 Ohio Cir. Ct. Territory *v.* Crum, 13 Okla. r *v.* Media Electric L., H. & Pa. Super. Ct. 519; Douglas , 25 Pa. Super. Ct. 9; Hoover 10 Kulp (Pa.), 59; Common- Fairfax County Ct., 2 (Va.) Morris, *In re,* 11 Gratt. (Va.) 292; Yeager, *In re,* 11 Gratt. (Va.) 665; Randolph County Ct. *v.* Stalnaker, 13 Gratt. (Va.) 523; Cowan *v.* Fulton, 23 Gratt. (Va.) 579; Kent *v.* Dickinson, 25 Gratt. (Va.) 817; Page *v.* Clopton, 30 Gratt. (Va.) 415; Dawson *v.* Frederick County Ct., 2 H. & M. (Va.) 132; Brown *v.* Crippin, 4 H. & M. (Va.) 173; King William County Ct. *v.* Munday, 2 Leigh (Va.), 165; Harrison *v.* Norfolk County Ct., 2 Leigh (Va.), 164; Manns *v.* Givens, 7 Leigh (Va.), 689.

In an act directing a contract for municipal supplies to be *awarded to the lowest responsible bidder,* the word "responsible" does not refer to pecuniary ability only, but the act calls for the exercise, in good faith, of *discretionary powers* on the part of the city officers, and if they act in good faith, though erroneously or indiscreetly, *mandamus* will not lie to compel them to change their decision. Douglass *v.* Commonwealth, 108 Pa. St. 559; *infra,* §§ 1489, 1496. To the same effect, Cook County *v.* People, 78 Ill. App. 586; State *v.* Columbus Board of Education, 6 Ohio N. P. 347; Brown *v.* Houston (Tex. Civ. App.), 48 S. W. Rep. 760; Vincent *v.* Ellis, 116 Iowa, 609. *Mandamus* will not lie to compel the performance of an act which, for any reason, it has become unlawful to perform. People *v.* Hyde Park, 117 Ill. 462; First Nat. Bank *v.* Heflebower, 58 Kan. 792; State *v.* United States Express Co., 95 Minn. 442; Tribune Ptg. & Binding Co. *v.* Barnes, 7 N. Dak. 591. *Mandamus* will lie only to secure a clear legal right and not to accomplish a wrong, or the violation of the Constitution. State *v.* Wyoming County Ct., 47 W. Va. 672. A demand for payment by a judgment creditor, made before the day fixed by statute for the adoption of an ordinance appropriating money

§ 1484 (828). **When it lies against Municipal Corporations.**—A writ of *mandamus* will, where it is an appropriate remedy, be granted against municipal corporations and their officers whenever they refuse or unreasonably neglect to perform any duty clearly enjoined upon them by charter, or statute, or law, and there is no ordinary or specific legal remedy adequate to enforce the right of the public, or the particular legal right of the relator.[1] "Whenever," says Mr. Justice Strong, adopting the doctrine of the English law, "there is a clear legal right in the relator, a corresponding duty in the defendants, and the want of any other adequate and specific remedy," a writ of *mandamus* is the appropriate process.[2] Such legal right may arise from the common law, from statute, or from contract.[3]

to pay necessary expenses and liabilities, will justify a proceeding by *mandamus* to compel a levy of taxes to satisfy the judgment. Cairo *v.* Campbell, 116 Ill. 305.

[1] Thomason *v.* Ruggles, 69 Cal. 465; Oakland Paving Co. *v.* Hilton, 69 Cal. 479; Treat *v.* Middletown, 8 Conn. 243; Strong's Case, Kirby (Conn.), 345; Hawkins *v.* Starke County, 14 Ind. 521; State *v.* Hale, 166 Ind. 413; Smalley *v.* Yates, 36 Kan. 519 (to compel execution and delivery of bonds); State *v.* Kirkley, 29 Md. 85; McCarthy *v.* Boston, 188 Mass. 338; St. Luke's Church *v.* Slack, 7 Cush. (Mass.) 226; McBride *v.* Grand Rapids, 47 Mich. 236 (to compel payment of a salary fixed by law); Martin *v.* Tripp, 51 Mich. 184; Hudson *v.* Whitney, 53 Mich. 158 (to compel the advertising and sale of lands for paving taxes); Elliott *v.* Detroit, 121 Mass. 611; Thatcher *v.* Adams County, 19 Neb. 485; People *v.* Chenango County, 8 N. Y. 317; People *v.* New York Board of Pol., 107 N. Y. 235; People *v.* McWilliams, 185 N. Y. 92; People *v.* Columbia County, 10 Wend. (N. Y.) 363; People *v.* Listman, 84 N. Y. App. Div. 633; People *v.* Guggenheimer, 28 N. Y. Misc. 735; Sedberry *v.* Chatham County, 66 N. Car. 486; Wool *v.* Edenton, 115 N. Car. 10; Hall *v.* Somersworth, 39 N. H. 511, and cases cited by *Bellows*, J.; State *v.* Wood County, 17 Ohio, 184; State *v.* Cincinnati, 19 Ohio, 178; Sycamore Board of Education *v.* State, 80 Ohio St. 133; Ball *v.* Lappius, 3 Oreg. 55; Commonwealth *v.* Allegheny County, 32 Pa. 218; Williamsport *v.* Commonwealth, 90 Pa. 498 (to compel payment of interest on bonds, there being money available in the treasury).

Mandamus does not lie to compel aldermen to perform their general official duties regularly. People *v.* Whipple, 41 Mich. 548. See also Wilson *v.* Cleveland, 157 Mich. 510. Municipal and executive officers can be required by *mandamus* to perform only such duties as are imposed upon them by law. German Security Bank *v.* Coulter, 112 Ky. 577. *Mandamus* will not lie to regulate the general course of conduct of a municipal officer, *e. g.*, to enforce a liquor law. People *v.* Busse, 238 Ill. 593. See also People *v.* Dunne, 219 Ill. 346.

[2] Commonwealth *v.* Pittsburgh, 34 Pa. 496, 509; Stephens's *Nisi Prius*, 2292; Rex *v.* Nottingham Waterworks Co., 6 A. & E. 355; Indianapolis & C. R. Co. *v.* State, 37 Ind. 489; People *v.* Rose, 211 Ill. 252; McGann *v.* Harris, 114 Ill. App. 308; State *v.* United States Express Co., 95 Minn. 442; People *v.* Coler, 58 N. Y. App. Div. 131; State *v.* Malheur County Ct., 46 Oreg. 519. The right must exist in the relator when the writ issues, otherwise the judgment must be for the defendant. Silverthorn *v.* Warren R. Co., 33 N. J. L. 372; *In re* Rooney, 26 N. Y. Misc. 73.

[3] Napier, *In re*, 18 Q. B. 695; Page *v.* McClure, 79 Vt. 83. A court will not grant a writ of *mandamus* where there is no power of enforcing obedience to it; Bristol & N. S. R. R. Co., *In re*, L. R. 3 Q. B. D. 10; or no legal power to obey it. *Post*, § 1509. *Mandamus* will not be granted when the

§ 1485 (829). **Mandamus not granted if the Ordinary Remedies are adequate.** — If a statute prescribes a *specific remedy*, particularly if adequate in its nature, such a remedy is ordinarily, if not always, exclusive of *mandamus*, which will not in such case be granted; but if no particular remedy be given, and there is no other plain and effectual mode of relief, *mandamus* is proper in all cases where it is adapted to enforce the right and duty in question.[1] It has repeatedly been held, both in England and in this country, that where there is a clear legal right in the relator, the writ will not be refused merely because there is also an adequate remedy in equity, or a remedy at law, if the latter be not adequate to the purpose, or because the officers or adverse party may be prosecuted criminally for neglect of duty.[2]

power to perform the duty sought to be enforced is inadequate or wanting. McCoy *v.* State, 2 Marv. (Del.) 543. Defendant must have the power to do the act. People *v.* Cook County, 176 Ill. 576.

[1] Ottawa *v.* People, 48 Ill. 233; Templeton *v.* Newton County (Ind.), 19 N. E. Rep. 880; Sturgeon *v.* Detroit Board of Assessors, 159 Mich. 99; State *v.* United States Express Co., 95 Minn. 442; Brown *v.* Owen, 5 Miss. 319; Hazlewood *v.* Rogan, 5 Tex. 295; State *v.* Gardner, 32 Wash. 550.

[2] Willcock, 356, pl. 40–44, and cases cited; State *v.* Wilson, 123 Ala. 9; Robertson *v.* Alameda, 136 Cal. 3; State *v.* Jacksonville Terminal Co., 41 Fla. 377; Smith *v.* Automatic Photographic Co., 118 Ill. App. 649; Indianapolis & C. R. Co. *v.* State, 37 Ind. 489; State *v.* Real Estate Building & Loan Assoc., 151 Ind. 502; Hardcastle *v.* Maryland & D. R. Co., Md. 32; Baltimore University *v.* Colton, 98 Md. 623; State *v.* Renick, 7 Mo. 292; Hopkins *v.* State, 64 Neb. 10; Moores *v.* State, 71 Neb. 2; State *v.* Coufal (Neb.), 95 N. W. 362; People *v.* New York Cent. & H. R. R. Co., 168 N. Y. 187; People *v.* Treanor, 15 N. Y. App. Div. 3; People *v.* Palmer, 14 N. Y. Misc. ; People *v.* New York, 10 Wend. (N. Y.), 393; Perry *v.* Chatham County, 130 N. Car. 558; Commonwealth *v.* Allegheny County, 32 Pa. 8; Commonwealth *v.* Doylestown, Pa. Co. Ct. R. 161; Rex *v.* Severn & Wye R. Co., 2 B. & Ald. 646; Robins, *re*, 7 Dowl. 566; Regina *v.* Bristol Dock Co., 2 Q. B. 64; Stephens's *Nisi Prius*, 2306.

Mandamus will lie to compel highway supervisors to repair the highways notwithstanding they are liable to a fine for failure to do so, since such fine does not compel the performance of their duty, and is not an adequate legal remedy. State *v.* Kamman, 151 Ind. 407. In State *v.* Patton, 108 Mo. App. 26, it was held that the existence of the remedy by *certiorari* is insufficient to bar the right of a school district to *mandamus* against the county clerk to compel him to extend levies and make an assessment for the district in case of his refusal so to do. When the courts refuse to grant a *mandamus* because there is another specific remedy, they mean only a specific remedy at law. Rex *v.* Stafford, 3 T. R. 651, *Buller*, J.; *post*, chap. xxxi.

It has been sometimes said, but perhaps without sufficient consideration, that a *remedy by injunction*, if ample, will prevent a resort to, or induce the court in its discretion to deny a *mandamus*. State *v.* Custer, 11 Ind. 210, 212, *per Hanna*, J.; People *v.* Salomon, 46 Ill. 415; State *v.* Hartford St. R. Co., 76 Conn. 174. But if the suit in chancery is not of a nature to do such complete justice as a proceeding by *mandamus*, the pendency of such a suit in equity will not prevent the court from awarding a *mandamus*. People *v.* Salomon, 51 Ill. 37; Calaveras County *v.* Brockway, 30 Cal. 325; *supra*, § 1482. Where the relator had a bill pending in equity on which full relief could be had, *mandamus* was

§ 1486 (830). **Same Subject; Right of Relator must be clear.** — The well-established general rule is, as above stated, that the writ of *mandamus* will only lie to give effect to a *clear legal right;* but if there be a reasonable or fair doubt in the particular case respecting the right of the public or of the relator to this form of remedy, the writ will be granted, and the question of the right considered on the return.[1] And however clear the legal right of the relator or applicant for the writ may be, the writ cannot be sustained, unless otherwise provided by statute, if there is a clear, ample, and adequate remedy by an ordinary action at law.[2]

denied. Hardcastle *v.* Md. & D el. R. R. Co., 32 Md. 32; Brown *v.* Nehmer, 128 Mich. 690; Detroit & B. Plank Road Co. *v.* Highland Park, 142 Mich. 326.

A statute provided that a creditor of a county should be entitled to the amount due him "in the county levy, or to a recovery thereof, with costs, by *action of debt* against the officer refusing to levy the same"; and it was held by the Court of Appeals of *Virginia* that this right to an action against the officers was such a specific legal remedy as to deprive the creditor of the right to a *mandamus* to compel the levy of the tax. King Wm. County *v.* Munday, 2 Leigh (Va.), 165. But *quære?* See Amy *v.* Des Moines County, 11 Wall. (U. S.) 136, referred to *infra*, § 1517.

[1] Willcock, 356, pl. 41; Cleveland *v.* United States, 111 Fed. Rep. 341; Moseley *v.* Collins, 133 Ala. 326; People *v.* Butler, 24 Colo. 401; People *v.* Rose, 211 Ill. 252; Scanlan *v.* Schwab, 103 Ill. App. 93; People *v.* Perrin, 103 Ill. App. 410; Davis *v.* Miller Signal Co., 105 Ill. App. 657; Knopf *v.* Corcoran, 112 Ill. App. 320; People *v.* Helt, 116 Ill. App. 391; State *v.* Toole, 32 Mont. 4; State *v.* Edwards, 40 Mont. 287; 106 Pac. Rep. 695; State *v.* Warren F. & M. Co., 32 N. J. L. 439; People *v.* Ransom, 2 N. Y. 490; People *v.* Stevens, 5 Hill (N. Y.), 616; Regina *v.* Heathcote, 10 Mod. 49; *post*, § 1526, note. See State *v.* Brewer, 39 Wash. 65. If the authority of a municipality to levy taxes is doubtful, a *mandamus* directing such levy will not be awarded. State *v.* Guttenberg, 39 N. J. L. 660. Citizen may institute *mandamus* to compel public officer to perform a statutory duty, in performance of which all citizens are equally concerned. People *v.* Swanstrom, 79 N. Y. App. Div. 94.

[2] State *v.* Richards, 50 Fla. 284; Wright *v.* Kelley, 4 Idaho, 624; Sullivan *v.* Robbins, 109 Iowa, 235; State *v.* Sommerville, 111 La. 1015; State *v.* Board of Police Comm'rs, 113 La. 424; Gardner *v.* Templeton St. R. Co., 184 Mass. 294; State *v.* Osborn, 60 Neb. 415; People *v.* Chenango County, 11 N. Y. 563; People *v.* New York, 10 Wend. (N. Y.) 393; Sweet *v.* Conley, 20 R. I. 381; Custer County Bank *v.* Custer County, 18 S. Dak. 274; State *v.* Nelson, 105 Wis. 111.

It has been said that the rule stated in the text is "not universally true in relation to corporations and ministerial officers." McCullough *v.* Brooklyn, 23 Wend. (N. Y.) 458. And in that case, where it appeared that the common council had neglected its duty in omitting to issue a warrant to collect a tax, *Bronson*, J., said that though an action on the case would *perhaps* lie in favor of the plaintiff, who would be entitled to the money when collected, yet a *mandamus* would be a more appropriate remedy; which, according to the commentary of *Nelson*, J., is only equivalent to saying, "If the remedy by action be doubtful, a *mandamus* will lie." People *v.* Chenango County, 11 N. Y. 563, 573, 574. See also People *v.* Columbia County, 10 Wend. (N. Y.) 363, 366, where it is said, "If an action lies in this case, then a *mandamus* should be refused." Boyce *v.* Russell, 2 Cow. (N. Y.) 444; People *v.* Stevens, 5 Hill (N. Y.), 616; People *v.* Brooklyn, 1 Wend. (N. Y.) 318, 325; People *v.* New York, 25 Wend. (N. Y.) 680. Relator is not entitled to *mandamus* where he does not es-

§ 1487 (831). **Mandamus to enforce Payment of Official Salaries.** —Thus, where *the salary or fees of an officer* of a municipal or

tablish both a specific legal right and a want of a specific legal remedy. Commonwealth *v.* James, 214 Pa. 319.

That mandamus will not lie where there is an adequate remedy by statute or by an ordinary action at law. Evans *v.* United States, 19 App. D. C. 207; Scarbrough *v.* Watson, 140 Ala. 349; Dorrington *v.* Yuma County, 8 Ariz. 4; Crandall *v.* Amador, 20 Cal. 72; Williams *v.* Bagnelle, 138 Cal. 699; State *v.* Cone, 40 Fla. 409; Johnson County *v.* Hicks, 2 Ind. 527; Franklin Tp. *v.* State, 11 Ind. 205; Louisville & N. A. R. Co. *v.* State, 25 Ind. 177; Kinzer *v.* Marion Ind. School Dist., 129 Iowa, 441; State *v.* McCrillus, 4 Kan. 250; State *v.* Hannon, 38 Kan. 593; Williams *v.* Maysville Tel. Co., 19 Ky. 33; State *v.* Police Jury, 108 La. 311; Perez *v.* Whitaker, 116 La. 47; Baker *v.* Johnson, 41 Me. 15; Berry *v.* Hull, 180 Mass. 547; Coffin Board of Education, 114 Mich. 342; Storer Post, No. 1, G. A. R. *v.* Page, 70 N. H. 280; Manchester *v.* Furnald, 71 N. H. 153; Cleveland *v.* Jersey City, 39 N. J. L. 629; People *v.* Chemung County, 11 N. Y. 563; People Crennan, 141 N. Y. 239; People *v.* New York, 166 N. Y. 154; People *v.* Interurban St. R. Co., 177 N. Y. 296; Jones *v.* Fonda, 85 N. Y. App. Div. 5; People *v.* Woodbury, 88 N. Y. App. Div. 593; People *v.* Edmonds, Barb. (N. Y.) 529; 19 Barb. (N. Y.) 468; People *v.* McGoldrick, N. Y. Civ. Proc. R. 292; Wright *v.* Bond, 127 N. Car. 39; Kensington Electric Co. *v.* Philadelphia, 187 Pa. 6; St. Paul's Par. Poor Com'rs *v.* Savannah, 2 McCord (S. Car.), 170; King Wm. County *v.* Munday, 2 Leigh (Va.), 165; State *v.* Manitowoc, 1 Wis. 423.

The courts will not by *mandamus* compel a municipal corporation to specifically perform business contracts. State *v.* Mortenser, 69 Neb. 376. It will not lie to compel a city to open a street, in accordance with a contract or agreement in a manner specified by the petitioner for his private advantage, disregarding public considerations; the party has an adequate remedy at law for damages. Parrott *v.* Bridgeport, 44 Conn. 180. It will not lie to compel payment to a street contractor from a special assessment which has been adjudged invalid in a taxpayer's suit to recover back what he had paid under stress of legal process. People *v.* East Saginaw, 40 Mich. 336. Nor for the enforcement of contract rights of a private nature. It is granted only to prevent a failure of justice in cases where ordinary legal processes furnish no relief. Parrott *v.* Bridgeport, 44 Conn. 180. The performance of a contract entered into by resolutions of a public body, which, in an important feature, violate a penal statute, will not be compelled by *mandamus*. Nor will the writ be granted if the resolutions show, on their face, that the body passed them under a clear mistake as to its legal obligations to do what it was resolving to do. Mabon *v.* Halsted, 39 N. J. L. 640. The approval of official bonds is the exercise of judicial, not of ministerial, power, and *mandamus* will not lie to revise the exercise of the power. Harris, *In re*, 52 Ala. 87; Thompson, *In re*, 52 Ala. 98.

A writ of *mandamus* may, in proper cases, be denied when it appears that there are no funds out of which a warrant can be paid if drawn. State *v.* Wayne County, 157 Ind. 356; State *v.* Minneapolis, 87 Minn. 156; State *v.* Spinney, 166 Ind. 282; People *v.* Coler, 41 N. Y. App. Div. 463; People *v.* York, 66 N. Y. App. Div. 453, aff'd 171 N. Y. 627; State *v.* Board of Elections, 24 Ohio Cir. Ct. R. 654; State *v.* Hiers, 51 S. Car. 388; McCaslan *v.* Major, 64 S. Car. 188; State *v.* Daniel, 52 S. Car. 201.

The proper remedy for holders of county warrants drawn against a particular fund, which has been diverted and exhausted by the county authorities, is *mandamus* to compel the commissioners to levy and collect a tax to pay such warrants. State Sav. Bank *v.* Davis, 22 Wash. 406. But where money has been appropriated for a specific purpose, it is not in all cases a sufficient answer to an application for a *mandamus* to compel its payment for that purpose, to set up that the money has been wrongfully applied to other purposes. It may be regarded in contemplation of law as

public corporation may, like other debts, be recovered by an action at law against the corporation, this ordinarily is the remedy, and not *mandamus;*[1] but if the officer cannot sue the corporation, he may, where entitled, compel payment by means of this writ,[2] unless

still in the treasury. First Nat. Bank *v.* Arthur, 12 Colo. App. 90; People *v.* Stout, 23 Barb. (N. Y.) 338; Hohl *v.* Westford, 33 Wis. 324; Campbell *v.* Polk County, 3 Iowa, 467; Lansing *v.* Van Gorder, 24 Mich. 456; Risley *v.* Smith, 64 N. Y. 570; People *v.* N. Y. Comptroller, 77 N. Y. 45. See also Dubordieu *v.* Butler, 49 Cal. 512. Under the English common-law procedure act of 1864, § 68, *mandamus* will not be sustained if there be any other remedy equally adequate and effective. Bush *v.* Beavan, 1 Hurl. & Colt. 500. So also under code of *California.* Rosenbaum *v.* San Francisco, 28 Fed. Rep. 223, aff'd 120 U. S. 450.

Mandamus will not lie where a party has *an appeal or the right to a writ of error,* which will give adequate relief. Virginia Com'rs, *Ex parte,* 112 U. S. 177; Burdett, *Re,* 127 U. S. 771; Atlantic City R. Co., *In re,* 164 U. S. 633; Huguley Mfg. Co., *In re,* 184 U. S. 297; Rosenbaum *v.* San Francisco, 28 Fed. Rep. 223, aff'd 120 U. S. 450; Preston *v.* Marion Ind. School Dist., 124 Iowa, 355; State *v.* King, 52 La. An. 1548; State *v.* Judge of Civil Dist. Ct., 107 La. 474; Hanson *v.* St. Mary Par. Police Jury, 116 La. 1080; Pulling *v.* Durfee, 97 Mich. 605; Freud *v.* Saginaw Circuit Judge, 125 Mich. 670; Cattermole *v.* Ionia Circuit Judge, 136 Mich. 274; Skutt *v.* Kent Circuit Judge, 136 Mich. 477; Hopper *v.* Livingston Probate Judge, 137 Mich. 124; Valley City Desk Co. *v.* Kent Circuit Judge, 139 Mich. 194; Recor *v.* St. Clair Circuit Judge, 139 Mich. 156; Wells *v.* Montcalm Circuit Judge, 139 Mich. 544; Lemon *v.* Oakland Circuit Judge, 140 Mich. 504; Pontiac, O. & N. R. Co. *v.* Oakland Circuit Judge, 142 Mich. 257; Williams *v.* Cooper Co. Com. Pl. J., 27 Mo. 225; State *v.* Westover (Neb.), 89 N. W. Rep. 1002; Jefferson *v.* Atlantic City, 64 N. J. L. 59; People *v.* Saratoga County, 106 N. Y. App. Div. 381; Nelson, *In re,* 1 Cow. (N. Y.) 417; People *v.* Bolte, 35 N. Y. Misc. 53; State *v.* Fourth District Court, 13 N. Dak. 211; State *v.* Franklin County, 7 Ohio N. P. 563; State *v.* Pike, 17 Ohio Cir. Ct. R. 624; State *v.* Mitchell, 2 Tr. Const. (S. Car.) 703; State *v.* Tallman, 29 Wash. 317; Rex *v.* Benchers of Gray's Inn, Douglas, 339; United States *v.* Edmunds, 3 Mackey (D. C.), 142; *post,* chap. xxxi. But where remedy by appeal is not a plain, speedy, and adequate remedy, the issuance of a writ to compel execution will not be denied. Holtum *v.* Greif, 144 Cal. 521.

Where the writ of *certiorari* was taken away, the court refused to indirectly interfere to bring the proceedings under review by *mandamus.* Rex *v.* Yorkshire, &c., 1 A. & E. 563; *post,* chap. xxxi. §§ 1591–1595.

Denying the right to the writ because there is another remedy "is not a rule of law, but a rule regulating the discretion of the court in granting writs of *mandamus.*" *Hill,* J., Barlow, *In re,* 30 L. J. Q. B. 271. To justify the refusal of the writ on this ground, the other remedy must be at least equally suitable, beneficial, and effectual. Addison on Torts, chap. xxiv. 1059, English edition. But where the proceeding by *mandamus* has been assimilated by statute to ordinary proceedings, the relator, if otherwise entitled, should not be denied a resort to this remedy on the ground that he can sue at law, unless it appears that this latter remedy is as adequate and effectual as the other.

[1] People *v.* Thompson, 25 Barb. (N. Y.) 73; Lynch, *In re,* 2 Hill (N. Y.), 45; People *v.* New York, 25 Wend. (N. Y.) 680; Boyce *v.* Russell, 2 Cow. (N. Y.) 444; *ante,* § 421; Reynolds *v.* Taylor, 43 Ala. 420; People *v.* Lindenthal, 77 N. Y. App. Div. 515; Payne *v.* School Dist., 87 Mo. App. 415. *Mandamus* will lie to compel the proper local authorities to fix the salary of an elected officer under the provisions of a statute requiring them to do so, but the court will not control their discretion in determining the amount of the salary. Mobile County *v.* State (Ala.), 50 So. Rep. 972.

[2] Baker *v.* Johnson, 41 Me. 15; People *v.* Edmonds, 15 Barb. (N. Y.) 529; Commonwealth *v.* Johnson, 2

nother is in possession under color of right, in which case the title) the office cannot ordinarily be determined in *mandamus*, or in ny collateral proceeding.[1] So in a case in which it appeared that ıe State of New York had issued bills of credit to the amount of 200,000, which sum was apportioned among the several counties f the State and paid over to each county to be loaned out to its tizens on mortgage security, and where it was provided by statute ıat if any deficiency on foreclosure should exist, the county supersors should raise the same as the ordinary county charges are vied and collected, it was decided that the remedy of the State, here the supervisors omitted to perform this duty, was by *mandaus* against them, and not by action against the county, as the unty was only liable in the way pointed out by the statute.[2]

nn. (Pa.) 275; People *v.* New York, N. Y. 473; McKannay *v.* Horton, 1 Cal. 711; Granger *v.* French, 152 ich. 356; State *v.* McQuade, 36 Wash. 9. But it will not lie to control a ıretion as to the amount to be owed. People *v.* New York, 1 Hill . Y.), 362; People *v.* Dutchess unty, 9 Wend. (N. Y.) 508. *Comsation of municipal officers. Ante,* 21.

In *North Carolina*, while it is coned that the court "will not, ordiily at least, interfere by *mandamus* ıre there is another specific legal edy" (State *v.* Jones, 1 Ired. L. -134), yet it is doubted whether, ın the legislature authorizes one of public officers, as, for example, hool committee, to make contracts, directs that the employees shall paid by another public officer, upon order from the first, there can be other specific legal remedy than t afforded by *mandamus*. *Per tle*, J., in Taylor *v.* Northampton unty, 5 Jones L. 98. *Mandamus* proper remedy to enforce the payıt of an official salary, the amount which is fixed. Speed *v.* Detroit, Mich. 92.

Winston *v.* Mosely, 35 Mo. 146; te *v.* State Auditor, 34 Mo. 375, owed, State *v.* Auditor, 36 Mo. 70; ple *v.* Brennan, 45 Barb. (N. Y.) ; French *v.* Cowan, 79 Me. 426; y *v.* Portland, 14 Oreg. 243; *infra*, 1501 *et seq.*, 1554; *post*, chap. xxx., *Warranto;* chap. xxxi.

People *v.* Columbia County, 10 ıd. (N. Y.) 363; People *v.* Ulster unty, 16 Johns. (N. Y.) 59.

The doctrines of the text, as to *mandamus*, may be illustrated by a brief reference to some of the adjudged cases, in which the writ has been held to be *the proper remedy* to compel the performance of a public duty. Thus, *mandamus* lies to compel public officers, on the *division of towns, to apportion the money* between them pursuant to the directions of the statute. People *v.* Marsh, 2 Cow. (N. Y.) 485; Higgins *v.* Midland County, 52 Mich. 16; *ante*, §§ 103, 106, 107, 115, and 358–360.

To pay for authorized public improvements within a municipality, the legislature may direct the local officers to *issue its bonds*, and upon their refusal to issue them, the duty may be compelled by *mandamus*. People *v.* Guggenheimer, 47 N. Y. App. Div. 9; People *v.* Flagg, 46 N. Y. 401. This case was distinguished in the later case of People *v.* Batchelor, decided by the Court of Appeals in 1873 (53 N. Y. 128), in which it was held that the legislature could not compel a municipal corporation to become a stockholder in a railway company and issue its bonds in payment for the stock without its consent. The opinion of *Grover*, J., refers to many of the previous cases, and admits that they establish that "municipal corporations may be compelled to enter into contracts for an exclusive public purpose," but not "when the purpose is private"; and he treats this purpose as private, and did not consider the decision of the United States Supreme Court in Olcott *v.* Fond du Lac County, 16 Wall. (U. S.) 678 (*ante*, § 318), as conclusive of the question before the court. It is

§ 1488 (831 *a*). **Inadequacy of Ordinary or Specific Remedy; Author's Comment.** — The principle that *mandamus* will not be awarded

noticeable that the case of Atkins *v.* Randolph, 31 Vt. 226, is cited, which was characterized by Chief Justice *Denio* in the manner heretofore noticed. See also Weismer *v.* Douglas, 64 N. Y. 91; Flatbush, *In re*, 60 N. Y. 398; Duanesburgh *v.* Jenkins, 57 N. Y. 177; Horton *v.* Thompson, 71 N. Y. 513; Duncan *v.* Louisville, 8 Bush (Ky.), 98; Selma & Gulf R. Co., *In re*, 46 Ala. 230; *ante*, §§ 115, note, 123; chap. xx; People *v.* White, 54 Barb. (N. Y.) 622; Creighton *v.* San Francisco, 42 Cal. 446; San Francisco *v.* Canavan, 42 Cal. 541; Halsey *v.* Nowrey, 71 N. J. L. 481; People *v.* Millard, 133 N. Y. App. Div. 139; State *v.* Middle Kittitas Irr. Dist., 56 Wash. 488; 106 Pac. Rep. 203.

Mandamus will lie to compel a city to make an assessment, directed by an act of the legislature, to pay for buildings pulled down to open a public street, or to make and collect street assessments. People *v.* Pontiac, 185 Ill. 437; Shoolbred *v.* Charleston, 2 Bay (S. C.), 63; Reock *v.* Newark, 33 N. J. L. 129; *ante*, § 1387; Himmelmann *v.* Cofran, 36 Cal. 411; Sinton *v.* Ashbury, 41 Cal. 525; Wilson *v.* Berkstresser, 45 Mo. 283; State *v.* Keokuk, 9 Iowa, 438; Chapin *v.* Osborn, 29 Ind. 99; Rex *v.* Stainforth & K. Canal Co., 1 M. & S. 132; Regina *v.* Wilts & B. Canal Co., 8 Dowl. P. C. 623. So the writ will lie to a city council to *compel prosecution of a local improvement* commanded by a statute to be made. Welch *v.* State, 164 Ind. 104; People *v.* Brooklyn, 22 Barb. (N. Y.) 404. So also to compel *commissioners of the poor* to discharge duties imposed on them, if there be no adequate remedy at law. Lynah *v.* St. Paul's Par. Com'rs, 2 McCord (S. C.), 170; State *v.* Mitchell, 2 Tr. Const. (S. C.) 703; Rex *v.* Bank of England, Doug. 506; *post*, § 1595. If the council delay or refuse to order a sale for delinquent taxes *mandamus* will be ordered on the relation of a citizen and taxpayer. Hugg *v.* Camden, 39 N. J. L. 620.

As the writ lies to enforce public rights, it will be granted to compel the *mayor* to perform his duty as a *presiding officer*, after default in that respect. State *v.* Meier, 143 Mo. 439; Dreyfus *v.* Lonergan, 73 Mo. App. 336; Rex *v.* Everett, Cas. Temp. Hardw. 261; Rex *v.* Williams, 2 M. & S. 141; Wille. 357, pl. 46; *ante*, §§ 387, 388, 511, 514. And to compel the proper officer of the city *to issue a license* to one entitled thereto. East St. Louis *v.* Wider, 46 Ill. 351. See People *v.* San Francisco, 20 Cal. 591.

Mandamus will lie to compel county commissioners to *make a record of their action* in a matter affecting individual rights, so that an appeal may be taken if desired. Warren County *v.* State, 15 Ind. 250; State *v.* Boyden, 18 S. Dak. 388. See State *v.* McGuire, 74 Neb. 769. And against an officer, to compel him to *record a deed or paper*. Strong's Case, Kirby (Conn.), 345; People *v.* Collins, 7 Johns. (N. Y.) 549; Goodell, *In re*, 14 Johns. (N. Y.) 325; Wulflange *v.* McCollom, 83 Ky. 361. And against commissioners of a county, to compel them to *receive and file a petition* for a change of the boundaries of the county, as required by law. Hawkins *v.* Starke County, 14 Ind. 521. So it will lie to compel the officer having custody of the *corporate seal* to affix it to any document to which it is the duty of such officer to put it. Halsey *v.* Nowrey, 71 N. J. L. 481; State *v.* Fisher, 5 Pennewill (Del.), 273; State *v.* Jenkins, 20 Wash. 78; Tapping on *Mandamus*, 96; 3 Blackst. Com. 110. As, for example, the seal to a county warrant. Prescott *v.* Gonser, 34 Iowa, 175.

Where a city charter provided for the election of a board of police commissioners, whose duty it should be to nominate to the common council suitable persons to fill vacancies occurring in the police department, but made no provision for the appointment of a clerk of the board, and one of the members of the board, at the request of his associates, acted as clerk and kept a record of the proceedings of the board, it was held that *such clerk was not a public officer*, and that a writ of *mandamus* would *not* lie to compel him to amend a record made by him. Pond *v.* Parrott, 42 Conn. 13. See *ante*, chap. xiv.

Where a statute is *mandatory*, enjoining upon the mayor and aldermen the performance of a duty, such as to appoint commissioners to *discharge a*

where any of the usual and ordinary actions at law afford a full and adequate remedy, or where a statute provides a specific remedy for the enforcement of the particular duty or right in question, *should, in the author's judgment, be applied with especial care* where this is the sole ground of the refusal of the writ. In general, no measure of relief is so exactly adapted to the demands of justice as (to borrow the language of equity) a specific execution of the precise duty. Other forms of relief may go beyond or fall short of the exact right of the party aggrieved. On principle, it would seem that there ought in our day to be no leaning by the courts against the remedy of *mandamus*. If the right of the relator and the corresponding duty of the respondent are both clear, a court which denies the writ on the sole ground that an ordinary action will give a full and adequate remedy ought to make sure that such

public duty connected with the navigation of a public stream, *mandamus* will lie. Savannah *v.* State, 4 Ga. 26. In *Georgia*, a city marshal may be compelled by *mandamus* to perform his official duty to *restore property levied on for taxes* to the claimant, on receiving the bond and security required by statute. Mitchell *v.* Hay, 37 Ga. 581. *Mandamus* lies to compel city treasurer to receive *coupons for taxes*, if a valid statute makes this his duty. Sands *v.* Edmunds, 116 U. S. 585. See Wilcox Hunter (Va.), 25 S. E. Rep. 1000. See Index, tit. *Coupons, Taxes*. It also lies to compel the county board of auditors to refund a fine paid to avoid imprisonment, the judgment imposing having been reversed on *certiorari*. People *v.* Wayne County, 41 Mich. 23. But it will not lie to compel the refunding of a tax unlawfully levied, there is an issue involved which right to go to a jury. Byles *v.* Golden, 7 Mich. 612. A *mandamus* is the proper remedy for the State to compel an officer — *e. g.*, a county auditor — to perform a public duty, in which the State is interested, — *e. g.*, *to issue a tax duplicate* without adding an *illegal* per cent. Hamilton *v.* State, 5 Ind. 452.

Mandamus is the appropriate remedy in any coercive proceedings against a county court *to compel the issue of bonds* in pursuance of valid county subscriptions. Jones Co. *v.* Guttenberg, 66 N. J. L. 659; Shelby County *v.* Cumb. & C. R. Co., 8 Bush (Ky.), 209; Smith *v.* Bourbon County, 127 U. S. 105; *supra*, § 1482. So a town was compelled by *mandamus* to guarantee certain bonds, pursuant to its vote, executed by the railroad company, which the town had under legislative authority voted to aid in this manner. New Haven, M. & W. R. Co. *v.* Chatham, 42 Conn. 465; Douglas *v.* Chatham, 41 Conn. 211.

County. — Duty as respects paupers. Where a statute provided that when any person, not a pauper, "shall fall sick and die in any county in this State, not having money to pay his board, medical aid, or burial expenses, it shall be the duty of the county court to make such allowances therefor as shall seem just," it was held that this extended to persons of this class within the limits of an incorporated place, the corporation charter being silent on the subject; and that the county could be compelled, by *mandamus*, to make a proper allowance when such expenses have been incurred. Gunn's Adm. *v.* Pulaski County, 3 Ark. 427.

Mandamus is the only remedy by which the State can *compel two cities*, who have purchased a toll bridge, to perform the duties owed to the public in connection with the bridge, thus securing a free bridge for public use. State *v.* Bangor, 98 Me. 114. *Mandamus* will lie to compel a county treasurer to comply with a statute relating to the deposit of county funds in depository banks of the county. State *v.* Cronin, 72 Neb. 642; People *v.* Gibler, 78 Ill. App. 193.

remedy is as complete and effectual as the remedy by *mandamus*. So, if the writ is denied on the sole ground that a statute has provided a specific remedy, the legislative intent that such remedy should be exclusive ought to be clear, particularly if it is less complete and effectual than the remedy by *mandamus*. It is not intended by these reflections to deny the soundness of the general rule stated in the preceding sections, but rather to suggest the wisdom of more caution in its application than has sometimes been observed, where the relief by *mandamus* was clearly adequate, but where this remedy has been refused for the single reason that the relator ought to bring an ordinary action, or that he is confined to a statute remedy, although the latter is not expressly declared, and by fair intendment does not appear, to be exclusive.

§ 1489 (832). **Distinction between Discretionary Powers and Imperative Duties.** — Powers conferred upon municipal corporations are, as we have heretofore seen, of two general classes, — the one mandatory, the other discretionary.[1] Discretionary powers are not, unless in extraordinary and exceptional instances of gross abuse, subject to judicial control;[2] but duties imperatively enjoined may, as we have just shown, be enforced by *mandamus*.

[1] *Ante*, chap. vii. § 246; Rock Island County *v.* United States, 4 Wall. (U. S.) 435, 444 (where Mr. Justice *Swayne* distinguishes the two classes of powers); Napa Val. R. Co. *v.* Napa County, 30 Cal. 435; Goodrich *v.* Chicago, 20 Ill. 445; Ottawa *v.* People, 48 Ill. 233; Baltimore *v.* Marriott, 9 Md. 160; Anne Arundel County *v.* Duckett, 20 Md. 468; Allegheny County School Com'rs *v.* Allegheny County, 20 Md. 449; State *v.* Bolte, 151 Mo. 362; State *v.* Weston (Neb.), 99 N. W. Rep. 520; People *v.* Brooklyn, 22 Barb. (N. Y.) 404; Brooklyn Teachers Ass'n *v.* New York, 176 N. Y. 564; State *v.* Bowers, 26 Ohio Cir. Ct. R. 326, aff'd 70 Ohio St. 423; Commonwealth *v.* Pittsburgh, 34 Pa. 496, 516, *per Strong*, J.; Rose *v.* Bennett, 25 R. I. 405; Meyer *v.* Carolan, 9 Tex. 250; Altgelt *v.* Campbell (Tex. Civ. App.), 78 S. W. Rep. 967; Sights *v.* Yarnalls, 12 Gratt. (Va.) 292; Hester *v.* Thomson, 35 Wash. 119; Rex *v.* Hastings, 1 D. & R. 148; Queen *v.* Bristol Dock Co., 2 Ry. & Canal Cases (Eng.), 599; Rex *v.* Eye Bor., 2 D. & R. 172 (construing the words "shall be lawful"). See Payne *v.* United States, 20 App. D. C. 581.

[2] *Ante*, chap. vii, § 242; *supra*, § 1483; *post*, § 1515, chaps. xxxi. xxxii. Mobile County *v.* State (Ala.), 50 So. Rep. 972; Collins *v.* Hawkins, 77 Ark. 101; People *v.* McMurray, 27 Colo. 277; McCoy *v.* State, 2 Marv. (Del.) 543; Atlanta *v.* Wright, 119 Ga. 207; Shoshone County *v.* Mayhew, 5 Idaho 572; People *v.* Van Cleave, 183 Ill. 330; Illinois State Board of Health *v.* People, 102 Ill. App. 614; People *v.* Church, 103 Ill. App. 132; Kinzer *v.* Marion Ind. School Dist., 129 Iowa 441; McCrea *v.* Roberts, 89 Md. 238; Provident Sav. Life Assur. Soc. *v.* Cutting, 181 Mass. 261; Fisher *v.* Wayne Circuit Judge, 128 Mich. 543; Hartwig *v.* Manistee, 134 Mich. 615; Fletcher *v.* Alpena Circuit Judge, 136 Mich. 511; State *v.* Bersch, 83 Mo. App. 657; State *v.* Walker, 85 Mo. App. 247; State *v.* Stull (Neb.), 96 N. W. Rep. 121; State *v.* Scott, 60 Neb. 98; State *v.* Lincoln, 68 Neb. 597; Bayonne *v.* North Arlington (N. J. Eq.), 75 Atl. Rep. 558; People *v.* Maher, 141 N. Y. 330; People *v.* Matthies, 179 N. Y. 242; People *v.* Morrison, 54 N. Y. App. Div. 262, aff'd 165 N. Y. 644; Donovan *v.* Cantor, 89 N. Y. App. Div. 50; People *v.*

: general rule is this: If the inferior tribunal, corporate body, ›lic agent or officer has a *discretion, and acts and exercises it,* iscretion cannot be controlled by *mandamus.*[1] But if the ır tribunal, body, officers, or agents refuse to act in cases the law requires them to act, and the party has no other emedy, and where, in justice, there ought to be one, a *manda-* ill lie to set them in motion, to compel action; and, in proper the court will settle the legal principles which should govern, thout controlling the discretion of the subordinate jurisdic- ody, or officer.[2]

ın, 98 N. Y. App. Div. 59; Wheeler, 100 N. Y. App. Div. el *v.* McAdoo, 101 N. Y. App. ; State *v.* Curler, 26 Nev. 347; ın *v.* Cecil Tp. School Direct- Pa. Co. Ct. R. 574; State *v.* us Board of Public Service, 81 218; 90 N. E. Rep. 389; State cket, 18 R. I. 350; Farnham *v.* 19 S. Dak. 343; Lewright *v.* Tex. 556; Miles *v.* Wells, 22 ; Marcum *v.* Lincoln, L., M. ounties, 42 W. Va. 263; Rob- 'aul, 50 W. Va. 528; State *v.* 121 Wis. 523.

e an act requires the exercise udgment of an officer *manda-* not lie. McGann *v.* Harris, App. 308; Sansom *v.* Mercer, 448. Where a discretion is and made to work injustice, it controlled by *mandamus.* . Wilmington, 4 Del. Ch. 491; *v.* People, 78 Ill. 382; People County, 176 Ill. 576; Van Anderson, 219 Ill. 32; Jury *v.* 81 Kan. 207; Douglas *v.* 25 Pa. Super. Ct. 9. See ır *v.* Anderson, 35 Tex. Civ.).

ıberlin *v.* Commission, 104 p. 653; Riverside County *v.* ıardino County, 134 Cal. 517; fg. & Inv. Co. *v.* School Dist., 3 Colo. 513; Cook County *v.* 78 Ill. App. 586; Reddick *v.* 82 Ill. App. 85; Chicago , 114 Ill. App. 145; Trustees of s Pension Fund *v.* McCrory, 89; 116 S. W. Rep. 326; Alex- Moss (Ky.), 89 S. W. Rep. 118; Baltimore, 111 Md. 543; 75 Atl. ; Friel *v.* McAdoo, 181 N. Y. ıyonne *v.* North Arlington .), 75 Atl. Rep. 558; Sycamore Education *v.* State, 80 Ohio Brown *v.* Ansel, 82 S. Car. 141; Carolina, C. & O. R. Co. *v.* Scott County, 109 Va. 34.

[2] Kennedy *v.* Washington, 3 Cranch C. C. (U. S.) 595; Kimberlin *v.* Commission, 104 Fed. Rep. 653; Minnesota Moline Plow Co. *v.* Dowagiac Mfg. Co., 126 Fed. Rep. 746; Hudmon *v.* Slaughter, 70 Ala. 546; Huey *v.* Waldrop, 141 Ala. 318; Magee *v.* Calaveras County, 10 Cal. 376; People *v.* Vanhorn, 20 Colo. App. 215; State *v.* Wilmington, 3 Harring. (Del.) 294; State *v.* Reeves, 44 Fla. 179; State *v.* Richards, 50 Fla. 284; People *v.* Cass County, 77 Ill. 438; People *v.* La Salle County, 84 Ill. 303; People *v.* Chytraus, 183 Ill. 190; Michigan City *v.* Roberts, 34 Ind. 471; Madison *v.* Smith, 83 Ind. 502; State *v.* Robinson, 1 Kan. 188, 220; McKean *v.* Louisville, 18 B. Mon. (Ky.) 9; State *v.* St. Paul, 113 La. 1066; Rice B. & F. Mach. & I. Co. *v.* Worcester, 130 Mass. 575; Boyd *v.* Detroit Board of Health, 140 Mich. 306; State *v.* Ames, 31 Minn. 440; Mau *v.* Liddle, 15 Nev. 271; Ahrens *v.* Fiedler, 43 N. J. L. 400; Nelson, *In re,* 1 Cow. (N. Y.) 417; Baily, *In re,* 2 Cow. (N. Y.) 479; Gourley *v.* Allen, 5 Cow. (N. Y.) 644; Elkins *v.* Athearn, 2 Denio (N. Y.) 191; People *v.* Dutchess County, 1 Hill (N. Y.) 50; People *v.* New York, 1 Hill (N. Y.) 362; People *v.* Albany County, 12 Johns. (N. Y.) 414; Hull *v.* Oneida County, 19 Johns. (N. Y.) 259; People *v.* Dutchess & C. R. Co., 58 N. Y. 152; *In re* Troy Press Co., 94 N. Y. App. Div. 514, aff'd 179 N. Y. 529; Cherokee County Board of Education *v.* Cherokee County, 150 N. Car. 116; Turner, *In re,* 5 Ohio, 542, 543, *per Lane,* J.; Commonwealth *v.* Park, 9 Phila. (Pa.) 481; Commonwealth *v.* Henry, 49 Pa. 530; Dechert *v.* Commonwealth, 113 Pa. 229; Commonwealth *v.* Doylestown Sup'rs, 16 Pa. Co. Ct. R. 161; Carolina, C. & O.

§ 1490 (833). **Same Subject; Mandamus to Federal Officer.**— Thus a *mandamus* will, in cases to which the writ is adapted, be

R. Co. *v.* Scott County, 109 Va. 34; State *v.* Chittenden, 112 Wis. 569; Giles's Case, 2 Stra. 881; Rex *v.* Nottingham Jus., Sayer, 217. The actions of a justice of the peace presiding in eminent domain proceedings may be controlled by mandamus. Sullivan *v.* Yazoo & M. V. R. Co., 85 Miss. 649.

The writ of *mandamus* lies to compel a public officer to perform a duty concerning which he is vested with no discretionary power, and which is either imposed on him by some express enactment, or necessarily results from the office which he holds. Farmers' Nat. Bank of Hudson *v.* Jones, 105 Fed. Rep. 459; Pond *v.* Parrott, 42 Conn. 13; Van Dorn *v.* Anderson, 219 Ill. 32, aff'g 117 Ill. App. 618; Rodenbarger *v.* State, 165 Ind. 685; McChesney *v.* Batman, 121 Ky. 303; State *v.* Lockett, 52 La. An. 1620; Bostock *v.* Sams, 95 Md. 400; State *v.* Adams, 161 Mo. 349; Goodell *v.* Woodbury, 71 N. H. 378; Bierman *v.* Seymour, 66 N. J. L. 122; Jones *v.* Guttenberg, 66 N. J. L. 659; Warmolts *v.* Keegan, 69 N. J. L. 186; *In re* Troy Press Co., 94 N. Y. App. Div. 514; People *v.* Page, 105 N. Y. App. Div. 212; People *v.* Brush, 110 N. Y. App. Div. 720; Davis *v.* Patterson, 12 Pa. Super. Ct. 479; Newton *v.* Leal (Tex. Civ. App.), 56 S. W. Rep. 209. A writ of *mandamus* will not be issued against a public officer to compel the performance by him of acts which do not come within his official duties. Holtzclaw *v.* Riley, 113 Ga. 1023. A *mandamus* will not issue to compel a public officer to perform a ministerial duty, when the evidence shows that his ability to do so depends on the cooperative action of a third person who is not before the court. State *v.* Cavanac, 30 La. An. 237; *ante*, § 274; *post*, § 1526, note. The principle in the text is well illustrated by the case of King *v.* Bristol Dock Co., 6 B. & C. 181, in which the dock company was authorized by Parliament to make a floating harbor in the city, and *required* "to make such alterations and amendments in the sewers of said city as might or should be necessary in consequence of the floating of said harbor," and it was decided that the directors might by *mandamus* be commanded, in the words of the act, "to make such alterations," &c.; but the nature of the alterations could not be specified, as this was a matter committed by Parliament to the judgment and discretion of the directors of the company.

The rule is further illustrated in two cases in Massachusetts, being applications for *mandamus* to compel a mayor to sign licenses, which had been granted by the board of aldermen. In Braconier *v.* Packard, 136 Mass. 50, the writ was awarded because, under the statute in force, the signing of the license was a merely ministerial duty. So also in Bankers Life Ins. Co. *v.* Howland, 73 Vt. 1; and Dean *v.* Campbell (Tex. Civ. App.), 59 S. W. Rep. 294. In Deehan *v.* Johnson, 141 Mass. 23, the writ was refused because the particular statute conferred upon the mayor a separate responsibility and discretion as to signing the license. Similarly in Armstrong *v.* Murphy, 65 N. Y. App. Div. 123. Also People *v.* Scully, 23 N. Y. Misc. 732, and Hart *v.* Folsom, 70 N. H. 213. See State *v.* Prendergast, 8 Ohio Cir. Ct. R. 401; and Williams *v.* State Board, 93 Tenn. 619.

So in *Illinois*. State Board *v.* People, 93 Ill. App. 436, it was held that the granting of a license was discretionary. Likewise State *v.* Coleman, 64 Ohio St. 377. But in Amperse *v.* Kalamazoo, 59 Mich. 78, a *mandamus* was awarded to compel a common council *to approve a liquor dealer's bond*, though by statute it had power to determine upon its sufficiency, holding that it must, without unnecessary delay, either approve the bond or give its reasons for not doing so. See Hawkins *v.* Litchfield, 120 Mich. 390. Where, however, there was nothing to show that the refusal to approve the bond was capricious or to rebut the presumption that all questions had been fairly passed upon, *mandamus* was refused. Parker *v.* Portland, 54 Mich. 308; Divine *v.* Lakeview, 121 Mich. 433; Bailey *v.* Van Buren Circuit Judge, 128 Mich. 627. The council's approval of the bond of a city attorney being a purely ministerial act, mandamus to compel its approval is a proper remedy. Speed *v.* Detroit, 97 Mich. 198; Metropolitan Life Ins. Co. *v.*

by the proper Federal court to an officer of the Federal gov-
nt, commanding him *to do a mere ministerial act,* but not one
involves the exercise of judgment and discretion.[1]

191 (834). **Same Subject; Writ to Public Officers of a State.** where there is a duty *purely ministerial, and not discretionary,* red by law upon the public officers of a State, and the refusal lect to perform the duty affects a specific legal right, the per- ereby injured may have a *mandamus.* This doctrine, under nditions just stated, has been very generally considered to be able to the *executive head* of the State; but if so, it should sly be limited to cases where the right of the relator is plain e duty of the executive clearly ministerial, and not discre- y. The leading cases on this subject are referred to in the

amp (Ky.), 66 S. W. Rep. *damus* held not to lie to enforce ard of a *contract to the lowest* Stanley Taylor Co. *v.* Board 'rs, 135 Cal. 486; Vincent *v.* 16 Iowa, 609; Maryland Pav. Mahool, 110 Md. 397; State *v.* , 68 Neb. 597; State *v.* Colum- ard of Public Service, 81 Ohio ; 90 N. E. Rep. 389; State *v.* ius, 9 Ohio Dec. 336; Akron *v.* 24 Ohio Cir. Ct. R. 63; State l du Lac Bd. of Ed., 24 Wis. ate *v.* Com'rs of Printing, 18 St. 386; Welsh *v.* Mahaska , 23 Iowa, 199; People *v.* Con- Board, 27 N. Y. 378; s. c. 46 N. Y.) 254; s. c. 33 N. Y. 382; nwealth *v.* Henry, 49 Pa. St. ople *v.* Brennan, 39 Barb. (N. l; Boren *v.* Darke County, 21 . 311; State *v.* Barlow, 48 Mo. an *v.* Borchsenius, 30 Wis. 236; *v.* Campbell, 72 N. Y. 496; . Chicago, 62 Ill. 279. But e State *v.* Louisiana State Board culture, 122 La. 677. *As to lowest bidder, ante,* chap. xviii. 812. Index — *Lowest Bidder.* ndall *v.* United States, 12 Pet. 524; Decatur *v.* Paulding (to defendant to pay pension), 14 . S.) 497; Reeside *v.* Walker, 11 U. S.) 272; United States *v.* , 17 How. (U. S.) 284; United . Seaman, 17 How. 225; Bra- Mason, 6 How. (U. S.) 97; States *v.* Land Com'rs, 5 Wall. (U. S.) 563; De Groot, *In re,* 6 Wall. (U. S.) 497; Secretary of Int. *v.* McGarrahan, 9 Wall. (U. S.) 298, 312; Carrick *v.* Lamar, 116 U. S. 423; Bayard *v.* United States, 127 U. S. 246; Parker, *Re,* 120 U. S. 736; Brown, *Re,* 116 U. S. 401; Newport *v.* Berry, 80 Ky. 354; Seymour *v.* United States, 2 App. D. C. 240; United States *v.* Wight, 15 App. D. C. 463; Allen *v.* United States, 22 App. D. C. 271; Roberts *v.* Consaul, 24 App. D. C. 551; Roberts *v.* United States, 176 U. S. 221; United States *v.* Hitchcock, 190 U. S. 316. As the *Secretary of State* is the confidential political agent of the President for the execution of his will in matters committed to his discretion by the Constitution, to coerce the action of the Secretary is to attempt the coercion of the President. United States *v.* Hay, 20 App. D. C. 576. *Mandamus* will not be granted to reverse the determination of *the postmaster general* prohibiting the circulation of a newspaper through the mails as unmailable matter. *In re* Coleman, 131 Fed. Rep. 151.

A State court cannot issue a mandamus to an officer of the United States. McClung *v.* Silliman, 6 Wheat. (U. S.) 598.

[2] United States *v.* Hitchcock, 190 U. S. 316; State *v.* Jelks, 138 Ala. 115; Orman *v.* People, 18 Colo. App. 302; State *v.* Upson, 79 Conn. 154; People *v.* Van Cleave, 183 Ill. 330; Traynor *v.* Beckham, 116 Ky. 13; State *v.* Smith, 23 Mont. 44; State *v.* Savage,

§ 1492 (835). **Official Discretion not controllable by Mandamus.** — On the principle that *official discretion cannot be judicially interfered with by mandamus*, this writ will not lie to control the discretion of commissioners to determine the site for a county seat, they

64 Neb. 684; People *v.* Rosendale, 142 N. Y. 670; State *v.* Nash, 66 Ohio St. 612; State *v.* Brooks, 14 Wyo. 393.

When the act neglected to be done by *the governor of a State* is purely ministerial, not discretionary, and affects a specific private right, a *mandamus* may issue. State *v.* Chase, 5 Ohio St. 528. Thus *the governor* will by *mandamus*, be compelled, in a proper case, to issue commission to an officer presenting legal evidence of his election. State *v.* Moffit, 5 Ohio St. 356, 358, 362, *per Hitchcock*, J.; State *v.* Chase, 5 Ohio St. 528. *Contra*, Hawkins *v.* Conway, 1 Ark. 570; State *v.* Price, 25 N. J. L. 331, in which the right to issue a *mandamus* to the governor in *any case*, is denied. People *v.* Governor, 29 Mich. 320, where the subject is elaborately considered and the conflicting cases cited by *Cooley*, J.; he draws a distinction between the governor and the heads of executive departments. Selma & G. R. Co., *In re*, 46 Ala. 230; People *v.* Bissell, 19 Ill. 229; State *v.* Warmoth, 22 La. An. 1; Rice *v.* Austin, 19 Minn. 103; State *v.* Dike, 20 Minn. 363.

It has been elsewhere held that the *governor or executive officers* of a State may, by means of this writ, be compelled to perform a mere *ministerial duty or act* in which individuals have an interest. Board of Liquidation of La. *v.* McComb, 92 U. S. 531; Nichols *v.* Crabbe, 4 Stew. & P. (Ala.) 154; Tennessee & C. R. Co. *v.* Moore, 36 Ala. 371; Middleton *v.* Low, 30 Cal. 596; Harpending *v.* Haight, 39 Cal. 189; State *v.* Towns, 8 Ga. 360; Biddle *v.* Willard, 10 Ind. 63; State *v.* Kirkwood, 14 Iowa 162; Bryan *v.* Cattell, 15 Iowa, 538; State *v.* Wrotnowski, 17 La. An. 156; State *v.* Mason, 43 La. An. 590; Magruder *v.* Swann, 25 Md. 173; Chamberlain *v.* Sibley, 4 Minn. 309; Pacific R. Co. *v.* Price, 23 Mo. 353; Cotten *v.* Ellis, 7 Jones L. (N. Car.) 545; Norris *v.* Cross (Okla.), 105 Pac. Rep. 1000; State *v.* Dahl, 6 N. Dak. 81; Commonwealth *v.* Griest, 196 Pa. 396. In Maurin *v.* Smith, 8 R. I. 192, *mandamus* was held not to lie to compel the governor to perform one of his statutory duties as commander-in-chief. In *Tennessee*, it has been held that as the governor constitutes one of the co-ordinate departments of the government, he cannot be compelled by *mandamus* to perform any act which devolves on him as governor. State *v.* Frazier, 114 Tenn. 516. In *New York* it has been held that *mandamus* cannot issue to compel the governor to do an act either purely ministerial or otherwise. People *v.* Morton, 156 N. Y. 136.

Mandamus lies against the *auditor of State* or comptroller of public accounts, where the right of the plaintiff is clear and no other remedy is provided, and the duty is not discretionary. Nichols *v.* Crabbe, 4 Stew. & P. (Ala.) 154; Danley *v.* Whiteley, 14 Ark. 687; Jobe *v.* Caldwell (Ark.), 125 S. W. Rep. 423; Fowler *v.* Pierce, 2 Cal. 165; Towle *v.* State, 3 Fla. 202; Divine *v.* Harvie, 7 T. B. Mon. (Ky.) 440; State *v.* Graham, 24 La. An. 429; State *v.* Anderson, 52 N. J. L. 150. *To State treasurer.* State *v.* Dubuclet, 24 La. An. 16. *Contra*, State *v.* Dike, 20 Minn. 363. The filing of the declaration and statement on reincorporation of a fraternal beneficiary society is a ministerial duty of the superintendent of insurance and may be compelled by *mandamus*. People *v.* Payn, 28 N. Y. Misc. 275.

In *Texas mandamus* may issue to the State comptroller or to the head of any other department of the State government, except the governor. Jernigan *v.* Finley, 90 Tex. 205. *Mandamus* granted to compel issuance of a county warrant by the auditor for a claim allowed by county commissioners, the duty being ministerial and no other adequate remedy being provided. American Bridge Co. *v.* Wheeler, 35 Wash. 40. The action of *land commissioners* on an application to direct the repayment of purchase money where title has failed is judicial, and repayment will not be directed by *mandamus*. Harris *v.* Land Office Com'rs, 149 N. Y. 26.

having been directed to locate it as near the centre of the county as a suitable location could be obtained, and having made a selection, although it was admitted that it would be granted to compel them to act.[1] So where the statute vests the county commissioners with the power to determine *when a court house and jail shall be erected* by the county, *mandamus* will not lie to compel them to erect those buildings, or, if the contract has been let, to proceed with the erection thereof.[2] But if a county board neglecting a plain statute duty fails to provide any kind of a jail, and the finances of the county justify the construction thereof, the board may be compelled by *mandamus* to build or provide one, but the court cannot control the discretion of the board as to the kind of jail.[3]

§ 1493 (836). **Same Subject.** — So where the *building of bridges, or the making of local improvements, is a discretionary power* entrusted to public or municipal corporations, and the proper authorities thereof have, in good faith, decided according to their judgment, *mandamus* will not be issued to compel them to a different course.[4] But a provision in a municipal charter that the council

[1] State *v.* Bonner, Busbee L. (N. Car.) 257. As to county seat elections, and the remedy for frauds therein, by *mandamus* and in equity, see People *v.* Wiant, 48 Ill. 263. See also People *v.* Salomon, 51 Ill. 37, 39. *Mandamus* will not be granted to compel the secretary of State to file articles of incorporation which are not entitled under the law to be filed. State *v.* Nichols, 40 Wash. 437.

[2] Black, *In re*, 1 Ohio St. 30; *post*, § 1527, note. See State *v.* Chester Tp., 25 Ohio Cir. Ct. R. 424.

[3] People *v.* La Salle County, 84 Ill. 303. See as to discretionary powers, Hull *v.* Oneida County, 19 Johns. 259; People *v.* Albany County, 12 Johns. (N. Y.) 414; People *v.* Superior Court, Wend. (N. Y.) 114; Gourley *v.* Allen, Cow. (N. Y.) 644; King *v.* Bristol Dock Co., 6 Barn. & C. 181. See Jacobs *v.* San Francisco, 100 Cal. 121. *Mandamus* held not to lie to compel *street cleaning commissioner* to remove ashes from a department store, his refusal to do involving the exercise of discretion. People *v.* Woodbury, 88 N. Y. App. Div. 443.

[4] Patterson *v.* Taylor, 98 Ga. 646; Michigan City *v.* Roberts, 34 Ind. 471; State *v.* Jefferson Par. Pol. Jury, 22 La. An. 611; Attorney-General *v.* Kalkaska & Antrim Counties, 120 Mich. 357; Oxby *v.* Kalkaska & Antrim Counties, 124 Mich. 463; Kingsley *v.* Nylan, 136 Mich. 535; State *v.* Thomas, 183 Mo. 220; State *v.* Essex County, 23 N. J. L. 214; People *v.* Queen's County, 142 N. Y. 271; People *v.* Clark, 40 N. Y. App. Div. 214; People *v.* Early, 106 N. Y. App. Div. 269; Glenn *v.* Moore County, 139 N. Car. 412; State *v.* Wayne County, 108 Tenn. 259; Howe *v.* Rose, 35 Tex. Civ. App. 328; Broaddus *v.* Essex County, 99 Va. 370; *post*, chap. xxxii.

The judgment and discretion of town supervisors as to the necessity of bridges and repairs thereon cannot be controlled by *mandamus* when the statute makes them the judges of the necessity. State *v.* Mount Pleasant, 16 Wis. 613; State *v.* Ahnapee, 99 Wis. 322. But the duty to repair and rebuild bridges may, when it is not discretionary and is clear, be enforced by *mandamus*. Treat *v.* Middletown, 8 Conn. 243; Ottawa *v.* People, 48 Ill. 233; Elmira H'way Com'rs *v.* Osceola H'way Com'rs, 74 Ill. App. 185; Leslie County *v.* Wooton, 115 Ky. 850; Pumphrey *v.* Baltimore, 47 Md. 145; Dutton *v.* State, 42 Neb. 804; People *v.* Dutchess County, 58 N. Y. 152; People *v.* Dutchess County, 1 Hill

shall "cause the *streets to be kept in repair*" has been held not to confer a discretionary power, but to enjoin a duty, the performance of which may in cases to which the writ is adapted be compelled by *mandamus*.[1] The performance of this duty is sometimes enforced by indictment, but more frequently by the indirect means of a private action for damages.[2]

§ 1494 (837). **Instances illustrating Use and Application of the Writ.** — In a well considered case, a statute after authorizing the city of Boston, for the purpose of abating a public nuisance, to

(N. Y.), 50; Howe *v.* Crawford County, 47 Pa. 361; Brander *v.* Chesterfield, 5 Call (Va.), 548; Queen *v.* Haldimond County, 7 Up. Can. L. J. 266; Augusta Tp. Municipality, *In re*, 12 Up. Can. Q. B. 522.

County commissioners were, by statute, "*authorized*" annually, at their June session, to levy a tax "for the construction and maintenance of a free turnpike road through their county." It was held that it "authorized," but did not require, the levy of the tax, and, no private rights having intervened, a *mandamus* to levy the tax was refused. Rollersville Turnp. R. Com'rs *v.* Sandusky County, 1 Ohio St. 149, approving and distinguishing New York *v.* Furze, 3 Hill (N. Y.), 612. In *England* it has been held that *mandamus* will not be issued to determine which of two parishes is liable to repair a road, under local acts. Regina *v.* Oxford & W. Turnp. Roads, 12 A. & E. 427. See Rex *v.* Llandilo Dist., 2 T. R. 232. Municipal duties as to ferries may be enforced by *mandamus*. *Ante*, § 275.

[1] Hammar *v.* Covington, 3 Met. (Ky.) 494; Uniontown Bor. *v.* Commonwealth, 34 Pa. St. 293; State *v.* Orange, 31 N. J. L. 131. The foregoing cases approved and followed in People *v.* Bloomington, 63 Ill. 207, where express power to keep streets in repair and to prohibit obstructions was held to impose the duty; and the court, at the instance of a private relator, granted a *mandamus* to compel the city to remove specified obstructions in the street. It was held in *Illinois* to be no objection to maintaining a *mandamus* to compel highway commissioners to remove specified obstructions in the highway, that there was a statutory remedy by indictment, as under the legislation of that State the remedy by *mandamus* is not affected by the existence of another legal remedy. People *v.* Highway Com'rs (Ill.), 22 N. E. Rep. 596. Distinguished, Michigan City *v.* Roberts, 34 Ind. 471; Indianapolis & Cinc. R. Co. *v.* State, 37 Ind. 489; *ante*, chapter on Streets, § 1157, note. See also Owen *v.* Moreland, 132 Mich. 477.

In People *v.* Stover, 138 N. Y. App. Div. 237, the relator asked for a peremptory writ of mandamus directing the commissioners of parks, in whom by statute was vested the control of Riverside Drive, to remove certain buildings which encroached upon Riverside Drive from three to four feet. The relator was the owner of adjoining property and claimed that the encroachments prevented the public from using the sidewalk, obstructed public travel, seriously injured the relator's property, and interfered with the relator's easements of light, air and access. The court held that, as no questions of fact were raised by the answering affidavit, and the relator had established a clear legal right, the relator was entitled to peremptory mandamus. This decision is the sequel to Ackerman *v.* True, 175 N. Y. 353, rev'g 71 N. Y. App. Div. 143, cited *ante*, §§ 1132, 1176, 1182.

Mandamus is the proper remedy to compel the *commissioners of highways* of adjoining towns to rebuild a bridge on a town-line road established by the joint action of both towns. Bigelow *v.* Brooks, 119 Mich. 208.

[2] See *post*, chap. xxxi.; also chap. xxxii., as to liability for defective streets. *Post*, §§ 1599, 1600. *City solicitor* held to have discretionary powers in the retrial of condemnation proceedings which cannot be controlled by *mandamus*. Gross *v.* Baltimore, 111 Md. 543; 75 Atl. Rep. 346.

nise the grade of lands in a particular district and to assess the expense thereof upon the owners of the lands, enacted that any person entitled to any estate in such land, and dissatisfied with the assessment, might give notice to the city council, and thereupon the city shall take his land, the title by the statute vesting absolutely in the city, and within sixty days thereafter file in the registry of deeds a description thereof, together with a statement that it was taken under the statute, which description and statement should be signed by the mayor, and the title to the land so taken should vest in the city. The owner of an estate in such land, being dissatisfied with the assessment, gave notice accordingly, and offered to surrender his estate to the city. The city council neglected to take it, but instead it passed an order vacating the assessment. The owner applied for a writ of *mandamus* to the city council and to the mayor, both of whom in their answers relied on the order vacating the assessment. It was held that, as soon as the assessment was made, the owner had the right under the statute to surrender his estate, and the city council could not afterwards vacate the assessment; and that the *mandamus* should issue, not only to the city council to take the land, but also to the mayor to sign the description and statement, although he could not do so, or be in default for not doing so, until the city council had passed an order taking the land, and although he might by the terms of the statute sign the description and statement at any time within sixty days after the taking.[1]

The performance of the duty enjoined by statute upon a municipal corporation to run a ferry as a toll ferry may be compelled by *mandamus* although the city council may have a discretionary power to fix the rates of toll.[2]

§ 1495 (838). **Mandamus as respects Municipal Elections and Officers; In England.** — In a previous chapter the powers of municipal corporations as to *elections and officers therein* have been considered;[3] and it may be here stated as a general proposition that *mandamus* is ordinarily the appropriate remedy to compel them and their officers, in case of refusal or neglect, to perform their duties in these respects.[4] In England the writ lies, and is con-

[1] Hamsworth *v.* Boston, 121 Mass. 3. See *ante*, §§ 1044, 1045, 1046.

[2] Attorney-General *v.* Boston, 123 Mass. 460, 469; *ante*, § 275.

[3] *Ante*, chap. xi., on Municipal Elections and Officers.

[4] *Ib.*; Lamb *v.* Lynd, 44 Pa. St. 336; s. c. Brightly's Election Cases, 624–631, and note of the learned editor; Demarest *v.* Wickham, 63 N. Y. 320, 324; Lewis *v.* Marshall County, 16 Kan. 102; Glencoe *v.* People, 78 Ill.

stantly issued, to compel the corporation to elect a mayor and other corporate officers according to their duty;[1] but if the office is full by the possession of an officer *de facto* under color of right, a *mandamus* will not, as hereafter explained, be granted to proceed to a new election until the person in possession has been ousted upon proceedings in *quo warranto*.[2] "The court," says Mr. Willcock,[3] "will grant a *mandamus* to proceed to an election of a new mayor, *after the charter day has passed* without such election, where the former mayor having the power to do so holds over, and refuses to convoke an assembly[4] for that purpose, unless the charter restrains the right of electing to a particular time"; and "it will be granted for the election of bailiffs, chamberlains, coroners, and other annual officers, although not the chief officers of the corporation."

§ 1496 (839). **Same Subject; In this Country.** — So, in this country it has been decided that an election for municipal officers *may be held after the charter day*, and that a *mandamus* may be granted to compel the proper officers to give notice thereof.[5] And

382; Carlson *v.* People, 118 Ill. App. 592; People *v.* Doe, 109 N. Y. App. Div. 670. In *Kentucky, mandamus* is the proper remedy to prevent the entry upon record of a vote upon a "local option" law, if the act is unconstitutional. Gayle *v.* Owen County, 83 Ky. 61.

[1] Rex *v.* Cambridge, 4 Burr. 2008; Rex *v.* Tregony, 8 Mod. 111, 113; Rex *v.* Abington, 1 Ld. Raym. 561; Rex *v.* St. Martin, 1 T. R. 148; Rex *v.* Liverpool, 1 Barnard. 83; Rex *v.* Woodrow, 2 Term R. 732; Rex *v.* Scarborough, 2 Stra. 1180; Rex *v.* Leyland, 3 M. & S. 184; Rex *v.* Thetford, 8 East, 270; Rex *v.* Norwich, 1 B. & Ad. 310; Willc. 357, pl. 45; *Ib.* 361, pl. 56; Tapping on *Mandamus*, 165; Rex *v.* York, 4 T. R. 669; Stephens's *Nisi Prius*, 2293–2295; Rex *v.* Winchester, 7 A. & E. 215; Regina *v.* Pembroke (corporation of), 8 Dowl. P. C. 302; Regina *v.* Leeds, 7 A. & E. 963; Grant on Corp. 204, 208, 213, 219.

[2] Rex *v.* Bankes, 3 Burr. 1454; Rex *v.* Cambridge, 4 Burr. 2008, 2011; Rex *v.* Radford, 1 East, 80; Rex *v.* Truro, 3 B. & A. 592; Rex *v.* Derby, 7 A. & E. 419; Reg. *v.* Hiorns, *Ib.* 960; *Ib.* 966; Rex *v.* Colchester, 2 T. R. 259; *infra*, §§ 1499–1503; *post*, § 1554. Section cited and approved; People *v.* Brooklyn, 77 N. Y. 503.

[3] Willc. 357, pl. 45; *Ib.* 361, pl. 56; Rex *v.* Cambridge, 4 Burr. 2008, 2011; Rex *v.* Scarborough, 2 Stra. 1180; Rex *v.* Norwich, 1 B. & Ad. 310; Angell & Ames, § 700.

[4] As to Corporate Assembly, see *ante*, chap. xiii.

Where, "by the charter," the office of alderman becomes immediately vacant by his election and acceptance of a public office, he is neither an alderman *de facto* nor *de jure*, and is the duty of the common council to order a special election to fill the vacancy. If the officer acts as alderman the remedy is not by *quo warranto*, but by *mandamus* to compel the ordering of a special election. People *v.* Brooklyn, 77 N. Y. 503; People *v.* Nostrand, 46 N. Y. 375, 381; People *v.* Carrique, 2 Hill (N. Y.), 93; Lamb *v.* Lynd, 44 Pa. 336; State *v.* Rahway, 33 N. J. L. 110; Fish *v.* Weatherwax, 2 Johns. (N. Y.) 217.

If municipal corporations neglect to hold elections as empowered by the remedial statute of 2 Geo. I., chap. iv., by which they are authorized to supply the vacant offices of mayor, they may be compelled to fill them by *mandamus*. Rex *v.* Oxford, Cas. temp. Hardw. 178; Rex *v.* Cambridge, 4 Burr. 2008, 2011; Willc. 360.

As to right of *officer to hold over*, see authorities last cited, and also *ante*, chap. xi. § 409.

[5] People *v.* Fairbury, 51 Ill. 149; State *v.* Young, 6 S. Dak. 406; s. p.

the writ will lie *in the name of the State on the relation of a voter* to compel the municipal council to hold or appoint a *special election*, according to the charter, to fill a vacancy in their body, when this is a duty enjoined upon them; and to justify the writ there need not be a positive refusal; unreasonable delay, manifesting an intention not to perform the duty, is sufficient.[1] So where it is made by charter the duty of the select and common councils *to assemble in joint meeting* to appoint certain corporate officers, not elected by the people, and the time for the meeting is fixed by law or ordinance, it is not discretionary in one of these bodies to refuse to meet with the other, and if it does so refuse, its members may be compelled by *mandamus*.[2]

§ 1497 (840). **To canvass Votes.**— Municipal councils, as we have before seen, are often invested with the control of municipal elections, and are *made canvassers and judges of the result*, and they may be compelled to perform their duties in this respect by *mandamus*.[3]

State v. Smith, 22 Minn. 218. *Cornell*, J., says: "So far as relates to the time when such election [for city assessors] should be made, the statute is directory. The city council having neglected its duty at the proper time from whatever cause, the obligation still rested upon it to elect at the earliest opportunity." Citing the text. Court has discretion to issue *mandamus* compelling the election officers to *recanvass the votes*. People v. Way, 92 N. Y. App. Div. 82. *Quo warranto* refused against an alderman elected on a wrong day, no fraud being alleged. State v. Tolan, 33 N. J. L. 195; *ante*, § 409 *et seq.*; Tapping on *Mandamus*, 55; *post*, § 1562. *Mandamus* may issue to compel public officers to perform a public duty, although the time prescribed by the statute has passed, and if the public officer has been succeeded by another, it is the duty of the *successor* to obey the writ when required, which his predecessor omitted. Reg. v. Monmouth, L. R. 5 Q B. 251; Rochester v. Reg., 27 L. J. Q. B. 436; Cooley on Torts (4th Eng. ed.), 1057; *ante*, §§ 396, 409–413, 416; *post*, § 1546–1550.

[1] State v. Rahway, 33 N. J. L. 110; State v. New Orleans, 52 La. An. 104; *Vacancies in municipal offices*. *ante*, § 414. Text cited and approved. People v. Brooklyn, 77 N. Y. 503, 512.

[2] Lamb v. Lynd, 44 Pa. St. 336; s. c. Brightly's Election Cases, 624, and note. *Read*, J., concurred because this was a necessary result of Kerr v. Trego, 47 Pa. St. 292; s. c. Brightly's Election Cases, 632, where he dissented; *ante*, chap. xiii. § 531. Further, as to *contested election cases*, Brightly's Election Cases, 270, 455, 466, 656; *post*, chap. xxx., on *Quo Warranto*.

[3] *Ante*, chap. ix. § 200 *et seq.*; Lamb v. Lynd, Brightly's Election Cases, 624, 630, and note; s. c. 44 Pa. St. 336; Morris v. Glover, 121 Ga. 751; Patton v. People, 63 Ill. App. 617; Stearns v. State, 23 Okla. 462; 100 Pac. Rep. 909. *Mandamus* will lie to compel election convassers, whose duties are ministerial, to act, but not to control their judgment. Magee v. Calaveras County, 10 Cal. 376; State v. Marshall County, 7 Iowa, 186; State v. Bailey, 7 Iowa, 390; Rice v. Smith, 9 Iowa, 570; State v. Marston, 6 Kan. 524; People v. Ward, 62 N. Y. App. Div. 531; People v. Way (canvass of votes), 92 N. Y. App. Div. 82; People v. Hanes, 44 N. Y. Misc. 475; Morgan v. Wetzel County Ct., 53 W. Va. 372; *ante*, § 381, note; Moses on *Mandamus*, chap. xiii.; Brightly's Election Cases, 261, 300, 305, 423, 434.

It will also lie, upon the relation of any voter or taxpayer interested to compel an election officer *to announce the result of an election*. People v. Salomon, 46 Ill. 415; Sumner County

§ 1498 (841). **To take Municipal Office; Whether compellable to serve.** — In England, on the principle heretofore adverted to,[1] if a corporator, elected to a corporate office, neglect or refuse, without sufficient legal excuse, *to serve, he may be compelled by mandamus;* but it is doubtful, as before suggested, how far this doctrine is applicable in this country,[2] although the Supreme Court of Illinois has in one case applied the doctrine of the English courts and has held that a person who possesses the requisite qualifications and has been duly appointed to office may be compelled by mandamus to accept the same.[3]

High School *v.* Sumner County, 61 Kan. 796. So it will lie to a returning officer, board of examiners, or managers of an election or council, to compel them to *give a certificate of election* to the person elected. State *v.* Judge, 13 Ala. 805; Putnam *v.* Langley, 133 Mass. 204; Strong, Petitioner, 20 Pick. (Mass.) 484. *Mandamus* will not lie to compel the making of a certificate of election to one who does not possess the requisite qualifications to the office to which he was elected. Bolton *v.* People, 95 Ill. App. 285; O'Ferrall *v.* Colby, 2 Minn. 180; State *v.* Newman, 91 Mo. 445; State *v.* Moffitt, 5 Ohio, 356, 358, 362; Rex *v.* York, 4 T. R. 669.

Mandamus will not lie to command a board of canvassers to declare relator elected to an office, where it involves a question of eligibility, of which the board has no jurisdiction. People *v.* Cortlandt Board of Canvassers, 61 N. Y. Supp. 727. Such certificates are important, since they are *prima facie* evidence of title, though not conclusive in the trial of contested elections. Kerr *v.* Trego, 47 Pa. 292; s. c. Brightly's Election Cases, 632, 641, and note; Carpenter *v.* Ely, 4 Wis. 420; Brightly's Election Cases, 258, 314, 320, 435. So *mandamus* lies to a municipal corporation to compel it to act according to its duty upon the sufficiency of sureties offered by a person elected to a municipal office. *Ante*, § 395, note. *Mandamus* lies in favor of relators duly elected to a municipal office to compel the mayor or proper officer to administer the oath of office to them. Blake *v.* Ada County, 5 Idaho, 163; Heath, *In re*, 3 Hill (N. Y.), 42.

Mandamus issues to compel a proper execution of a purely ministerial duty by an election officer. State *v.* Livaudais, 48 La. An. 847. Title to office cannot be tried in a *mandamus* proceeding to compel the board of canvassers to reconvene and certify the votes received by each candidate. People *v.* Hamilton County, 75 N. Y. App. Div. 110. *Mandamus* to compel corporation to amove an officer. *Ante*, § 475, note. In the absence of any statutory provision giving authority therefor and making it the duty of the electing officers to reconvene and recount all the votes, the courts cannot compel a recount by *mandamus*. Hearst *v.* Woelper, 183 N. Y. 275. See also People *v.* Ammenwerth, 197 N. Y. 340, 342.

[1] *Ante*, § 223 and authorities cited; Douglass *v.* Essex County, 38 N. J. L. 214; Rex *v.* Bedford, 1 East, 80; Rex *v.* Leyland, 3 M. & S. 184; Willc. 367. When the writ lies to compel an officer to take upon himself the duties of his office. *Ante*, § 415; Tapping on *Mandamus*, 189.

[2] *Ante*, §§ 415, 418. Where the office of *governor* is vacant, and the president of the senate refuses to assume the same, *mandamus* will lie to compel him to do so. Attorney-General *v.* Taggart, 66 N. H. 362, 363.

[3] In People *v.* Williams, 145 Ill. 573, it appeared that the board of auditors of a town, acting under a peremptory *mandamus*, had audited and allowed the relator's claim for $45,050 as indebtedness owing by the town upon its bonds belonging to the relator, and had made a certificate thereof. The town clerk left the State, and it was impossible, by reason of his absence and the failure of the town board to appoint a successor, to take the necessary steps for the levy of a tax for the amount of the bonds. At the next election a town clerk was elected, but the person so elected neglected and refused to qualify. Thereafter various

1499 (842). **To compel Admission to Office.** — In appropriate s, *mandamus* will lie to compel the proper officers of a municicorporation *to admit to the possession of his place* one elected ny municipal or corporate office.[1] *Mandamus* is not considered, ngland, the proper remedy to try the right to a public or municioffice, and a *mandamus* to admit gives no title to the person itted, but it enables him to try or enforce his right; and if there ıother remedy open to the applicant, as, for instance, an inforion in the nature of *quo warranto* (which lies where the adverse nant or officer is in possession), a *mandamus* will not be granted. it will be granted, says Mr. Willcock, "where *quo warranto* not lie, although the office be already full, as otherwise in y cases the applicant would be without remedy."[2] In cases e *mandamus* lies, the applicant will be refused the writ unless ıows a *prima facie* title.[3]

1500 (843). **Same Subject; American Decisions.** — In this counhe same general principles are recognized, although there is, as

ent persons eligible to the office successively appointed, but all em neglected and refused to acand qualify. It was further that finally the town board apd the defendant, Williams, and d him of his appointment, but Williams had neglected and reto accept the office. The court following the doctrine of the h cases, that by the common is the duty of every person have requisite qualifications, elected pointed to a public municipal to accept the same, and granted *mus* to compel the defendant, ns, to accept office and act. It lso held that when the person or appointed has been duly d of his appointment and reo serve, no demand upon him to necessary before issuing a *man*, and that a statutory provision ng that any person who should to serve should forfeit the sum nty-five dollars, did not relieve rson who had been appointed for clerk from serving upon payof the penalty. This case has everal times cited in support of ctrine that it is the duty of the elected or appointed to accept t. See Nagle *v.* Wakey, 161 Ill. 92; s. c. 59 Ill. App. 198, 204; *v.* Chicago Election Com'rs, . 9; Anderson *v.* Schubert, 55 Ill. App. 227, 229; Neville *v.* Viner, 115 Ill. App. 364, 366; Earlsville *v.* Radley, 141 Ill. App. 359, 366; Hoy *v.* State, 168 Ind. 506; Ballinger *v.* McLaughlin, 22 S. Dak. 206; 116 N. W. Rep. 70. See also Johnson *v.* Grand Forks County, 16 N. Dak. 363; State *v.* Kitsap County, Super. Ct., 46 Wash. 616.

[1] State *v.* Rahway, 33 N. J. L. 110, 111; followed in McDermott *v.* Miller, 45 N. J. L. 251; Smith *v.* Eaton County, 56 Mich. 217; Willc. 368, pl. 74; Angell & Ames on Corp., § 703; Shaw *v.* Marshalltown, 131 Iowa, 128; State *v.* Kersten, 118 Wis. 287; People *v.* Ogden, 41 N. Y. Misc. 246; Kline *v.* McKelvey, 57 W. Va. 29. The writ was refused when applied for to compel admission to an office pending proceedings in *quo warranto* between the same parties, though on appeal. Hannon *v.* Halifax County, 89 N. Car. 123.

[2] Regina *v.* Leeds, 11 A. & E. 512; Rex *v.* Winchester, 7 A. & E. 215; Rex *v.* Sawyer, 10 B. & C. 486; Regina *v.* Slatter, 11 A. & E. 502; Regina *v.* Derby Bor., 7 A. & E. 419; Same *v.* Hiorns, *Ib.* 960; Frost *v.* Chester, 5 E. & B. 531; Willc. 373, pl. 87. The *requisites of returns* to writs of *mandamus to admit* are stated by Mr. *Willcock*, at pp. 413–417, and by Angell & Ames, § 722.

[3] Willc. 368, pl. 74; Cruse *v.* State, 52 Neb. 831; Searing *v.* Clark, 69 N. J. L. 609.

we shall see, some difference of opinion as to the scope of the remedy by *mandamus* where there is an officer or adverse claimant in possession. Thus *mandamus* lies to compel the city council *to admit a councilman* duly elected to that office.[1] But on the ground that *mandamus* is not a proper proceeding to try the right to a public office, the court declined to make an order to show cause, in a case where the relator claimed to have been elected by the common council to the office of assessor, and also claimed that the council wrongfully deprived him of his office by refusing to count the vote of one of the members in his favor.[2]

§ 1501 (844). **Respective Functions of Quo Warranto and Mandamus.** — The adjudged cases in this country agree that *quo warranto*, or an information or proceeding in the nature of a *quo warranto*, is the appropriate remedy, when not changed by charter or statute, for an *usurpation of a municipal franchise*, as well as for unauthorized usurpations and *intrusions into municipal offices*.[3]

[1] State *v.* Rahway, 33 N. J. L. 110, 111; Ellison *v.* Raleigh, 89 N. Car. 125; Doyle *v.* Raleigh, 89 N. Car. 133; Commonwealth *v.* Fleming, 23 Pa. Super. Ct. 404.

[2] People *v.* Detroit, 18 Mich. 338. See also Cripple Creek *v.* People, 19 Colo. App. 399; People *v.* Greene, 95 N. Y. App. Div. 397; La Chance *v.* Mackinac County Board of Canvassers, 157 Mich. 679. *Mandamus* and *quo warranto* are sometimes concurrent remedies to try the right of contending parties to an office. State *v.* Falconer, 44 Ala. 696; State *v.* Palmer, 10 Neb. 203. See also Reid, *In re*, 50 Ala. 439. The *right to an office* cannot be tried in a proceeding by *mandamus* to compel the payment of salary to one who claims the office, or to compel another officer to perform an official duty in favor of one who claims an office. State *v.* John, 81 Mo. 13. See also State *v.* Newark, 6 Ohio N. P. 523; State *v.* Daggett, 28 Wash. 1.

[3] Sawyer, *Re*, 124 U. S. 200; Cochran *v.* McCleary, 22 Iowa, 75; People *v.* Matteson, 17 Ill. 167; Reynolds *v.* Baldwin, 1 La. An. 162, 165; State *v.* Ramos, 10 La. An. 420; State *v.* Haverly, 62 Neb. 767; Maverick Oil Co. *v.* Hanson, 67 N. H. 203; Worthley *v.* Steen, 43 N. J. L. 542; Fort *v.* Howell, 58 N. J. L. 541; People *v.* Goetting, 133 N. Y. 569; People *v.* Yonkers Police Com'rs, 174 N. Y. 450; s. c. 79 N. Y. App. Div. 82; People *v.* Stevens, 5 Hill (N. Y.), 616; People *v.* Kings County, 89 Hun (N. Y.), 38; Hullman *v.* Honcomp, 5 Ohio St. 237; Brennan *v.* Bradshaw, 53 Tex. 330; *ante*, § 514. *Legality of election* and title to office cannot [ordinarily] be tested by *bill in chancery*. *Re* Sawyer, 124 U. S. 200, where *Gray*, J., considers at large the nature and extent of the jurisdiction in equity, where not enlarged by statute. But see, in exceptional instances, Kerr *v.* Trego, 47 Pa. St. 292; cited *ante*, § 517; s. c. Brightly's Election Cases, 632. *Remedy by injunction*. Brightly's Election Cases, 573, 623, and cases cited; *infra*, § 1504, note.

The title to office must in general be tested on *quo warranto*, and cannot be questioned collaterally. Bonner *v.* State, 7 Ga. 473, and cases cited; People *v.* Fletcher, 3 Ill. 487; St. Louis County Ct. *v.* Sparks, 10 Mo. 11[illegible]; Winston *v.* Moseley, 35 Mo. 146; State *v.* Smith, 49 Neb. 755; Kokes *v.* State, 55 Neb. 691; State *v.* Hyland, 75 Ne[illegible] 767; People *v.* Brush, 146 N. Y. [illegible]; People *v.* Yonkers Police Com'rs, 1[illegible] N. Y. 450; People *v.* Rickerson, [illegible] N. Y. App. Div. 588; People *v.* M[illegible] Adoo, 110 N. Y. App. Div. 432; People *v.* Kip, 4 Cow. (N. Y.) 383; Lewis *v.* Oliver, 4 Abb. Pr. (N. Y.) 121; Caffrey *v.* Caffrey, 28 Pa. Super. Ct. 22; Briggs *v.* Carr, 27 R. I. 477; Lynde *v.* Dibble, 19 Wash. 328. A petition which is simply

When no special tribunal, with exclusive and final power to settle contested titles to office, is provided, the regular method, unless it is otherwise provided by statute, is by *quo warranto;*[1] and the instances are exceptional when this may be done on *mandamus*. If another is commissioned, and in actual discharge of the duties of the office, an adverse claimant to the office is not entitled to a *mandamus*, but must resort to *quo warranto;* it was admitted, however, that where the office is attempted to be held under an appointment which is merely colorable and void, *mandamus* would lie.[2] In Texas it is held that *mandamus* will lie to recover or to be admitted to the possession of an office to which the claimant has been elected and commissioned.[3] In Georgia, and in some of the other States, the English rule is maintained, namely, that where a person is an officer *de facto*, — that is, is in the exercise of the duties of an office under a *prima facie* right or color of title, — the remedy to admit another having a lawful claim is not by *mandamus*, but by an information in the nature of a *quo warranto*.[4]

or *mandamus* to compel a mayor to perform the ministerial duty of administering the oath of office to one who has been duly elected is not open to the objection of being an attempt to try the right to office by *mandamus*. Quey *v.* Jones, 140 Ala. 479. In *North Carolina* the remedy to try title to office is *quo warranto*. Howerton *v.* State, 66 N. Car. 231, and note; *ante*, chap. xi. § 379; *ante*, chap. xiii. In *Pennsylvania*, *quo warranto* lies to try the right to all offices, military as well as civil. Commonwealth *v.* Small, 27 Pa. St. 31; Field *v.* Commonwealth, 7 Pa. St. 478. So in *Alabama* and *Connecticut*. Harris, *In re*, 52 Ala. 87; Duane *v.* McDonald, 41 Conn. 517.

[1] *Ante*, chap. xi. §§ 379–382; People *v.* Detroit, 18 Mich. 338; State *v.* Hamil, 8 Ala. 107; People *v.* Hinsdale, 43 N. Y. Misc. 182.

[2] State *v.* Dunn, 1 Minor (Ala.), 46; Goodwin *v.* Sherer, 145 Ala. 501; State *v.* Thompson, 36 Mo. 70, *per Wagner*, J.; People *v.* Scrugham, 20 Barb. (N. Y.) 402; *post*, § 1554; Eldodt *v.* Territory, 8 N. Mex. 141; People *v.* Scannel, 22 N. Y. Misc. 298; People *v.* Dalton, 34 N. Y. App. Div. 6, aff'd 158 N. Y. 54; State *v.* Callahan, 4 N. Dak. 481; State *v.* Archibald, 5 N. Dak. 359; State *v.* South Milwaukee Bd. of Education, 100 Wis. 455.

[3] Lindsey *v.* Luckett, 20 Tex. 516. It was held however in another case, that when the authorities of a city threatened to unlawfully appoint a successor of an officer, and to dispossess him of his office, his remedy was not *mandamus*, but injunction. Callaghan *v.* McGown (Tex. Civ. App.), 90 S. W. Rep. 319.

[4] State *v.* Dunn, 1 Minor (Ala.), 46; Bonner *v.* State, 7 Ga. 473; Ashwell *v.* Bullock, 122 Mich. 620; St. Louis County *v.* Sparks, 10 Mo. 117; Casey *v.* Chase, 64 N. J. L. 207; People *v.* New York, 3 Johns Cas. (N. Y.) 79; State *v.* Deliesseline, 1 McCord (S. Car.), 52; Rex *v.* Colchester, 2 T. R. 259.

"*Mandamus* will not be issued to admit a person to an office while another is in under color of right." State *v.* Thompson, 36 Mo. 70, *per Wagner*, J. *Mandamus* will not lie to turn out one officer and to admit another in his place. People *v.* Matteson, 17 Ill. 167; People *v.* Head, 25 Ill. 325; People *v.* Hilliard, 29 Ill. 413. But a groundless, colorless claim to an office, or a pretended intrusion into or retention of it, will not, as against a person duly elected and acting, be sufficient to drive the informant to a *quo warranto*, and he may have a *mandamus* to compel such person, though he was the informant's predecessor in office, to deliver up the books and property belonging to the office. People *v.* Kilduff, 15 Ill. 492; Rex *v.* Cambridge, 4 Burr. 2008; Boffing (al.

§ 1502 (845). **Maryland Rule; Title to Office tried in Mandamus.** — But, in a case in Maryland,[1] in which the claimant sought not only the removal of the incumbent, but the possession of the office for himself, the objection was made that *quo warranto*, and not *mandamus*, was the proper remedy to try the title to the office; the Court of Appeals held, however, that the objection was not well taken, and that the plaintiff need not resort to *quo warranto* as preliminary to *mandamus*, as this might prove inadequate, by reason of the delay it would occasion. The court was of opinion that *mandamus* to compel the defendant to surrender to the petitioner the office was the only complete remedy, since "under the *quo warranto* information the judgment might amove the occupant, but would not install the claimant."[2] And the court further held that *mandamus* might issue although the office was filled by the defendant, who claimed title. It admitted the conflict of decisions on this point, but regarded *mandamus* as particularly applicable to the cause before the court.

§ 1503 (846). **Same Subject.** — Where the subject is not controlled by legislation there is much *to recommend the views of the Maryland court* in the case just referred to, since the delays of resorting to *quo warranto* are such, in consequence of the short terms of our elective officers, as frequently to amount to a denial of justice. Before the *quo warranto* proceedings can be determined, the term of the claimant often expires, and a judgment in his favor is a barren victory.[3] It is agreed that where, for any

Tintagel) Bor., *In re*, 2 Stra. 1003; Rex *v.* Winchester, 7 A. & E. 215. When *mandamus* is the proper remedy to determine the right to an office. Grant on Corp. 216; *post*, §§ 1553, 1554.

Mandamus will not be issued to compel a municipal council to do an act which they have no legal duty to perform; as, for example, to direct the treasurer to retain a portion of the school fund, and apply it to the payment of certain special assessments against school property. Union Board of Education *v.* Union, 52 N. J. L. 69. But the treasurer having so applied a portion of the fund against the objection of the board of education, a *mandamus* will lie to compel him to restore it to the school account. *Ib.* Where public officers at the expiration of their term refuse to deliver property pertaining to the office to their successors, *mandamus* will lie to compel such delivery, though in determining its possession the title to the office is incidentally questioned. Sinclair *v.* Young, 100 Va. 284.

[1] Harwood *v.* Marshall, 9 Md. 83.

[2] *Ib.*; citing Strong's Case, 20 Pick. (Mass.) 484, 497; Dew's Case, 3 Hen. & M. (Va.) 1, 23. See also, in *Massachusetts*, Howard *v.* Gage, 6 Mass. 462.

[3] Where a judgment of ouster in *quo warranto* has been rendered in an inferior court and the defendant has duly appealed and filed the necessary *supersedeas* bond, *mandamus* from the superior court to the inferior court to execute the judgment of ouster will not be awarded, although the term of office will expire before the appeal can be regularly heard in the appellate tribunal. United States *v.* Addison, 22 How. (U. S.) 174. If the appellant fails to prosecute his appeal with effect, it is intimated by Mr. Justice *McLean*

reason, *quo warranto* will not lie, and there is no other adequate remedy provided, the right to a disputed office may be settled on *mandamus*.[1] Looking at the question in view of our short official terms, we should say that where the effect of compelling a resort to *quo warranto* would be unreasonably to delay the decision of the disputed right (which concerns not only the individuals, but the public), the court would be justified in interfering by *mandamus*, so far, at least, as to see that the incumbent is actually a *bona fide* possessor of the place, and that there is a real dispute, and fair doubt as to which party has the legal title.[2]

§ 1504 (847). **To restore to Municipal Office.** — The power of municipal corporations *to amove officers* has been treated in a former chapter;[3] and the corporation, as we have seen, may in some cases be compelled by *mandamus* to exercise this power.[4] Where a municipal officer or member of a municipal council has been illegally suspended or illegally removed, he is, in general, entitled to a *mandamus* to be restored.[5] The doctrine has been sanctioned, that where an officer of a corporation has been *irregularly* removed, yet

hat the *supersedeas* bond would be vailable in such a case to the appellee r defendant in error as an indemnity. b. 185; *infra*, § 1546.

[1] Willc. 373, pl. 87; People *v.* tevens, 5 Hill (N. Y.), 616.

[2] *Post*, chap. xxx. When *conflicting aims to office* may be settled on *mandamus*, — discussed, but not determined, People *v.* Stevens, 5 Hill (N. Y.), 616; e Rex *v.* Cambridge, 4 Burr. 2008; ople *v.* Scrugham, 20 Barb. (N. Y.) 2; People *v.* Kilduff, 15 Ill. 492; nton *v.* Wilson, 4 Tex. 400; Lindsey Luckett, 20 Tex. 516; Diggs, *In re*, Ala. 381; Angell & Ames, § 706. here a municipal charter provided the election of a member of the ard of education by the mayor and lermen by ballot, and no other official s directed to declare or certify such ction, and no provision was made for ontest, it was held in *Tennessee* that validity of such an election could be termined by *mandamus*. Lawrence Ingersoll, 88 Tenn. 52. In Heath, *re*, 3 Hill (N. Y.), 42, the question ether the relators were duly elected municipal offices was incidentally ermined on *mandamus*, but the question as to the "proper remedy was not de." People *v.* Stevens, 5 Hill (N. , 616, *per Bronson*, J. But where *mandamus* is resorted to in order to try which of two persons has been elected to an office, and indeed in every such proceeding except *quo warranto*, the regular determination of the board of canvassers is conclusive. People *v.* Stevens, 5 Hill (N. Y.), 616, where the court refused the application of relator to compel, by *mandamus*, his predecessor in office to deliver books and papers, because the relator's title to the office was not clear. People *v.* Vail, 20 Wend. (N. Y.) 12, 14; *post*, § 1554. If there be any doubt as to the validity of an election, the court will not interfere by *mandamus* in the first instance, but will put the parties to their remedy by *quo warranto*. Commonwealth *v.* Philadelphia County, 5 Rawle (Pa.), 75.

[3] *Ante*, chap. xii. §§ 460–485; Willc. 375; Grant on Corp. 243, 416.

[4] *Ante*, § 471, note; Delahanty *v.* Warner, 75 Ill. 185.

[5] *Ante*, § 471, note; § 482; Duffield's Case, Bright. Elec. Cas. 646; Maxwell *v.* San Francisco, 139 Cal. 229; Thompson *v.* Troup, 74 Conn. 121; State *v.* Teasdale, 21 Fla. 652; Scott *v.* State, 43 Fla. 396; Etzler *v.* Brown (Fla.), 50 So. Rep. 416; Akerman *v.* Cartersville School Com'rs, 118 Ga. 334; Delahanty *v.* Warner, 75 Ill. 185; Chicago *v.* People, 210 Ill. 84; Marshall

if the court see good cause for the removal, that is, if they see that by regular proceedings another amotion for the same cause would follow, and that it is the *duty* of the corporation to exercise the power to amove, the peremptory writ to compel his restoration may, in the discretion of the court, be refused.[1]

§ 1505 (848). **To enforce Delivery and Inspection of Books and Papers.** — *Mandamus*, as we have before seen, is a proper remedy

v. Illinois State Reformatory, 103 Ill. App. 65; Metsker *v.* Neally, 41 Kan. 122; State *v.* New Orleans, 107 La. 632; Miles *v.* Stevenson, 80 Md. 358; Lattime *v.* Hunt, 196 Mass. 261; State *v.* Miles, 210 Mo. 127; State *v.* Kansas City Police Com'rs, 80 Mo. App. 206; State *v.* Jersey City, 25 N. J. L. 536 (suspension of councilman); State *v.* Paterson, 35 N. J. L. 190 (city treasurer); People *v.* Scannell, 172 N. Y. 316; People *v.* Dalton, 27 N. Y. Misc. 667; People *v.* Kearney, 44 N. Y. App. Div. 449, aff'd 161 N. Y. 648; People *v.* Hamilton, 98 N. Y. App. Div. 59; People *v.* McAdoo, 98 N. Y. App. Div. 312; People *v.* Hayes, 106 N. Y. App. Div. 563; Shane *v.* New York City, 135 N. Y. App. Div. 218; State *v.* Baldwin, 77 Ohio St. 532; People *v.* Bingham, 135 N. Y. App. Div. 813; Commonwealth *v.* Gibbons, 196 Pa. 97; Pratt *v.* Police & Fire Com'rs, 15 Utah, 1; Dew *v.* Judges, 3 Hen. & M. (Va.) 1; Schmulbach *v.* Speidel, 50 W. Va. 553; State *v.* Watertown, 9 Wis. 254; Mayor of Durham's Case, 1 Sid. 33; Bac. Abr., title "*Mandamus*"; Grant on Corp. 247–250; Willc. 378.

Where county commissioners removed a clerk, the court ordered a peremptory *mandamus* to restore the party removed to his office, because the record did not show the ground of removal. Street *v.* Gallatin County, 1 Ill. 25. Where a corporate body strikes off the name of a member without notice to him, a *mandamus* to restore him will be granted. Delacy *v.* Neuse River Nav. Co., 1 Hawks (N. Car.), 274; Duffield's Case, Bright. Elec. Cas. 646. *Mandamus* will not lie to restore one to an office to which he is not entitled, though he may have been illegally removed. People *v.* Metropolitan Police Board, 26 N. Y. 316; Major *v.* Randolph, 4 Watts & Serg. (Pa.) 514. Forasmuch as an officer unlawfully removed has a remedy by *quo warranto* or by *mandamus* to restore, when either of these remedies is proper, *a city officer cannot resort to equity* to enjoin the corporate authorities from unlawfully removing him and appointing a successor. Delahanty *v.* Warner, 75 Ill. 185 (street commissioner); *supra*, § 1501, note. Index, tit. *Equity, Injunction.*

Mandamus will lie against the *civil service commissioners* to compel them to replace on the eligible list a name which they have unlawfully removed therefrom. People *v.* Cobb, 13 N. Y. App. Div. 56. The fact that a municipal office to which a veteran is entitled has been filled by another is no defence to a *mandamus* proceeding by the veteran to enforce his right thereto. People *v.* Scannell, 63 N. Y. App. Div. 243. In *New York*, the rule that the title to an office will not be tried by *mandamus*, but the person out of possession will be left to his remedy by *quo warranto*, applies only to public offices, and therefore *mandamus* is the proper remedy for clerks or employees who are unlawfully removed from their positions by superior authority. People *v.* Sutton, 88 Hun (N. Y.), 173.

[1] Rex *v.* Axbridge, 2 Cowper, 523; Rex *v.* London, 2 T. R. 182, *per Ashhurst*, J.; Rex *v.* Bristol, 1 D. & R. 389; s. c. 5 B. & Ald. 731; Paine, *In re*, 1 Hill (N. Y.), 665, 667, *per Cowen*, J.; Rex *v.* Bank, 2 B. & Ald. 620; People *v.* Chicago, 99 Ill. App. 489. See People *v.* McAdoo, 110 N. Y. App. Div. 894; *ante*, § 429, note; § 481. Mr. *Willcock* (Munic. Corp. 379, pl. 100) stated the doctrine thus: A peremptory *mandamus* to be restored "will not be granted to a public officer who admits that he was justly but irregularly removed"; citing Rex *v.* Axbridge, 2 Cowper, 523. See also Rex *v.* Campion, 1 Sid. 14; Rex *v.* Oxford, 2 Salk. 428, 429; Rex *v.* Slatford, 5 Mod. 316; Reg. *v.* Ipswich, 2 Ld. Raym. 1232, 1240.

Requisites of returns to a mandamus to restore. Willc. 417–424; Angell & Ames, §§ 723–725, 729.

r the duly elected officer of a municipal corporation to obtain ssession of the *seal, books, papers, and records* appertaining to ch office, from his predecessor;[1] but, as elsewhere stated, the urts will not, in general, try by *mandamus* whether one person entitled to an office actually filled by another under commission color of right.[2] In this country, the records, books, and by-laws municipal corporations are of a public nature, and if such a corration should refuse *to give inspection* thereof to any person havg an interest therein, or, perhaps, for any proper purpose to any habitant of the corporation, whether he had any special or prive interest or not, a writ of *mandamus* will lie to command the rporation to allow such inspection, and copies to be taken, under asonable precautions to secure the safety of the originals.[3]

§ 1506 (849). **To enforce Duties towards Creditors.** — *Mandamus* one of the principal remedies by which municipal and public porations are compelled to *perform their duties towards their ditors*. The rightful authority of the legislature over these corations is such that it may require them to levy a tax to pay ditors, and obedience to such requirement may be enforced by *ndamus*.[4] The power of municipal corporations to make con-

Ante, § 559; Tapping on *Manda-*, 50, 94; 3 Black. Com. 110; ole *v.* Kilduff, 15 Ill. 492; Frisbie Clarkville, 78 Ind. 269; State *v.* ero, 122 La. 885; Cecil County *v.* ks, 80 Md. 321; Bates *v.* Plymouth, ray (Mass.), 163; State *v.* Hyland, Neb. 767; Cameron *v.* Parker, 2 . 277; Wadsworth *v.* Reel, 15 Pa. St. R. 440; Sinclair *v.* Young, 100 284; State *v.* Oates, 86 Wis. 634; *v.* Buller, 8 East, 388; Rex *v.* ins, 1 Q. B. 161; Rex *v.* Greene, & E. 549; *post*, § 1562.

People *v.* Head, 25 Ill. 325; People lliard, 29 Ill. 413; *supra*, §§ 1499–; Tapping on *Mandamus*, 27, 28; *v.* Pitot, 21 La. An. 336; Grant Corp. 216, and authorities cited. State *v.* May, 106 Mo. 488. Lies st *mere usurpers*, without color of . Kimball *v.* Lamprey, 19 N. H.

Ante, § 560. *Further, as to inspec-* 1 Greenl. Ev. §§ 471–478; Angell nes, §§ 707; Tapping on *Manda-* 52, 95; Rex *v.* Newcastle, 2 Stra. Rex *v.* Babb, 3 T. R. 579, Rex *v.* Shelley, *Ib.* 142; Rex *v.* , 10 East, 235; Rex *v.* Tower, 4 M. & S. 162; State *v.* King, 154 Ind. 621; Clement *v.* Graham, 78 Vt. 290; Field *v.* Manistee Water Com'rs, 156 Mich. 186. *Mandamus* will lie to compel an officer to deliver up property of the State held by him without any right or authority of law. State *v.* Bacon, 6 Neb. 286. It will also lie to compel the custodian of registration lists, poll books, &c., to grant an inspection of them to one who is interested in enforcing a public or private right. State *v.* Hoblitzelle, 85 Mo. 620.

[4] Commonwealth *v.* Pittsburgh, 34 Pa. St. 496; Meriwether *v.* Garrett, 102 U. S. 472; Graham *v.* Folsom (a striking case), 200 U. S. 248, 252; *infra*, § 1509; Santa Fé County *v.* Coler, 215 U. S. 296; United States *v.* Saunders, 124 Fed. Rep. 124, 128; Meyer *v.* Brown, 65 Cal. 583; Shelley *v.* St. Charles County, 30 Fed. Rep. 603; Munday *v.* Rahway, 43 N. J. L. 338; Lilly *v.* Taylor, 88 N. Car. 489; Bloomfield *v.* Charter Oak Bank, 121 U. S. 121. In the *New England States* judgments against municipalities are not enforced by *mandamus*, but in a mode peculiar to those States. By the common law of the New England States, derived from

tracts and to create liabilities has been before considered,[1] and this authority imposes the duty of providing for the payment of obligations and liabilities in the special mode prescribed by law, and if no such mode is prescribed, then by the levy and collection of taxes under the provisions of the charter or other legislative act.[2] Whether the duty to provide for the payment of the liabilities of the corporation be specially enjoined, or whether it results from the general powers and nature of the corporation, it may, equally, in all proper cases, be enforced by *mandamus*.[3]

immemorial usage, the estate of any inhabitant of a county, town, territorial parish, or school district, is liable to be taken on execution on a judgment against the corporation. 5 Dane Ab. 158; Hawkes *v.* Kennebec County, 7 Mass. 461, 463; Chase *v.* Merrimack Bank, 19 Pick. (Mass.) 564, 569; Gaskill *v.* Dudley, 6 Met. (Mass.) 546. "In *Connecticut*, as in *Massachusetts* and *Maine*, by common law or immemorial usage, the property of any inhabitant may be taken on execution upon a judgment against the town." *Per Gray*, J., in Bloomfield *v.* Charter Oak Bank, 121 U. S. 121; Eames *v.* Savage, 77 Me. 212; Beardsley *v.* Smith, 16 Conn. 368. In *Massachusetts*, payment of such a judgment has never been compelled by *mandamus* against the corporation, as in other parts of the United States. *Per Gray*, C. J., Hill *v.* Boston, 122 Mass. 344; *ante*, § 992; *post*, § 1639, note; Newman *v.* Scott County, 5 Sneed (Tenn.), 695; *ante*, chap. iv. §§ 105, 106, 113; Darlington *v.* New York, 31 N. Y. 164; Commonwealth *v.* Allegheny County, 37 Pa. 277; Bassett *v.* Barbin, 11 La. An. 672; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535; text approved, Brown *v.* Gates, 15 W. Va. 131; *supra*, § 1482; *post*, § 1639, note.

Where there is a valid contract to receive *coupons in payment for taxes* this duty may in proper cases be enforced by *mandamus*. Poindexter *v.* Greenhow, 114 U. S. 270; McGahey *v.* Virginia, 135 U. S. 662; McCullough *v.* Virginia, 172 U. S. 102; Royall *v.* Virginia, 121 U. S. 102. As to statutory or contract right to pay taxes in warrants of the municipality, see *ante*, § 863.

[1] *Ante*, chap. xviii., on Contracts; chap. xx., on Municipal Bonds; *post*, chap. xxxii.

[2] Commonwealth *v.* Pittsburgh, 34 Pa. 496, 510; Commonwealth *v.* Allegheny County, 37 Pa. 277. In this case, *Thompson*, J., says: "The authority to create a debt implies an obligation to pay it, and where no special mode is provided, it is implied that it is to be done in the ordinary way, by the levy and collection of taxes." 37 Pa. St. 290; s. p. United States *v.* New Orleans, 98 U. S. 381; United States *v.* New Orleans, 17 Fed. Rep. 483; compare Knox *v.* Baton Rouge, 36 La. An. 437; and see Ralls County *v.* United States, 105 U. S. 733; Graham *v.* Folsom, 200 U. S. 248, 252; United States *v.* Saunders, 124 Fed. Rep. 124, 128. Where power to levy taxes for general purposes was expressly limited, an authority to contract debts beyond that amount for special purposes was held not to imply an authority to levy taxes to pay such special debts. State *v.* Guttenberg, 39 N. J. L. 660; text approved, Brown *v.* Gates, 15 W. Va. 131. See *ante*, chap. on Taxation; Hasbrouck *v.* Milwaukee, 25 Wis. 122. See Macon County Case, 99 U. S. 582, referred to below; *ante*, §§ 1402, 1482; *post*, § 1508 *et seq.*

[3] See cases cited in last note; also Young *v.* Clarendon, 132 U. S. 340; Santa Fé County *v.* Coler, 215 U. S. 296, aff'g 14 N. Mex. 134; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535; Galena *v.* Amy, 5 Wall. (U. S.) 705; Walkley *v.* Muscatine, 6 Wall. (U. S.) 481; Butz *v.* Muscatine, 8 Wall. (U. S.) 575; Davenport *v.* Lord, 9 Wall. (U. S.) 409 (distinguished Supervisors *v.* United States, 18 Wall. (U. S.) 71); Heine *v.* Levee Com'rs, 19 Wall. (U. S.) 655; Rees *v.* Watertown, 19 Wall. (U.S.) 107; *ante*, § 1482; United States *v.* Saunders, 124 Fed. Rep. 124, 128; Kennedy *v.* Sacramento, 19 Fed. Rep. 580; Lake County *v.* Schradsky, 43 Colo. 84; Columbia County *v.* King, 13 Fla. 451; Brown *v.* Crego, 32 Iowa, 498; Maddox *v.* Graham, 2 Met. (Ky.) 56; State *v.* Burbank, 22 La. An.

§ 1507 (850). Creditor sometimes required to Recover Judgment before being entitled to a Mandamus. — We have seen that it is a

318; Lexington *v.* Mulliken, 7 Gray (Mass.), 280; McKillop *v.* Cheboygan County, 116 Mich. 614; State *v.* Holgate, 107 Minn. 71; Kelly *v.* Wimberly, 61 Miss. 548; Flagg *v.* Palmyra, 33 Mo. 440; State *v.* Buffalo County, 6 Neb. 454; Holroyd *v.* Indian Lake, 180 N. Y. 318; Harrison *v.* New Brighton, 110 N. Y. App. Div. 267; Peagram *v.* Cleaveland County, 64 N. Car. 557; Hawley *v.* Fayetteville, 82 N. Car. 22; Pitt County *v.* McDonald, 148 N. Car. 125; Commonwealth *v.* Allegheny County, 32 Pa. 218; Commonwealth *v.* Perkins, 43 Pa. 400; Douglas *v.* McLean, 25 Pa. Super. Ct. 9, quoting text; Padgett *v.* McAlhany, 53 S. Car. 139; Waldron *v.* Snohomish, 41 Wash. 566; Brown *v.* Gates, 15 W. Va. 131, approving text; Soutter *v.* Madison, 15 Wis. 30; State *v.* Milwaukee, 20 Wis. 87; State *v.* Milwaukee, 25 Wis. 122.

Form of alternative writ in favor of creditor. Commonwealth *v.* Pittsburgh, 34 Pa. 496.

In *Mississippi*, *mandamus* is the proper remedy of the creditor to compel the county board of police *to proceed to audit the claim*, and when audited the party is entitled to a county warrant on the treasurer, and if there is no money in the treasury, *mandamus* will lie to compel the board to levy a tax to pay the warrant. Attala County *v.* Grant, 17 Miss. 77; Carroll *v.* Tishamingo County, 28 Miss. 38; Klein *v.* Warren County, 51 Miss. 578; Klein *v.* Smith County, 54 Miss. 254; Madison County *v.* Alexander, Walker (Miss.), Rep. 523.

In *Tennessee:* Newman *v.* Scott County, 1 Heisk. (Tenn.) 787.

In *Arkansas:* Gunn's Adm. *v.* Pulaski County, 3 Ark. 427; Vance *v.* Little Rock, 30 Ark. 435.

In *California*, where a money judgment is recovered against a county, no execution can issue; and the only remedy is to present it to the board of supervisors for allowance as an audited claim, within the time prescribed by law; and if the board refuse to perform its duty by allowing it as such, it may be compelled to do so by *mandamus*. Alden *v.* Alameda County, 43 Cal. 270.

In *New Jersey*, *mandamus* is generally a proper remedy to enforce the levy of taxes for the payment of judgments against municipal corporations, when the ordinary process of execution is inadequate. State *v.* Guttenberg, 39 N. J. L. 660. In this case the court say: "Every lawful tax rests upon legislative enactment, and subordinate bodies that seek to impose such a burden upon the citizen must be able to show a power so to do, derived from positive statute. The grant relied on must also be evident and unmistakable. It is not, perhaps, requisite that express authority to levy taxes for every specific purpose for which they are imposed should be produced. The power, or more guardedly speaking, an extension of power, might, under certain circumstances, be implied. For example, if a municipality, restricted as to the purposes for which it might incur debts or expend moneys, had, under its charter, unlimited authority to impose taxes for these purposes, then a subsequent extension of its power of expenditure, or of contracting obligations, would usually, by implication, enlarge also its power of taxation, so as to embrace these new purposes. Such an inference would arise, because *taxation furnishes the common source of revenue for these public bodies;* and when the legislature authorized increased expenditure on the part of such a body, whose power to tax had been limited only by its power to spend, it would be reasonable to suppose that the use of this sole power that it possessed to raise the means for its expenditures was also intended. As, however, the power of taxation is a high prerogative of sovereignty, and one whose exercise directly divests the citizen of his property, its grant by implication is but little favored, even as compared with other implied grants; and the inference of its existence, in any case, is easily rebutted. An authority to wield it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor deduced from any considerations of convenience or advantage. Nothing short of express words or necessary implication will answer the purpose. It should never be exercised where the right is doubtful."

In *Wisconsin*, by construction of the

general rule, relating to the writ under consideration, that it will not lie if there be a plain and complete remedy by the ordinary

statute, *judgments against incorporated cities are to be enforced*, not by execution, but the amount is to be made part of the next tax roll, and collected as other taxes. Crane *v.* Fond du Lac, 16 Wis. 196. But judgments in that State may be enforced by *mandamus* to levy and collect the requisite tax to pay them. State *v.* Milwaukee, 20 Wis. 87; State *v.* Beloit, 20 Wis. 79; State *v.* Madison, 15 Wis. 30.

In *Iowa*, the remedy of a creditor against county corporations (State *v.* Floyd County, 5 Iowa, 380) and upon ordinary municipal indebtedness *is by suit, and not by mandamus*, where the indebtedness is in the original form, as a simple contract debt. Coy *v.* Lyons, 17 Iowa, 1; State *v.* Davenport, 12 Iowa, 335. The remedy of one who has paid a tax in aid of a railroad, which is afterwards declared illegal, is by *mandamus* against the proper officers to compel them to return it. Eyerly *v.* Jasper County, 72 Iowa, 149. Compare Barnes *v.* Marshall County, 56 Iowa, 20.

In *Alabama:* Miller *v.* McWilliams, 50 Ala. 427; Elmore County *v.* Long, 52 Ala. 277. Nor can a suit be maintained against a county on a claim which has been audited and allowed without reduction. The only remedy is by *mandamus* to compel the levy of such tax as the law permits to be levied, to pay the claim (overruling Randolph County *v.* Hutchins, 46 Ala. 397), Covington County *v.* Dunklin, 52 Ala. 28. See also Shinbone *v.* Randolph County, 56 Ala. 183.

In *Pennsylvania*, it is held that *an ordinary execution cannot be issued against a municipal corporation;* that none of the property of such a corporation, whether real or personal, "necessary for governmental purposes," can be seized or sold thereon; and that the proper remedy for the judgment creditor is the *mandamus execution* provided by statute, which commands the corporation treasurer to pay the amount of the judgment out of any unappropriated moneys in his hands, and which must be obeyed by the officer whether the council have made an appropriation therefor or not. These writs have priority in the order in which they are served. Monaghan *v.* Philadelphia, 28 Pa. 207; *In re* Marcy Tp., 10 Kulp. (Pa.) 43; Commonwealth *v.* Pittsburgh, 88 Pa. 66; *infra*, § 1508, note. And in the same State, it has been held that an action would not lie upon the resolution of a municipal corporation directing the mayor to issue certificates of debt to an individual, the only remedy being by *mandamus*. Commonwealth *v.* Lancaster, 5 Watts (Pa.), 152. *Mandamus* to county commissioners to draw orders on county treasury refused where the treasury has no money therein with which the orders can be paid. Commonwealth *v.* Philadelphia County, 1 Whart. (Pa.) 1; Commonwealth *v.* Philadelphia County, 2 Whart. (Pa.) 286. Remedy of a claimant against a county in *Pennsylvania*, when by action and when by *mandamus*, see Hester's Case, 2 Watts & S. (Pa.) 416; Commonwealth *v.* Allegheny County, 16 Serg. & R. (Pa.) 317; Lyon *v.* Adams, 4 Serg. & R. (Pa.) 443; Wilson *v.* Huntingdon County, 7 Watts & S. (Pa.) 197.

Remedy by mandamus to compel payment of county orders or warrants, or audited claims. Cuthbert *v.* Lewis, 6 Ala. 262; Smith *v.* McCutchen, 146 Ala. 455; Keller *v.* Hyde, 20 Cal. 593; Connor *v.* Morris, 23 Cal. 447; Rooney *v.* Snow, 131 Cal. 51; Coleman *v.* Neal, 8 Ga. 560; State *v.* Mount, 20 La. An. 352; State *v.* Holgate, 107 Minn. 71; State *v.* Cass County, 53 Neb. 767; People *v.* Anderson, 69 N. Y. App. Div. 619; Commonwealth *v.* Johnson, 24 Pa. Super. Ct. 490; Abernethy *v.* Medical Lake, 9 Wash. 112; State *v.* Gunn, 92 Minn. 436; *ante*, chap. xix., on Warrants.

Mandamus will lie against a county treasurer where he refuses to pay a school order. Wright *v.* Kinney, 123 N. Car. 618. A writ of *mandamus* will issue to compel county commissioners to issue a warrant of distress to enforce payment of damages awarded by them for land and rights taken by water companies. Furbish *v.* Kennebec County, 93 Me. 117. Where a claim against a county has never been formally rejected or allowed, *mandamus* will lie to compel the comptroller having authority to audit such claims to act thereon. People *v.* Coler, 48 N. Y. App. Div. 492. In *Maryland*, the levy-

ocesses of the law; and this principle has been applied to the ode of compelling municipal corporations to meet their liabilities d obligations. Therefore, it has been generally, but not uniformly, held, if the creditor may bring suit against the corporation d obtain a judgment, which may be enforced and *rendered effecl by ordinary execution*, that *mandamus* will not lie to compel payent, in advance of judgment recovered; and this view, under the nditions just stated, is the one most consistent with principle,

of a tax by the county commissioners the payment of claims authorized by r, may be compelled by *mandamus*, orcester County *v.* Melvin, 89 Md. . *Mandamus* does not lie, in *New rk*, to compel supervisors to audit d allow the amount of a tax illegally essed and collected from the relator. ople *v.* Chenango County, 11 N. Y. 3.

In *Iowa*, it is held that *mandamus* l not lie to compel the county audit- officer to act by either allowing or allowing a claim against the county, the reason that the claimant has, an action in the courts, a plain and quate remedy. State *v.* Floyd nty, 5 Iowa, 380. *Mandamus* lies city treasurer to compel a perform- e of the ministerial act of issuing a rant for an audited or approved Reynolds *v.* Taylor, 43 Ala. 420; e *v.* Mount, 20 La. An. 352, 369; ple *v.* Brennan, 39 Barb. (N. Y.)

reasurer may by *mandamus* be com- d to pay a city warrant where it has legally issued and he has sufficient s at hand. Wyker *v.* Francis, 120 509. *Mandamus* to city auditor to warrant. State *v.* Mason, 153 23. See also American La France Co. *v.* Seymour (N. J. L.), tl. Rep. 439; Ullman *v.* Sandell, Mich. 496. *Mandamus* lies to el a municipality to issue city nts in payment of a judgment. Rock *v.* United States, 103 Fed. 418. *Mandamus* will lie to com- town to pay a claim for which tiff has received an order on the irer without his first reducing the to judgment. Thomas *v.* Mason, . Va. 526. *Mandamus* will not lie auditor of a county or other public ration to draw an order when the nt has not been ascertained, and he has by law no power to fix the nt. State *v.* Mount, 20 La. An. 352; People *v.* Flagg, 17 N. Y. 584; Putnam County *v.* Allen County, 1 Ohio St. 322; Burnett *v.* Portage County, 12 Ohio St. 57; State *v.* Hamilton County, 19 Ohio, 116. The statutes of *Missouri* require the warrant holder to reduce his claim to judgment before applying for a *mandamus*. State *v.* Clay County, 46 Mo. 231; State *v.* Bollinger County, 48 Mo. 475; State *v.* Pacific, 61 Mo. 155.

The writ of *mandamus* is the proper remedy against an auditor who refuses issue to a county warrant when directed to do so by the board of supervisors. An action on the auditor's official bond is not a "plain, speedy, and adequate remedy." Babcock *v.* Goodrich, 47 Cal. 488; *ante*, § 856. When debt is payable out of a particular fund, the remedy is ordinarily by *mandamus*, and not by action. Beeney *v.* Irwin, 6 Colo. App. 66; Illinois Hosp. for Insane *v.* Higgins, 15 Ill. 185; Reed *v.* Heglie (N. Dak.), 124 N. W. Rep. 1127. See also State *v.* Harrison, 81 Ohio St. 98; 90 N. E. Rep. 150. Where one having a claim entitled to be paid out of a special fund, neglected to present it or demand payment until after the fund had been lawfully exhausted, he could not compel the issuance of a warrant against such fund for his claim. Parks *v.* Hays, 11 Colo. App. 415.

Mandamus to town auditor in *Illinois* to audit debt granted. United States *v.* Ottawa, 28 Fed. Rep. 407.

Mandamus will not lie to compel the county court to grant an application of a judgment creditor of the county to issue a warrant on the treasury payable out of a particular fund, the action of the court being judicial, and an appeal lying therefrom to the Circuit Court. State *v.* Macon County Ct., 68 Mo. 29; see *ante*, chap. xviii., on Contracts. Liability to be sued, see *post*, chap. xxxii.; *ante*, § 860.

when the matter stands wholly unaffected by legislation.[1] When judgment is rendered, and there is no property subject to execu-

[1] People *v.* Clark County, 50 Ill. 213; State *v.* Floyd County, 5 Iowa, 380, 383; Coy *v.* Lyons, 17 Iowa, 1; State *v.* Davenport, 12 Iowa, 335; Lexington *v.* Mulliken, 7 Gray (Mass.), 280; State *v.* Union Tp., 37 N. J. L. 84. See Knapp *v.* Hoboken, 38 N. J. L. 371; State *v.* Clay County, 46 Mo. 231; State *v.* New Orleans, 30 La. An. 82; Marsh *v.* Little Valley, 64 N. Y. 112; People *v.* New York, 64 N. Y. 627; State *v.* New Orleans, 30 La. An. 129; State *v.* Pacific, 61 Mo. 155; Mansfield *v.* Fuller, 50 Mo. 338, and cases cited by *Bliss*, J.; Moran *v.* Elizabeth, 9 Fed. Rep. 72. Text approved; Brown *v.* Gates, 15 W. Va. 131. See and compare Buck *v.* Lockport, 6 Lansing (N. Y.), 251; *supra*, §§ 992, 1485–1487; Hugg *v.* Ivins, 59 N. J. L. 139; Poling *v.* Philippi Board of Education, 50 W. Va. 374. In *Kansas, mandamus* to compel a tax levy was allowed to issue prior to a judgment at law on the bonds. Riley *v.* Garfield, 54 Kan. 463.

In Hambleton *v.* Dexter, 89 Mo. 188, it was held that, while it should appear in the alternative writ that the relator has no other remedy, it is *not necessary to show that an execution has been issued* and been unavailing; proof that the town has no property upon which it could be levied and no money subject to the payment of the judgment is sufficient. See Hubbel *v.* Maryville, 85 Mo. App. 165. But if required by statute, a return of the *fi. fa.* will be held necessary in the Federal court. Laird *v.* De Soto, 25 Fed. Rep. 76.

In Greene County *v.* Daniel, 102 U. S. 187, the ruling was that, although by statute of a State *mandamus* will lie to compel the assessment and levy of taxes to pay interest on bonds, yet the holder who resorts to the courts of the United States must first obtain judgment before he is entitled to that remedy. S. P. Osborne *v.* Adams County, 7 Fed. Rep. 441; *post*, § 1514.

In Chicago *v.* Hasley, 25 Ill. 595, the question was presented, whether, at common law, or *in the absence of an express statute authorizing it, a judgment against a municipal corporation could be enforced by an ordinary fieri facias.* The majority of the court were of opinion that such a writ was not allowable, and quashed it, holding that the only proper course for the creditor to pursue, after refusal to pay, was by *mandamus* to compel payment, or the levy of a sufficient tax for that purpose. The conclusion that their property is exempt from sale on execution is based upon the propositions, that such corporations are created for public and civil purposes; that to pay their debts, they are clothed with the power to raise money by taxation; that their property is possessed for corporate purposes, and not in the way in which it is possessed by individuals; that to levy upon and sell such property — for instance, water-works, fire-engines, public buildings, the revenues, &c. — would destroy the corporation, or, at least, the means of enabling it to discharge its proper functions. No execution can be awarded against a municipal corporation in Illinois. Bloomington *v.* Brokaw, 77 Ill. 194, following Chicago *v.* Hasley, 25 Ill. 595; Olney *v.* Harvey, 50 Ill. 453; Elrod *v.* Bernadotte, 53 Ill. 368; Morrison *v.* Hinkson, 87 Ill. 587; Chicago *v.* People, 98 Ill. App. 517.

As to exemption of municipal revenues from judicial seizure, see *ante*, §§ 248, 249. *As to sale of municipal property on execution*, see *ante*, chap. xxi. § 992; *ante*, §§ 1396, 1397.

In the absence of an express provision of law to that effect, creditors of a municipal corporation cannot, outside of the New England States, resort to the *individual property of the inhabitants* for the purpose of discharging a judgment against the corporation. Their remedy is by *mandamus* to compel the corporation to pay the debt by levying a tax; but the failure of the corporation to make the levy, or of the inhabitants to pay the tax, does not render their individual property liable to be taken by the creditor. Horner *v.* Coffey, 25 Miss. 434. In this case it appeared that the town of Grand Gulf was incorporated, with the usual power of contracting, suing, and being sued, and levying taxes. A judgment was recovered against the corporation, on which execution was returned "*nulla bona.*" The corporation refused to levy a tax to pay the judgment, whereupon the creditor issued another execution, and levied the same upon the private property of the inhab-

tion out of which it can be made, *mandamus* will lie, and is the proper remedy, to comepl the levy and collection of the necessary tax to pay the judgment. When the claim is reduced to judgment, the duty to provide for its payment becomes perfect, and if it can be paid in no other way, it must be done by the levy and collection of a tax for that purpose, and this duty will be enforced by *mandamus*.[1] Indeed *mandamus and not a bill in equity* is, as will be

tants. The court restrained the proceedings, holding that, in the absence of express provision, private property could not be taken for corporate debts; and refusing to follow the doctrine laid down in Angell & Ames on Corp. § 629, and in Beardsley *v.* Smith, 16 Conn. 368. See Bloomfield *v.* Charter Oak Bank, 21 U. S. 121; *ante*, chap. xxi. § 992; *infra*, § 1519, note; *post*, § 1639.

On a petition by a judgment creditor for *mandamus* to compel the collection of a tax, no matter can be urged in defence which could have been pleaded as a defence in the action on the bonds in which the judgment was recovered. Santa Fé County *v.* Coler, 215 U. S. 96, aff'g 14 N. Mex. 134.

[1] Louisiana *v.* St. Martin's Par. Pol. Jury, 111 U. S. 716; Rock Island County *v.* United States, 4 Wall. (U. S.) 435; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535; Galena *v.* Amy, 5 Wall. (U. S.) 705; Riggs *v.* Johnson County, 6 Wall. (U. S.) 166; Weber *v.* Lee County, 6 Wall. (U. S.) 210; United States *v.* Keokuk, 6 Wall. (U. S.) 4; Britton *v.* Platte City, 2 Dillon C. R. 1; United States *v.* Ottawa, 28 Fed. Rep. 407; Frank *v.* San Francisco, 21 Cal. 668; State *v.* Jackson County, 19 Fla. 17; Olney *v.* Harvey, Ill. 453; People *v.* Cairo, 50 Ill. 155; Rogers *v.* People, 68 Ill. 154; Peoria County *v.* Gordon, 82 Ill. 45; Lyons *v.* Coolidge, 89 Ill. 529; Coy *v.* Lyons, Iowa, 1; Fleming *v.* Dyer (Ky.), S. W. Rep. 444; Muhlenberg County *v.* Morehead (Ky.), 46 S. W. Rep. 691; State *v.* New Orleans, 30 La. An. 705; Klein *v.* Warren County, Miss. 578; Klein *v.* Smith County, Miss. 254; State *v.* Hugg, 44 Mo. ; State *v.* Kineval (Neb.), 97 W. Rep. 798; Gabler *v.* Elizabeth, 42 N. J. L. 79; Clarke *v.* Jersey City, 42 N. J. L. 94; Fry *v.* Montgomery County, 82 N. Car. 304; Shaffer *v.* Cadwallader, 36 Pa. 126; Commonwealth *v.* Pittsburgh, 88 Pa. 66; Corpus Christi *v.* Woessner, 58 Tex. 462; Sherman *v.* Langham, 92 Tex. 20; Brown *v.* Gates, 15 W. Va. 131, approving text; Fisher *v.* Charleston, 17 W. Va. 595; State *v.* Madison, 15 Wis. 30; State *v.* Wilson, 17 Wis. 687; State *v.* Milwaukee, 20 Wis. 87; State *v.* Beloit, 20 Wis. 79; Watertown *v.* Cady, 20 Wis. 501.

The writ will be refused where it will be *unavailing*. State *v.* New Orleans, 35 La. An. 221; State *v.* New Orleans, 35 La. An. 68; Spiritual Atheneum Soc. of W. R. *v.* Randolph, 58 Vt. 192; Fisher *v.* Charleston, 17 W. Va. 595; Wells *v.* Mason, 23 W. Va. 456. Held to lie in a *State court* to enforce a *judgment in the Federal court* of the district; but *quære?* State *v.* Beloit, 20 Wis. 79. See Holman, *In re*, 28 Iowa, 88.

A *written demand* upon a city for the payment of a judgment, without asking for the levy of a tax for the purpose, is sufficient to authorize a *mandamus* requiring the levy of a tax for the payment of the judgment. United States *v.* Saunders, 124 Fed. Rep. 124; Cairo *v.* Everett, 107 Ill. 75; Lewis *v.* Johnathan Creek & L. Drainage Com'rs, 111 Ill. App. 222. *Mandamus* may be issued without previous demand for payment where the demand would be a mere idle act. United States *v.* Brooklyn, 8 Fed. Rep. 473. Where one seeks by *mandamus* to compel the levy of a tax to pay a judgment, on the ground that a change in the law limiting the power of taxation was in violation of the contract, he must allege and prove that his judgment was founded upon a contract. State *v.* St. Martin's Par. Pol. Jury, 32 La. An. 884. But there is an implied contract to pay for official services at the rate of compensation in force when the services were rendered, which cannot be impaired by subsequent legislation. Fisk *v.* Jefferson Par. Pol. Jury, 116 U. S. 131; Stewart *v.* Jefferson Par. Pol. Jury, 116 U. S. 135. *Mandamus* to enforce the collection of a judg-

presently stated more at length, the proper mode of compelling the performance, by a municipality, of the duty of levying a tax to pay judgments against it.[1]

§ 1508 (851). **Special Limitations on the Power to levy Taxes.**—Where a bonded debt is authorized, and *the power of taxation for its payment is limited* by the enabling act itself, and by the general statutes in force at the time, to the special tax designated in the act, there is want of power to levy any greater tax than the one thus specially provided and limited. If there is no statute giving *the power* to issue bonds, the municipality is not bound, and cannot

ment against a municipal corporation is legally equivalent to a statutory execution, and is subject to the same limitation as to time when it may be resorted to. United States *v.* Oswego, 28 Fed. Rep. 55. The writ lies against a county to enforce a judgment against an incorporated township within its limits, when by statute it is the duty of the county to make provision for its payment. Labette County *v.* Moulton, 112 U. S. 217.

Where a city corporation was commanded to levy and collect a *specific* tax sufficient to pay the relator's judgment, a return showing that they had levied a tax to pay this judgment and *other claims* is not sufficient. Other claims cannot, in such case, be included. The return must state facts showing performance of the mandate, or a sufficient excuse for the non-performance of the duty enjoined. Benbow *v.* Iowa City, 7 Wall. (U. S.) 313. Mr. Justice *Davis*, in this case, observes: "To make the return properly responsive to the writ, it was necessary to disclose the whole act constituting the levy, so as to enable the court to determine whether it was sufficient to pay the judgment of the relator." This remark is made in relation to that part of the return which states, in general terms, that the defendant had levied a tax sufficient to pay the judgment. Under a special statute, held to be a duty enforceable by *mandamus* to levy a tax to pay improvement bonds on *all the taxable property* of the city, and not simply upon the property improved or locally benefited. United States *v.* Fort Scott, 99 U. S. 152.

An assignee of a judgment against a city may enforce payment by *mandamus*. Chicago *v.* Sansum, 87 Ill. 182. On the application for such *mandamus*, the original defence cannot be set up a second time. *Ib.*

As to the right of the creditor to have the *tax*, which is ordered to be levied, *set apart* and applied to his use, see also Coy *v.* Lyons, 17 Iowa, 1; Galena *v.* Amy, 5 Wall. (U. S.) 705; Loute *v.* Allegheny County, 10 Pitts. L. J. 241; Pollock *v.* Lawrence County, 7 Pitts. L. J. 373. Judgment creditor entitled, as a reward of his diligence, to priority over simple contract creditors. Coy *v.* Lyons, *supra*. *Mandamus* may be refused if the corporation has been guilty of no unreasonable or improper delay in levying the tax. Tillson *v.* Putnam County, 19 Ohio, 415.

[1] Walkley *v.* Muscatine, 6 Wall. (U. S.) 481; *supra*, § 1482; *infra*, §§ 1513, 1520; Rees *v.* Watertown, 19 Wall. (U. S.) 107, 116; Heine *v.* Levee Com'rs, 19 Wall. (U. S.) 655; Meriwether *v.* Garrett, 102 U. S. 472; The last two cases distinguished, see Graham *v.* Folsom, 200 U. S. 248, 252; *ante*, §§ 335, 336, and cases cited in notes; *post*, §§ 1520, 1521. The effect of *dissolution* and of the *repeal* of municipal charters and *change of boundaries* on the rights of creditors, and the jurisdiction of equity in such cases, has been discussed in previous chapters (vii. and viii.) of this work. *Ante*, §§ 335, 336, 338, 339, 357–360. See also Graham *v.* Folsom, 200 U. S. 248. In proceedings in *mandamus* the respondent will not be allowed to make allegations which contradict the record of the judgment. Harshman *v.* Knox County, 122 U. S. 306; see *infra*, § 1508, note, and compare with Brownsville *v.* Loague, 129 U. S. 493.

be compelled by *mandamus* to levy a tax to pay them.[1] So, too, if the municipality has no power, either by *express grant or by implication*, to raise the money by taxation to pay the indebtedness, the municipal authorities cannot be required to levy a tax for that purpose.[2] But the Supreme Court of the United States has held that

[1] United States *v.* Macon County Ct., 99 U. S. 582 (distinguishing United States *v.* Clark County, 96 U. S. 211, quoted *infra*); *supra*, §§ 1402 note and cases, 1506, note; *infra*, § 1509; Knox County Ct. *v.* United States, 109 U. S. 229; *ante*, § 1402; Aspinwall *v.* Daviess County, 22 How. (U. S.) 364; Marsh *v.* Fulton County, 10 Wall. (U. S.) 676; Cleveland *v.* United States, 111 Fed. Rep. 341; Chicot County *v.* Kruse, 47 Ark. 80; Bissell *v.* Kankakee, 64 Ill. 249; People *v.* Jackson, 92 Ill. 444; McPherson *v.* Foster, 43 Iowa, 48; Williamson *v.* Keokuk, 44 Iowa, 88; Sykes *v.* Columbus, 55 Miss. 115; State *v.* Macon County, 68 Mo. 29; also chaps. xviii. and xx., on Contracts and Municipal Bonds. See State *v.* Royse (Neb.), 97 N. W. Rep. 173, 98 N. W. Rep. 459; Denison *v.* Foster (Tex. Civ. App.), 37 S. W. Rep. 67. Duty of city and rights of bondholder where his bonds are payable only out of the *general fund* levied for current expenses. East St. Louis *v.* United States, 110 U. S. 321.

Where, by statute, the amount of tax which a county can lawfully levy is limited to six mills, and the judgment creditor had no contract for the levy of a special tax, and the whole six mills are necessary for the *ordinary current expenses* of the county, it was held that the court could not in a *mandamus* proceeding, direct one mill, or any portion of the six mills tax authorized by law, to be levied separately from the rest and set apart for the payment of the judgment (following East St. Louis *v.* United States, 110 U. S. 321). Clay County *v.* McAleer, 115 U. S. 616. Subsequent constitutional provision held to have the effect to remove a prior charter limitation on the power of the council to levy a tax for the payment of bonded debt thereafter incurred. East St. Louis *v.* Amy, 120 U. S. 600; *ante*, § 1402; *post*, § 1509, and note. The remedy by *mandamus* is prospective only, and the failure of a city in past years to exercise its entire taxing power within the prescribed statutory limit, will not justify a levy in any future year in excess of the charter limitation for the purpose of paying a contract debt which has been reduced to judgment. Cleveland *v.* United States, 111 Fed. Rep. 341, 348.

[2] United States *v.* Macon County, 99 U. S. 582; M. E. Church, *In re*, 66 N. Y. 395; State *v.* Guttenberg, 39 N. J. L. 660; Grand County *v.* King, 67 Fed. Rep. 202; Cleveland *v.* United States, 111 Fed. Rep. 341; Grand County *v.* People, 16 Colo. App. 215; State *v.* Wahoo, 62 Neb. 40. See State *v.* Royse (Neb.), 91 N. W. Rep. 559.

Macon County Case. In the case of United States *v.* Macon County, *supra*, *Waite*, C. J., in delivering the opinion of the court, says: "If there had been nothing in the act to the contrary, it might perhaps have been fairly inferred that it was the intention of the legislature to grant full power to tax for the payment of the extraordinary debt authorized, to an amount sufficient to meet both principal and interest at maturity. *This implication is, however, repelled* by the special provision for the *tax of one-twentieth of one per cent*, and the case is thus brought directly within the maxim, *Expressio unius est exclusio alterius*. Thus, while the debt was authorized, the power of taxation for its payment was limited by the act itself and the general statutes in force at the time to the special tax designated in the act, and such other taxes applicable to the subject as then were or might thereafter by general or special acts be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued. The general power of taxation to pay county debts is as ample now as it was when the railroad company was incorporated and the debt incurred. The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of purchasers when investing in such securities. *Every purchaser of a municipal bond is charge-*

when, in order to execute an expensive public work, a municipal corporation has been vested with authority to borrow money or

able with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has *no power*, either by express grant or by implication, *to raise money by taxation to pay the bond*, the holder cannot require the municipal authorities to levy a tax for that purpose. If the purchaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment. As it is, he holds the obligation of a debtor who is unable to provide the means of payment. We have *no power* by *mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation.* In this case it appears that the special tax of one-twentieth of one per cent has been regularly levied, collected, and applied, and no complaint is made as to the levy of the one-half of one per cent for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order."

The case of United States *v.* Macon County (99 U. S. 582), just noticed, should be read in connection with Harshman *v.* Knox County (122 U. S. 306), and the latter in connection with Brownsville *v.* Loague (129 U. S. 493, referred to *infra*, § 1509. In Harshman *v.* Knox County the bonds recited specifically that they were issued under an act which *limited* (as in U. S. *v.* Macon County) *the power and duty* "to levy a tax each year, not to exceed one-twentieth of one per cent, upon the assessed value of the taxable property." When the bondholder brought action upon the bonds he alleged in his declaration that they were issued under the General Railroad Law. This law provided that a special tax might be levied to pay the bonds, and did *not limit the amount.* Judgment was taken by *default* for the amount of the bonds. Harshman *v.* Knox County was a subsequent *mandamus* proceeding based upon this judgment. The county showed that it had levied the one-twentieth of one per cent. But the relator claimed that his judgment on the bonds estopped the county in the *mandamus* proceeding to show, by the recitals of the bonds or otherwise, that the recital as to *the* act under which the bonds were issued was correct; that it estopped the county to show that they were *not* issued under the General Railroad Act. The Supreme Court held with the relator, and decided that he was entitled to a peremptory *mandamus* under the General Railroad Act, without limitation as to amount. In Brownsville *v.* Loague, *supra*, the bondholder had recovered judgment on the bonds of the city of Brownsville which recited that they were issued under a statute which was abrogated; and in the subsequent *mandamus* proceeding it was held that the estoppel of the judgment on the bonds did not conclude the city from showing that the act under which they were issued, and which contained the only provision for levying a tax for their payment, was void; and, being void, the Supreme Court further held that the judgment creditor was not entitled to a writ of *mandamus* to compel the collection of any tax for their payment.

Author's comment. The above questions are nice and delicate; but the author confesses his difficulty in reconciling the two cases, or, to speak more precisely, he thinks it may hereafter deserve re-examination whether the principle of *res judicata* was not carried to an unsound extent in Harshman *v.* Knox County. In the action on the bonds the only material issue, it is submitted, would be whether the county owed the debt, *i. e.*, whether the bonds were valid; and they were equally valid whether they were issued under the act recited in the bonds or under the act alleged in the declaration; and thus the averment was, in that action, immaterial. As the county did not deny the debt it suffered judgment by default. In the *mandamus* proceedings the issue was wholly different. The county did not there contest the debt or the judgment; but it did contest the extent of its power and its duty to levy a tax to pay the debt. That question did not and could not arise in the action on the bonds. It arose for the first time in the *mandamus* proceeding. It could not

incur an obligation, it has the power to levy a tax to raise revenue wherewith to pay the money or discharge the obligation, without

have arisen before. For these reasons may not the principle of estoppel have been carried too far, or possibly have been wholly misapplied, in Harshman v. Knox County? With deference we suggest the doubt for further consideration.

City of Cleveland, Tenn. The binding character of the obligation of a city to provide by taxation for the payment of its contract debts and the extent to which the Federal courts will sustain and protect against impairment by subsequent legislation the powers of taxation of the city existing at the time when the contract was made are well illustrated in the case of a judgment against this city on a contract liability. A judgment was recovered in 1899 against the city for $9,852 for water and light rents. See Cunningham v. Cleveland, 98 Fed. Rep. 657. The tax levy was limited by charter to seventy-five cents on each $100 of valuation, and the judgment so recovered was payable from this levy as a current expense of the city; and in Cleveland v. United States, 111 Fed. Rep. 341, it was held that there was no implied power to levy a special tax to pay water and light rents, which were ordinary municipal expenses, and that the officers of the city could not be compelled by *mandamus* to levy a tax to pay the judgment exceeding the charter limitation. See also Cleveland v. United States, 127 Fed. Rep. 667. In Cunningham v. Cleveland, 152 Fed. Rep. 907, a subsequent stage of the same litigation, it appeared that after the writ of *mandamus* had issued to levy a tax for the entire amount of the limit prescribed by law, the city had expended a portion of the taxes levied pursuant thereto for the purpose of erecting school buildings. The charter authorized the city to borrow money and issue its bonds to erect public buildings. The court held that the erection of public buildings, such as school-houses, was not an ordinary current expense to which the revenues of the city could be applied whilst it owed money on judgment for a debt incurred as a current expense, and that if the city desired to erect school-houses it should have done so by exercising its power to borrow money and issue bonds. It was further held that it had no power to divert this money from the payment of the relator's debt. In Cleveland v. United States, 166 Fed. Rep. 677, a later stage of the same litigation, it appeared that, by a statute enacted after the making of the contract under which the debt was incurred, all assessments were required to be made by a county assessor whose assessment was subject to review by the county board of assessors, the decision of the latter being final, unless altered by the State Board of Equalization, whose decision should be final; and it was expressly provided that "no municipality or taxing district shall assess any property for taxation, but shall copy the assessment made by the assessor herein provided for, so far as the same may be necessary for such municipality or taxing district." By the provisions of the charter of the city at the time when the contract was made upon which the judgment was recovered, the recorder of the city was entrusted with the duty, and had full power to assess for taxes all property in the city and to collect all taxes levied thereon, and no other person or officer joined in either of these duties. By the Constitution and laws of the State he was required to assess the property at its actual value. The court held that the plaintiff, by virtue of his contract with the city, became entitled to claim the exercise of the powers and duties conferred upon the city recorder; that the subsequent statute providing for the assessment by the county assessor was void as impairing the obligation of the contract with the plaintiff by depriving him of a remedy against the recorder to compel the assessment of property at its true value; that consequently the provision of the charter for assessment by the recorder was not repealed; and that the recorder could be compelled by *mandamus* to reassess property for previous years which had been assessed by the county assessor at less than its actual value, and to levy taxes upon such reassessment for the purpose of paying the plaintiff's judgment. The statutes of Tennessee contained ample authority permitting the reassessment of undervalued or omitted property. *Severens*, C. J., who de-

any special mention that such power is granted, unless the implication is repelled by other provisions in the charter or legislative enactments.[1]

§ 1509 (851 *a*). **Judgment Creditor not entitled to Mandamus to enforce Collection of Tax under a Statute abrogated at the time when the debt was created.** — The principle that mandamus *does not confer*

livered the opinion of the Circuit Court of Appeals (*Lurton* and *Richards*, C. J., concurring), said: "There is but a single question, and that is stated in counsel's first proposition, for, if the later statute impairs the plaintiff's remedy, it is therefore void, and did not repeal the statute which committed this duty to the city recorder. That duty continued to be attached to his office as if the repealing statute had never been passed. Under the former law, the plaintiff's remedy, if his judgment was not paid, was by a direct and simple order against the city's own officer. It was in no wise hampered or impeded by any external relations with those of the county or State, or by any relation of its officer with those of the county or State, of subordination or otherwise. But what is the plaintiff's remedy under the later act? Counsel for the city answer this question first by suggesting that the county assessor is required by law to assess property at its true cash value, and the plaintiff may repose upon the presumption that he will comply with the law; and, further, that, if the assessor does not do this, the plaintiff may bring the matter before the county board, and if he does not get relief there, he may carry his grievance to the State Board of Equalization, a board whose decision is made final; or, second, he might sue the county assessor on his official bond, and he might prosecute him in the criminal courts. This suggestion that the party may rely upon the presumption that the officers concerned with the assessment and collection of the necessary taxes is not new, and has been answered in previous cases. Seibert *v.* Lewis, 122 U. S. 284. . . . It has occurred to us that we should consider whether or not the plaintiff would have any remedy which the court where the judgment rests, or another Federal court in another district, could enforce. The assessor for the county of Bradley is not an officer of the city of Cleveland, but of another municipality. If it be assumed that the court below would have jurisdiction to entertain a proceeding by *mandamus* against the assessor of the county to compel him to assess the property in Cleveland at its true value, still he could not be compelled to do that without also increasing his other valuations in other parts of the county, and, if the valuations in other counties are the same as his own, it would be impossible for him to change his own without producing the disparity which the Constitution of the State forbids. The statute requires that a party aggrieved by the county assessor shall seek his relief, not in the courts, but by proceedings in the nature of an appeal to superior authorities, who could only be reached, at the last step, in another Federal district, and then the matter would be so complicated with taxation throughout the State that relief would be well-nigh, if not quite, impossible. It seems obvious that none of these expedients would be 'a prompt and efficacious remedy' such as that which the plaintiff would have under the law of his contract which the later statute displaces. The impairment which the Constitution of the United States forbids is not limited to cases where the statute destroys the remedy and provides no other, but includes all cases where the substitution of a different remedy is of one in substance more difficult, more burdensome or uncertain than that which is repealed; one which appreciably lessens the value of the contract; is less prompt and efficacious; or as otherwise variously expressed to signify a like meaning."

[1] United States *v.* New Orleans, 98 U. S. 381, 391. See United States *v.* Lincoln Co., 5 Dillon, 184, 194, where the cases are cited. See also cases cited in last note. and also the chapter on Municipal Bonds, *ante*. United States *v.* Saunders, 124 Fed. Rep. 124.

ev authority, but lies only to enforce the performance of a legal uty which respondents must have the power to perform, is further trikingly illustrated in a case in the Supreme Court of the United tates.[1] Bonds to pay for stock in a railway company had been ssued under an act of February 8, 1870, which act contained the *nly* authority to issue the bonds and to levy a tax for their payment, and was wholly abrogated by an amended Constitution hich took effect May 5, 1870, and *before* the bonds were voted or ssued. A bondholder had recovered judgment on such bonds, nd in 1886 sought to enforce the levy and collection of a tax under he act of 1870 to pay the judgment. The court below held that, lthough the act of 1870 was wholly abrogated by the State Contitution, and the bonds were therefore void, yet the relator's judgment conclusively established, so far as that judgment was conerned, the validity of the bonds, and at the same time, *quoad* the idgment, it also conclusively established the validity of the act f 1870 giving the remedy by a levy of taxes for the payment of e bonds. This decision was, however, reversed by the Supreme ourt, which held that the *judgment on the bonds did not estop the unicipality* from showing that it had no legal power to levy the x by reason of the abrogation of the act of 1870, under which the nds were issued, and which was the only source of authority to y a tax for their payment. But the case is entirely different ere the abrogation of the enabling act is *after* bonds have been ly issued and sold, since where this is the case such enabling act d its provisions for the levy of a tax to pay the bonds constie a *contract* with the bondholder which is protected by the deral Constitution.[2]

Brownsville *v.* Loague, 129 U. S. , distinguishing Harshman *v.* Knox inty, 122 U. S. 306; *ante*, § 1508, e. "*Res judicata*," says Chief Jus- *Fuller*, giving the judgment of the rt, "may render straight that which rooked, and black that which is te, *facit ex curvo rectum, ex albo rum* (Jeter *v.* Hewitt, 22 How. (U. 352, 364); but where application is de to collect judgments by process contained in themselves, and rering, to be sustained, reference to alleged cause of action upon which y are founded, the aid of the court uld not be granted when upon the of the record it appears, not that re error supervened in the rendition such judgments, but that they rest upon no cause of action whatever." 129 U. S. 493, *supra*.

Mandamus awarded to compel levy of tax to the *full limit in force when the debt was created*, notwithstanding a subsequent constitutional restriction on the amount of taxes which might be levied. Fisk *v.* Jefferson Par. Pol. Jury, 116 U. S. 131; *supra*, § 1507, and note.

[2] Graham *v.* Folsom, 200 U. S. 248. In this important case municipal bonds were issued under valid statute authority *in South Carolina* to aid in the construction of a railroad. This statute provided that "the county auditor or other officers discharging such duties shall be authorized and required to assess an annual tax upon the property" of the obligor municipality to pay the

§ 1510 (852). **Where Creditor is entitled to have a special Tax Levy.** — Where the law under which the debt was incurred provides for *the levy of a* SPECIAL *tax to pay it*, this contract duty will be enforced by *mandamus*, and in such a case it is no answer to the creditor's application for this remedy that an execution has not been returned *nulla bona*, or that the corporation debtor may have property subject to a sale on execution.[1]

§ 1511 (853). **Where Statute gives Creditor the Right to a Tax Levy; Prior Judgment not always required.** — Where a municipal

bonds. Bonds of *Township Ninety-six* were issued and held to be valid by the Supreme Court of the United States. (Folsom *v.* Ninety-six, 159 U. S. 611.) The State devised this scheme apparently to defeat the collection of the bonds. A *constitutional* amendment was adopted providing that "the corporate existence of said township is hereby destroyed, and all offices in said township are abolished and all corporate agents removed." Township Ninety-six was subsequently embraced within the limits of a newly organized county, and under a legislative act new officers therefor were appointed directly by the governor and they were by the said act expressly forbidden to collect taxes to pay the bonds. Graham *v.* Folsom, *supra* (200 U. S. 248), was a *mandamus* proceeding in the United States Circuit Court to compel these officers so appointed by the governor to assess and collect taxes to pay the relator's judgment.

The *mandamus* was awarded by the Circuit Court and its judgment was affirmed by the Supreme Court, which held that the *obligation of the contract* with the bondholder could not be impaired by the abolition or change of boundaries of the municipality, and that the officers appointed by the Governor were under the duty to levy and collect the tax provided for in the enabling act, which duty could be enforced by *mandamus* issued by the Federal Court.

In so holding the court distinguished Heine *v.* Levee Com'rs, 19 Wall. (U. S.) 655, and Meriwether *v.* Garrett, 102 U. S. 472, 498. It regarded the case as like Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535; Galena *v.* Amy, 5 Wall. (U. S.) 705; Seibert *v.* Lewis, 122 U. S. 284; Mobile *v.* Watson, 116 U. S. 289; Mount Pleasant *v.* Beckwith, 100 U. S. 514, elsewhere referred to in this work. *Ante*, §§ 113, 337, 338, 357. It also held that this *mandamus* proceeding to compel county officers to levy and collect a tax on property within the township to pay bonds was not a suit against the *State*, either because those officers are also State officers, or because the bonds were issued under legislative authority of the State.

[1] Knox County *v.* Aspinwall, 24 How. (U. S.) 376. In this case an act of assembly authorized the county to issue its bonds and coupons (see 21 How. 542), and made it the duty of the county commissioners, for the purpose of paying the interest due on the bonds, "at the levying of the county taxes for each year, to assess *a special tax* sufficient to realize the amount of the interest to be paid for the year." S. P. State *v.* Davenport, 12 Iowa, 335; Louisiana *v.* St. Martin's Par. Pol. Jury, 111 U. S. 716; Austin *v.* Cahill, 99 Tex. 172, citing text; Greenfield *v.* State, 113 Ind. 597 (to compel the council to order an estimate for an assessment for a street improvement). See Benbow *v.* Iowa City, 7 Wall. (U. S.) 313.

The rights of the creditor under a *mandamus* execution against a county, and its effect upon the county and its funds, under the statute of *Pennsylvania*, are very fully considered in Loute *v.* Allegheny County, 10 Pitts. L. J. 241, and Pollock *v.* Lawrence County, 7 Pitts. L. J. 373. It is held by these cases that the effect of such an execution is to set apart for the creditor all unappropriated money in the treasury, and also the first that may come into it, so far as necessary, to pay the execution. See also Commonwealth *v.* Pittsburgh, 34 Pa. St. 496, 523, as to nature of *mandamus* execution; Monaghan *v.* Philadelphia, 28 Pa. St. 207; *supra*, § 1506, note; State *v.* Burbank, 22 La. An. 318.

oration *is authorized by the legislature to create a debt of a specific ıcter*, to borrow money to pay it, and to make provision for the nent of the principal and interest of the money so borrowed, by ıssessment and collection of such taxes as may be necessary, a *lamus* is the appropriate remedy of the creditor to compel the ɔration to levy and collect the taxes to pay such debt or the est thereon.[1] It has been several times adjudged, where there luty to levy and collect a *special tax* to pay a specified class of ı, — as for example, railway aid bonds, — and there is no valid ıce alleged or claimed, and no question made as to the genuine- of the bonds or coupons, and they are in the possession of the ɔr, that a prior judgment at law was not essential to give the to a *mandamus* to compel the proper officers to levy and col- he tax.[2] Undoubtedly, in such cases the court *may* award rit without a prior judgment; but if there is any doubt as to alidity of the debt, the court may well decline to grant the ıntil applied for to enforce a judgment obtained. And in the al courts, as we shall presently see, there must be a prior ıent.[3]

ɔn Hoffman *v.* Quincy, 4 Wall.) 535; Walkley *v.* Muscatine, 6 (U. S.) 481; Commonwealth *v.* ırgh, 34 Pa. St. 496; State *v.* ı County, 6 Ohio St. 280; Flagg myra, 33 Mo. 440; Common- *v.* Allegheny County, 37 Pa. 7; Maddox *v.* Graham, 2 Met. 56; Rock Island County *v.* United 4 Wall. (U. S.) 435; Riggs *v.* ın County, 6 Wall. (U. S.) 166; County *v.* Aspinwall, 24 How. 384; Davenport *v.* Lord, 9 Wall.) 409; Washington County *v.* t, *Ib.* 415 (U. S.). Text approved; *v.* Gates, 15 W. Va. 131; Lime- County *v.* Rather, 48 Ala. 433. *ntucky* the provisions in regard nary county claims do not apply ıty bonds payable to bearer and under special legislative author- Elliott County *v.* Kitchen, 14 (Ky.), 289. The proper remedy ɔlder of such county bonds is by *mus* to compel the levy of a tax the bonds as provided in the act izing their issue. *Ib.* Subse- legislation impairing the right nedy of a creditor to a specific tax ıconstitutional. Louisiana *v.* St. 's Par. Pol. Jury, 111 U. S. 716;) 1512; *ante*, chap. iv.

ɔmmonwealth *v.* Pittsburgh, 34 Pa. St. 496; Maddox *v.* Graham, 2 Met. (Ky.) 56; State *v.* Clinton County, 6 Ohio St. 280, 287; Commonwealth *v.* Allegheny County, 37 Pa. St. 277; Columbia County *v.* King, 13 Fla. 451; Rahway Sav. Inst. *v.* Rahway, 49 N. J. L. 384; Dix *v.* Big Four Drainage District, 207 Ill. 17; Riley *v.* Garfield, 54 Kan. 463; Territory *v.* Socorro, 12 N. Mex. 177. See State *v.* Davenport, 12 Iowa, 335, where the point was left open.

What the relator, who is the *holder of bonds* issued by a municipal corporation under express authority of the legislature, *must show in order to entitle him to a mandamus* against the corporation to compel it to levy and collect a tax to pay such bonds, see Commonwealth *v.* Pittsburgh, 34 Pa. St. 496, where it is fully considered; Commonwealth *v.* Allegheny County, 32 Pa. St. 218; Commonwealth *v.* Allegheny County, 37 Pa. St. 277; State *v.* Milwaukee, 20 Wis. 87.

In State *v.* Clinton County, 6 Ohio St. 280, 287, it is held that an agreement of the railroad company to pay the interest on the bonds of the county is collateral, and does not relieve the county from primary liability to the holder. Commonwealth *v.* Pittsburgh, 34 Pa. St. 496.

[3] *Post*, §§ 1514, 1518.

§ 1512 (854). **Right of Creditor as depending on Legislation at the Date of the Creation of the Debt.** — In ascertaining *the rights and remedies of municipal creditors* special reference must always be had to the legislation under which the debts were created. If the legislature authorizes the creation of a debt, and provides no special mode for its payment, it is a sound proposition that it was intended that it should be paid in the usual way in which such debts are paid, viz., by the levy and collection of a tax for that purpose, if there is nothing to rebut such intention.[1]

In respect of railway aid bonds of municipal and public corporations, the settled rule of law is that the power to issue them must be expressly conferred; and in the legislative act conferring it, or in the general legislation of the State concerning the subject, express provision is usually made, authorizing or requiring the levy and collection of taxes, or of a special tax, to pay the debt thus created. Such provisions are of great consequence, and have often proved to be the sole ultimate legal reliance of the creditor; and they are so far connected with the *obligation of the contract* as to come under the protection of the Federal Constitution, and hence they cannot be impaired by subsequent legislation.[2] The doctrine, where the act authorizing the issue of the bonds contains a provision for the levy and collection of a special tax to pay the same, that such provision enters into and becomes a part of the contract with the creditor, which cannot be repealed by the legislature without substituting a remedy legally equivalent or equally efficacious, or be otherwise impaired, has been recently reasserted by the Supreme Court of the United States, under circumstances which impressively show that this tribunal not only recognizes but means to enforce it whenever and so far as it has the power to do so.[3]

[1] United States *v.* New Orleans, 98 U. S. 381, 391; Kelley *v.* Milan, 127 U. S. 139, 150; Norton *v.* Dyersburg, 127 U. S. 160; Graham *v.* Folsom, 200 U. S. 248; *supra*, § 1509; *supra*, § 1508, and note.

[2] Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535, is the leading case on this point, but there are numerous others in which the principle has been applied which are cited and referred to. See also Graham *v.* Folsom, 200 U. S. 248; Galena *v.* Amy, 5 Wall. (U. S.) 705; Hicks *v.* Cleveland, 106 Fed. Rep. 459; Padgett *v.* Post, 106 Fed. Rep. 600; *ante*, §§ 113, 114, and chap. xx., on Municipal Bonds.

[3] Seibert *v.* Lewis (*mandamus* to levy and collect taxes), 122 U. S. 284. In this case the *Missouri Act* of March 23, 1868, which authorized the issue of the bonds, provided "that in order to pay the interest and principal thereon, the county court [of the county issuing the bonds] shall, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax" upon the taxable property of the township making the subscription. Under this provision, and long prior to 1879, bonds were issued and negotiated. Subsequently (March 8, 1879), the legislature passed an act, known as the "Cottey Act," repealing the provisions in the act of 1868 giving the creditor the aforementioned right to a special

§ 1513 (855). **Remedy of Bondholder is by Mandamus, and not in Equity.** — The proper mode of enforcing or compelling the performance of the duty of levying and collecting taxes in such cases is by *mandamus*, and not by a bill in equity. This was first decided

tax, and substituting a provision to the effect that State taxes, taxes for current county expenditures and for schools, should be levied as theretofore, but that no other tax (which would include taxes to pay these bonds) should be levied except upon petition and an order of the circuit court of the county or the judge in vacation, and making it penal for any county officer to levy or collect such taxes without such order of the circuit court or judge.

After the act of March 8, 1879, the relator obtained judgment in the Circuit Court of the United States on bonds issued *prior* to that act, and applied therein for a writ of *mandamus* to collect a special tax pursuant to the act of March 23, 1868, under which the bonds were issued. The county officers resisted the application on the ground that the act of 1868 was repealed by the act of 1879, which made penal for its officers to undertake the collection of taxes pursuant to the act of 1868; and upon the further ground that the State circuit court had enjoined the county officers from the levy and collection of taxes pursuant to the act of 1868, and that its action in this respect had been affirmed by the Supreme Court of the State, which had decided that there was no authority to levy or collect taxes except pursuant to the act of 1879, and that it was illegal to attempt it. The county, therefore, claimed that the Circuit Court of the United States had no power to command it or its officers to do an illegal act.

But the Supreme Court of the United States, in Seibert *v.* Lewis, *supra*, held that the provision in the act authorizing the issue of the bonds, giving to the bondholder the right to the levy and collection of a special tax in the same manner as county taxes, entered *into and constituted a material part of the contract with the creditor;* that, although it was competent for the legislature of the State to change or modify the revenue laws, yet this could not be done unless the substituted remedy was legally equivalent, — that is, as efficacious as the repealed provision; and, in this case, the act of 1879, which discriminated against this class of indebtedness, and in the place of the repealed provisions substituted a remedy clogged with limitations and conditions which seriously embarrassed and delayed the creditor, was not a legal equivalent to the creditor for the provisions in his behalf contained in the repealed statute; and that the result was that the act of 1868 was still in force for the purpose of levying and collecting the tax necessary for the payment of the relator's judgment.

The Supreme Court declined to follow the contrary judgment of the Supreme Court of *Missouri* on the point, and ordered a peremptory writ for the collection of the taxes, in accordance with the law under which the bonds were issued, and disregarded the intermediate injunction of the State courts. To the objection that such action on the part of the Federal court was in violation of the laws of the State as contained in the act of 1879, the Supreme Court of the United States said: "The question is not whether a tax shall be levied in *Missouri* without the authority of its law, but which of several of its laws are in force and govern the case"; and its judgment was that the act of 1868 was in force so far as necessary to pay the relator's judgment, and that to order a tax to be levied and collected in pursuance thereof was not to order a tax to be levied and collected contrary to, but in accordance with, the laws of the State of *Missouri* as applicable to relator's case.

The Circuit Court of the United States had previously held that the said act of March 8, 1879, known as the "Cottey Act," if it could be construed as applicable to judgments rendered in the Federal court, was, as to bonds issued *prior* thereto, in conflict with the Constitution of the United States, which prohibits a State from impairing the obligation of contracts, and had ordered writs of *mandamus* pursuant to the laws in force at the time when the bonds were issued. United States *v.* Lincoln County, 5 Dillon, 184; United States *v.* Johnson County, *Ib.* 207, note.

by the United States Supreme Court in Walkley *v.* Muscatine;[1] and that tribunal subsequently,[2] under circumstances which made a strong appeal to its sense of justice, has reaffirmed the principle, and refused to exercise *equity jurisdiction* over a repudiating municipality to compel it to pay a judgment which the process of *mandamus* had proved (by reason of successive resignations of the municipal officers, aided by the character of the legislation of the State), for a period of fourteen years, ineffectual to enforce. The court reasserted the doctrine that *the regular and appropriate remedy of the creditor is the writ of mandamus;* and declared that in legal contemplation, judged by its nature and ordinary results, and not by its failure in exceptional cases, it was an adequate remedy, and that the difficulty of its execution in a particular instance afforded no sufficient ground for equitable jurisdiction.

§ 1514 (856). **Remedy in Federal Court; Prior Judgment required; Course of Procedure.** — The remedy of the municipal or county bondholder *in the Federal courts is to sue at law and obtain a judgment* to establish the validity and amount of his debt.[3] There-

[1] Walkley *v.* Muscatine, 6 Wall. (U. S.) 481; *supra*, § 1507; *infra*, § 1520.

[2] Rees *v.* Watertown, 19 Wall. (U. S.) 107; followed and affirmed in Heine *v.* Levee Com'rs, 19 Wall. (U. S.) 655; Deuel County *v.* First Nat. Bank, 86 Fed. Rep. 264; *ante*, § 1508. The principle that a *court of equity cannot enforce the levy and collection of taxes* to pay the debts of municipal corporations, first decided in Walkley *v.* Muscatine, 6 Wall. (U. S.) 481, was reasserted in Rees *v.* Watertown; Heine *v.* Levee Com'rs; Barkley *v.* Levee Com'rs, 93 U. S. 258, and is reaffirmed in Thompson *v.* Allen County, 115 U. S. 550, where it was held that *mandamus* was the remedy, and that *equity had no jurisdiction to collect taxes through a receiver appointed by it*, even though no public officer with authority from the legislature to perform the duty can be found, or person who would accept the office. See also Graham *v.* Folsom, 200 U. S. 248, 252.

It seems to the author to be the result of the cases in the Supreme Court of the United States, taking them together, that the levy and collection of taxes cannot be enforced in or by the Federal Circuit Courts, exercising equity jurisdiction, but only by appropriate remedies in a court of law, namely, by actions to recover judgments and the enforcement of such judgments by *mandamus*. *Ante*, § 336, and cases cited and comments thereon. How far cases like Mount Pleasant *v.* Beckwith, 100 U. S. 514, are an exception to this rule is not very clear. *Post*, §§ 1520, 1521.

Rights of creditors, see *ante*, chaps. iv., ix., and x.

[3] Heine *v.* Levee Com'rs, 19 Wall. (U. S.) 655, 657; Queensbury *v.* Culver, 19 Wall. (U. S.) 83, 92; Thompson *v.* Perris Irrig. Dist., 116 Fed. Rep. 769; Jordan *v.* Cass County, 3 Dillon C. C. R. 185; Mather *v.* San Francisco, 115 Fed. Rep. 37, 40. In such cases the Federal courts have no power to issue a writ of *mandamus* as an *original* proceeding, and hence a bondholder cannot (as it is held in some of the State courts he may do under certain circumstances), *before* putting his claim into judgment, apply for a *mandamus*. In the Federal court he *must*, as stated in the text, first obtain his judgment. Bath County *v.* Amy, 13 Wall. (U. S.) 244; *post*, § 1518. Then, upon making the proper relation, he becomes entitled, under what was § 14 of the Judiciary Act (now Rev. Stats. § 716) to a writ of *mandamus*, as the appropriate remedy to enforce his judgment. It is, when thus issued, the *final process* to enforce

upon it is usual to issue execution, if the corporate debtor *can* by law have property subject to execution. On a return of the writ *nulla bona* or unsatisfied, application is made upon an information or relation under oath reciting these facts for a *mandamus* to compel the levy and collection of a tax to pay the judgment. But if the bondholder is by the statute expressly entitled to a levy of a *special* tax to pay such judgment, and if the duty of levying it has been neglected or refused, it is not necessary that an execution should in such case be returned *nulla bona* in order to give such judgment creditor the right to a *mandamus*. As the course of procedure in the Federal courts is in such cases assimilated to that at common law, and is not controlled by State statutes, a *demand* of the respondent and a *refusal* must be shown, or circumstances which will dispense with the demand. When a demand is made, it should be upon the corporation, or the particular officers whose duty it is, and who have the legal power, to comply therewith, and the demand should be for the performance of the exact duty due to the creditor; as, for example, to levy and collect the necessary tax. It is probable that an execution issued and a demand upon the proper officers thereunder for payment, would ordinarily be treated as a demand to levy a tax, as it would then, we think, become the duty of the officers to levy the proper tax. At all events, such an effect is in practice usually ascribed to an execution. The prudent and very cautious practitioner would accompany the writ of execution with a specific written demand to levy and collect the tax, and have it served at the same time with the writ of *mandamus*, the service whereof should be upon *the* officers upon whom the legal duty rests to do the act demanded.[1]

§ 1515 (857). **Creditor entitled to enforce full Exercise of Power.** Although there may be a *discretion* in the city council *as to the*

judgment, and performs, in substance, against municipal corporate debtors the office of a writ of execution, with the operation of which the state courts can no more interfere than they can with the other process of the federal courts. These are settled principles in the jurisprudence of the United States. The leading case is Riggs *v.* Johnson County, 6 Wall. (U. S.) 166, and its doctrines have been frequently reasserted and applied. *Ibid.*, § 1519, note. The Circuit Court of the United States cannot acquire jurisdiction of a *mandamus* suit to compel levy of taxes, *by way of removal from the State court*, under the Act of 1875 and Rev. Stats. U. S. § 716. Rosenbaum *v.* Bauer, 120 U. S. 450, three judges dissenting.

[1] The course of procedure here outlined is stated upon the author's knowledge of it in the Eighth Federal Circuit, and it is believed to be substantially coincident with the practice in the other circuits. See United States *v.* Saunders, 124 Fed. Rep. 124.

amount of tax which they are authorized to levy for ordinary purposes, yet a creditor who has obtained judgment is entitled to have the whole power of the corporation exerted, if it be necessary, for the payment of his judgment.[1] So where an act of the legislature provided that the city council "*may, if it believe* that the public good and best interests of the city require" it, levy a tax to pay its funded debt, a judgment creditor on a debt of this character may, by *mandamus*, compel it to levy a tax if it refuses to do so.[2] So also, where an act of the legislature declared that the "board of supervisors of counties owing debts which their current revenue, under existing law, is not sufficient to pay *may, if deemed advisable*, levy a special tax, to be used in liquidation of such indebtedness," the Supreme Court of the United States held that this power was mandatory, if its exercise was necessary in order to pay judgments rendered against the county.[3] The court places the decision upon the principle that where power is given to public officers, though conferred in language which is permissive in form, it will be regarded as peremptorily imposing a positive and abso-

[1] Coy *v.* Lyons, 17 Iowa, 1; Butz *v.* Muscatine, 8 Wall. (U. S.) 575, denying Clark *v.* Davenport, 14 Iowa, 494; Commonwealth *v.* Pittsburgh, 34 Pa. St. 496, 513, 517; Pitt County *v.* McDonald, 148 N. Car. 125; Kent *v.* United States, 113 Fed. Rep. 232; Howard *v.* Huron, 6 S. Dak. 180. See also Santa Fé County *v.* Coler, 215 U. S. 296, aff'g 14 N. Mex. 134. *As to limitation on rate or amount of taxation*, see Butz *v.* Muscatine, *supra;* Iowa R. Land Co. *v.* Sac County, 39 Iowa, 124; *ante*, §§ 322, 1508; *ante*, chap. xxvii., on Taxation; Britton *v.* Platte City, 2 Dillon C. C. 1. In Cleveland *v.* United States, 166 Fed. Rep. 677, it was held that in compelling by *mandamus* the levy of a tax to pay a judgment against the municipal corporation, the court might distribute the tax over a number of years to avoid unreasonable hardship to the taxpayers.

[2] Galena *v.* Amy, 5 Wall. (U. S.) 705.

[3] Rock Island County *v.* United States, 4 Wall. (U. S.) 435; s. p. Robinson *v.* Butte County, 43 Cal. 353; State *v.* New Orleans, 30 La. An. 129; Memphis *v.* Brown, 97 U. S. 300; United States *v.* Memphis, 97 U. S. 284; Memphis *v.* United States, 97 U. S. 293. In the case of Memphis *v.* Brown, *supra*, a creditor, having a decree against the city of Memphis for the payment of money, obtained in March, 1875, a *mandamus*, commanding it to levy upon all the taxable property of the city a tax sufficient in amount to pay the decree, which proceeding was authorized by the laws of the State. The city thereupon passed an ordinance levying a special tax, in professed conformity with the writ. The creditor, finding that such special tax did not include merchants' capital, which, under the laws of the State, was taxable for general purposes, and that the required sum would not be raised, moved for a further peremptory *mandamus*, commanding that such merchants' capital, assessed and returned for taxation for the year 1875, be included by the city within the property to be taxed for the payment of the decree, in accordance with the original writ. The court awarded the writ accordingly. It was held by the Supreme Court that the *mandamus* to compel the city to levy and collect the tax for the payment of the decree was process in the nature of an execution, and that the court below rightfully exercised control over it in deciding that its order to levy a tax upon all the property of the city included the capital of merchants taxable under the laws of the State for general purposes.

lute duty, whenever public interests and individual rights call of right for its exercise, and distinguishes the case from those which involve the exercise of a discretion judicial in its nature, and which the courts cannot control.[1]

§ 1516 (858). **Officers compelled, if necessary, to meet to levy the Required Tax.** — If the municipal officers *fail or neglect to perform the duty of levying a tax at the annual or regular meeting*, they may be compelled by *mandamus* to meet again and do their duty, the same as if it had been performed at the proper time and place, and this without the aid of any special legislative enactment.[2] In Arkansas, while it is admitted by the Supreme Court of the State that the Federal courts may in proper cases, by *mandamus*, compel county courts therein to levy taxes to pay judgments rendered in the Federal courts, yet it is denied that this writ, under the Constitution and laws of that State, can command the county court to convene for this purpose at a *time* not authorized by law, as the meeting of the court at such a time would not be a lawful meeting, and its acts would be *coram non judice*. The reason for this conclusion, as given by Chief Justice English, is that the writ of *mandamus* "cannot impart power to the county court; it can only enforce the exercise of power conferred upon it by the laws of the State."[3]

§ 1517 (859). **Liability to Private Action by the Creditor for Neglect of Duty.** — On the ground that where the law absolutely requires a ministerial act to be done by a public officer, and he neglects or refuses to do it without sufficient legal excuse, he is *liable in a private action to the person injured by his misconduct*, the Supreme Court of the United States held, where a judgment creditor of a public corporation had procured a peremptory *mandamus* to county supervisors to levy a tax sufficient to pay his judgment, which they refused or neglected to obey, that they were liable to him in a civil action in damages to the extent of the injury thereby occasioned. The court observed that honest intentions or a mistake as to their duty would constitute no defence to such an action; but it gave no opinion as to the rule by which to measure the damages, that is, whether the plaintiff would be limited in his recovery

[1] As to mandatory and discretionary powers, see further, *ante*, § 246; *supra*, § 489; People *v.* Albany County, 12 Barb. (N. Y.) 414, 416.

[2] People *v.* Chenango County, 8 N. Y. 317, 330, and prior cases in that State, cited by *Willard*, J.

[3] Graham *v.* Parham, 32 Ark. 676.

to the actual injury sustained, or whether his recovery would be the amount of his judgment, with interest.[1]

§ 1518 (860). **Jurisdiction of Circuit Courts of the United States in Mandamus; Prior Judgment required.** — The *power to issue the writ of mandamus*, as an *original and independent proceeding*, has not been conferred by the Judiciary Act of 1789 upon the Circuit Courts of the United States, and these courts are by that act and its revisions authorized to issue this writ only when ancillary to a jurisdiction already acquired.[2] Applying this rule, the Supreme Court of the United States has decided that the holder of coupons attached to bonds issued by a public or municipal corporation, and which have not been put into judgment, is not entitled to a *mandamus* from the Federal Circuit Court to compel the levy and collection of a tax to pay such coupons.[3]

§ 1519 (861). **Mandamus is in Nature of Execution of Judgment; May issue to State Officers; Relation of Federal and State Courts.** — But where the Circuit Court of the United States has rendered a judgment against a public or municipal corporation, it has the authority, under the fourteenth section of the Judiciary Act, and under the corresponding provision of the Revised Statutes, to issue the writ of *mandamus* where it is the appropriate remedy to enforce such judgment. By means of this writ, the Circuit Court of the United States may compel the officers of public and municipal corporations, though deriving their existence from State legislation, to

[1] Amy *v.* Des Moines County, 11 Wall. 136. The refusal of the treasurer of a public corporation to pay a certified demand against the corporation will not, unless, perhaps, where it can be shown that the refusal was wilful, and that he had funds in his hands applicable to the purpose for which they were demanded, make the treasurer *personally responsible* in an action at law, and the appropriate remedy of the party injured is, by *mandamus*, to compel him to make payment. Huff *v.* Knapp, 5 N. Y. 65, affirming s. c. 3 Sandf. (N. Y.) 299. See Bartlett *v.* Crosier, 17 Johns. (N. Y.) 439; People *v.* Lawrence, 6 Hill (N. Y.), 244; People *v.* Kelly, 5 Abb. New Cas. 383; *supra*, § 1485, note. *Further, as to personal liability of public officers. Ante*, §§ 433, 436–444.

[2] McIntyre *v.* Wood, 7 Cranch (U. S.), 504; McClung *v.* Silliman, 6 Wheat. (U. S.) 598, 601; Kendall *v.* United States, 12 Pet. (U. S.) 524, 584; Secretary of Int. *v.* McGarrahan, 9 Wall. (U. S.) 298, 311; Bath County *v.* Amy, 13 Wall. (U. S.) 244; Indiana *v.* Lake Erie & W. R. Co., 85 Fed. Rep. 1; United States *v.* Judges of U. S. Court of Appeals, 85 Fed. Rep. 177; *ante*, § 1514.

[3] Bath County *v.* Amy, *supra*; Labette County *v.* Moulton, 112 U. S. 217; Rosenbaum *v.* Bauer, 120 U. S. 450, affirming 28 Fed. Rep. 223; Greene County *v.* Daniel, 102 U. S. 187; Davenport *v.* Dodge County, 105 U. S. 237; Smith *v.* Bourbon County, 127 U. S. 105, 112; *ante*, § 1514; chap. xviii., on Contracts.

perform their duty to levy and collect the necessary taxes to pay judgments rendered therein against such corporations. The writ of *mandamus*, when so issued, is the final process of the court for the enforcement of its judgment, and performs, in substance and effect, the office of a writ of execution. It is considered by the Supreme Court of the United States to be a writ necessary to render effectual the jurisdiction of the Circuit Court, which attached when the action was commenced, which existed when the judgment was rendered, and which continues until it is collected. It is a result of these principles, and of the nature of the relations of the Federal and State jurisdictions, that neither the State legislatures nor the State courts can enjoin, or in any manner interfere with, the Federal tribunals in the exercise of the power of enforcing their own judgments.[1] To enforce the payment of judgments rendered therein, the Federal courts, on the refusal of the State officers to levy taxes as commanded, have, in a few instances, *under special circumstances*, exercised, with reluctance, the high and delicate authority of appointing the United States marshal as a commissioner for that purpose. The decisions on this subject are referred o in the note to this and a subsequent section.[2] Taking the deci-

[1] Riggs *v.* Johnson County, 6 Wall. U. S.) 166, which is the leading case on his subject. Approved and followed, eibert *v.* Lewis, 122 U. S. 284; Graham Folsom, 200 U. S. 248; United States Silverman, 4 Dillon, 224; Knox ounty *v.* Aspinwall, 24 How. (U. S.) 76, 384; Weber *v.* Lee County, 6 Wall. J. S.) 210; United States *v.* Keokuk, Wall. (U. S.) 514, 518; Washington ounty *v.* Durant, 9 Wall. (U. S.) 415; avenport *v.* Lord, 9 Wall. (U. S.) 409; my *v.* Des Moines County, 11 Wall. J. S.) 136; Hill *v.* Scotland County, 2 Fed. Rep. 716; Lafayette County Wonderly, 92 Fed. Rep. 313; Thompon *v.* Perris Irr. Dist., 116 Fed. Rep. 69; Kinney *v.* Eastern Trust & Banking Co., 123 Fed. Rep. 297; United tates *v.* Saunders, 124 Fed. Rep. 124; ee also Carter County *v.* Schmalstig, 27 Fed. Rep. 126; Anniston *v.* Hurt, 40 Ala. 394; State *v.* Rainey, 74 Mo. 29; State *v.* Middle Kittitas Irr. Dist., 3 Wash. 488; 106 Pac. Rep. 203; *ante*, hap. xx. §§ 886-915.

Illustrative of the controversy between e Federal and State authority in Iowa, owing out of the municipal railway d bonds, see Riggs *v.* Johnson ounty, 6 Wall. (U. S.) 166; Weber *v.* Lee County, 6 Wall. (U. S.) 210; United States *v.* Keokuk, 6 Wall. (U. S.) 514, 518; Lee County *v.* Rogers, 7 Wall. (U. S.) 181; Holman, *In re*, 28 Iowa, 88; *ante*, chap. xx. §§ 886-958. In King *v.* Wilson, 1 Dillon C. C. R. 555, the history of the *State* adjudications in *Iowa* on the subject of municipal aid to railways is given. *Ante*, § 313.

Commitment of officers for *contempt of court* in refusing to levy tax as directed by *mandamus* from Federal court; pardoning power of President. See Nevitt, *In re*, 117 Fed. Rep. 448.

[2] Lee County *v.* Rogers, 7 Wall. (U. S.) 175. The appointment of the marshal, in this case, as such commissioner, was considered to be authorized by the statute of the State (Revision of *Iowa* of 1860, § 3770) adopted in this particular case, and not by a general rule of practice. See also Lansing *v.* County Treasurer, 1 Dillon C. C. 522; Welch *v.* Ste. Genevieve, *Ib.* 130. See further on this point, *infra*, §§ 1520, 1521.

In Morgan *v.* Beloit, U. S. C. C. Wis., in the United States Circuit Court for *Wisconsin*, the question of the right of a judgment creditor of a municipality which would not levy and collect the necessary taxes to pay his judgment,

sions of the Supreme Court together they appear to the author to establish that such a commissioner cannot be appointed without statutory authority therefor.[1]

to resort to equity for relief, was presented. The debt of the town, in that case, was incurred under a special act of the legislature, approved Feb. 10, 1853, authorizing the town of Beloit to issue bonds in aid of a railroad, and the third section of the act provided that "the board of supervisors of the town of Beloit, *whenever the same shall become necessary, shall annually levy a tax upon the taxable property of said town*, sufficient to pay the interest upon such bonds, after deducting the dividends due to such town on said shares of stock." The complainant recovered a judgment in the Federal court in 1860, and a peremptory *mandamus* was issued in 1862, commanding the board to levy a tax to pay the judgment; but by repeated resignations, causing vacancies and want of quorum, no tax had ever been levied, and no attachments for contempt (as the bill alleged) could be had or made effectual. The bill made the town, in its *corporate capacity*, and its *inhabitants, defendants*, and asked for a decree subjecting the taxable property of the town and of the inhabitants to sale at auction by the marshal. A demurrer to the bill was sustained and the bill dismissed by *Miller*, District Judge, holding the Circuit Court. On appeal, the Supreme Court, after one argument, ordered a reargument upon this question: "Whether or not it is competent for the Circuit Court of the United States, on a bill filed for the purpose, to appoint a master or commissioner to levy and collect a tax, under and in pursuance of the third section of an act passed by the legislature of *Wisconsin*, Feb. 10, 1853, upon the taxable property of the town, sufficient to pay the judgment of the plaintiff, in case of a refusal of the supervisors of the town to levy the same, after service of a peremptory writ of *mandamus*." At the December term, 1869, the decree below, dismissing the bill, was affirmed by an equal division of opinion, there being at the time eight judges on the bench. No opinions were delivered, and no report of the case has been published. The arguments of counsel (Mr. Carpenter for the bill, and Messrs. Palmer and Ryan, *contra*) were mainly addressed to the question of *equity jurisdiction* in such a case, and the right to subject the *private property* of the inhabitants to the payment of the debts of the municipality. *Ante*, §§ 992, 1506, note, 1508, 1513.

In Rees *v.* Watertown, in the Circuit Court of the United States for the Western District of *Wisconsin*, June term, 1872, the bill, which was similar to the one in the case of Morgan *v.* Beloit, U. S. C. C. Wis., *supra*, was dismissed. *Hopkins*, District Judge, expressing an opinion against the right claimed, and *Drummond*, Circuit Judge, in view of the diversity of opinion among the judges in Morgan's case, concurring in that disposition of the matter. In Rees *v.* Watertown, 19 Wall. (U. S.) 107, the decree below was affirmed, and the Supreme Court denied the right of the creditor to resort to a court of equity, although the remedy by *mandamus*, in consequence of successive resignations of the municipal officers, had for years proved unavailing; and the same principle was applied in Heine *v.* Levee Com'rs, 19 Wall. (U. S.) 655.

In Hubbell *v.* Waterloo, the Circuit Court of the United States for the Eastern District of *Wisconsin* (present, *Drummond* and *Miller*, JJ.), in April, 1872, in an application in a *mandamus* proceeding supplemental to a judgment against the town of Waterloo for the appointment of the marshal as commissioner to levy and collect the taxes, which the local officers evaded, and refused (by successive resignations) to levy and collect, the judges were divided in opinion as to the power of the court to make the appointment, and the question was certified to the Supreme Court of the United States. Review of cases in the Supreme Court concerning the power and jurisdiction of equity in respect of the levy and collection of taxes, and as to the general result thereof, see *ante*, §§ 336, 1482, 1513, and notes.

[1] Statutory provision in *Washington* for appointment of commissioner to execute mandate of the court, when necessary. See State *v.* Middle Kittitas Irr. Dist., 56 Wash. 488; 106 Pac. Rep. 203.

§ 1520 (861*a*). Enforcement of Judgments in the Federal Courts; utwell's Case; Case of City of Watertown. — In the *enforcement of lgments on municipal bonds*, the creditors have encountered stacles arising or supposed to arise from two decisions of the Su- eme Court, — United States *v.* Boutwell,[1] and Rees *v.* City of

[1] United States *v.* Boutwell, 17 Wall. 8.) 604. The Supreme Court in its nion says: "The office of a writ of *ndamus* is to compel the performance a duty resting upon the person to om the writ is sent. That duty may e originated in one way or in an- er. It may have arisen from the eptance of an office which has im- ed the duty upon its incumbent. no matter out of what facts or tions the duty has grown, what the regards and what it seeks to enforce a writ of *mandamus* is the personal gation of the individual to whom dresses the writ. If he be an officer, the duty be an official one, still the is aimed exclusively against him person, and he only can be pun- l for disobedience. The writ does reach the office. It cannot be ted to it. It is, therefore, in sub- e a personal action, and it rests the averred and assumed fact the defendant has neglected or ed to perform a personal duty, to performance of which by him the or has a clear right. Hence it is mperative rule that, previous to ng application for a writ to com- l the performance of any par- ar act, an express and distinct and or request to perform it must been made by the relator or pros- or upon the defendant, and it appear that he refused to comply such demand, either in direct s or by conduct from which a al can be conclusively inferred. it is the personal default of the idant that warrants impetration e writ, and if a peremptory *manda-* be awarded, the costs must fall the defendant. It necessarily vs from this, that on the death or ment from office of the original idant the writ must abate, in the ice of any statutory provision to ontrary. When the personal duty s only so long as the office is held, ourt cannot compel the defendant rform it after his power to perform eased. And if a successor in office be substituted he may be mulcted in costs for the fault of his predecessor, without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty and render the interposition of the court unnecessary. At all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative. As might be expected, therefore, we find no case in which such a substitution as is asked for now has ever been allowed, in the absence of some statute authorizing it. On the contrary, after the statute of 9 Anne, chap. xx. § 1, it was the acknowledged doctrine in England that the rules and practice as to abatement by death, resignation, or removal from office were the same in cases of *mandamus* as in personal actions. By that statute it was enacted that the prosecutor or relator may plead to or traverse all or any of the material facts averred in the return, the defendant having liberty to reply, take issue, or demur; and it was directed that such further proceedings might be had as might have been had if the prosecutor had brought his action on the case for a false return. Thus *mandamus* became in effect a personal action against the defendant. This statute was in force in *Maryland* when the District of Columbia was a part of that State, and hence it is in force in the District now. Therefore, whatever may be the rule elsewhere, *here* a writ of *mandamus* must abate whenever the performance by the defendant of the personal duty it seeks to enforce has become impossible. The law was changed to some extent in England by the later act of Parliament of 1 William IV. chap. xxi. § 5, by which it was enacted that in case the return to any writ (of *mandamus*) within the purview of the act should, in pursuance of an allowance made by it, be expressed to be made on behalf of any other person than the defendant, the further proceedings on such writ should not abate or be discontinued by death, resignation, or removal from office of the person who made such return, but the same might be continued and carried on in

Watertown.[1] The case against Mr. Boutwell arose when he was Secretary of the Treasury, and was an application in the inferior court for a *mandamus* to compel him to pay a certain order. The writ was refused, and a writ of error taken to the Supreme Court, after which Mr. Boutwell resigned and his successor was appointed. The Supreme Court refused the application to substitute the successor, and one ground of refusal was, that in the absence of a statute altering the common-law rule, the writ of *mandamus* abates by the death, *resignation*, or removal from office of the officer to whom it is directed. In the view of the court, the office of a writ of *mandamus* is to compel the performance of a personal duty resting on the respondent: "if he be an officer, and the duty an official one, still the writ is aimed exclusively against him as a person, and *he* only can be punished for disobedience; the writ does not reach the office and cannot be directed to it; it is the personal default of the defendant that warrants the impetration of the writ; it necessarily follows from this that on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary." The burden of the reasoning of the Supreme Court is that the duty is personal, not official. But in fact and in substance, was not the duty which it was here sought to have Mr. Boutwell perform, official, and not personal? While the technical correctness of the court's views and conclusion cannot perhaps be impugned, they seem to savor of that refinement which formerly pervaded everywhere the common-law procedure, and in a striking degree the proceedings in *mandamus*.

the name of such person, and if a peremptory writ should be awarded, it might be directed to any successor of such person in office or right. No similar statute exists with us, and its enactment in England was a recognition of the rule that the death, resignation, or removal from office of the defendant worked an abatement of the action. It required a statute to change the rule; and, to avoid injustice, the costs of the writ, when issued and obeyed, were committed to the discretion of the court. If the retirement of the defendant from office, and his consequent inability to perform the act demanded to be done, does not abate the writ or necessitate its discontinuance, there is still an insuperable difficulty in the way of our directing the substitution asked for. We can exercise only appellate power. We have no original jurisdiction in the case. But any summons issued, or rule upon his successor requiring him to become a party to the suit, would be the exercise of original jurisdiction over both a new party and a new cause, for the duty which he would be required to perform would be his own, not that of his predecessor. Marbury *v.* Madison, 1 Cranch (U. S.), 137; Kendall *v.* United States, 12 Pet. (U. S.) 524, 526; Secretary of Int. *v.* McGarrahan, 9 Wall. (U. S.) 298, 313." Boutwell's Case followed; United States *v.* Chandler, 122 U. S. 643; United States *v.* Butterworth, 169 U. S. 600; Territory *v.* Baker, 12 N. Mex. 456, aff'd 196 U. S. 432; Seymour *v.* Nelson, 11 App. D. C. 58; State *v.* Board of Canvassers, 32 Mont. 13.

[1] Rees *v.* Watertown, 19 Wall. (U. S.) 107; *ante*, §§ 336, 1482, 1513, and notes.

The Supreme Court in the other case referred to[1] decided, in ffect, these propositions: 1. That in the enforcement of his judgnent against the municipality, the plaintiff was confined to his emedy at law by *mandamus* or otherwise, no ground of equity urisdiction being made out. 2. That the neglect and refusal of he municipal officers to levy the taxes, their disobedience of the rits of *mandamus*, and their resignations to evade the duty of evying and collecting the taxes, did not authorize the court to ppoint officers of its own to levy and collect them, denying, on his point, Welch *v.* Ste. Genevieve,[2] and distinguishing Supervisors . Rogers,[3] and Lansing *v.* County Treasurer.[4] 3. That it was not ompetent for the court, in virtue of its general jurisdiction as a ourt of equity (there being *no individual liability* on the part of ie taxpayers or inhabitants of the municipality to pay the debts f the corporation), itself to subject individual property within the orporation to pay the judgment, the exclusive remedy being by *andamus* directed to the municipality or its proper officers, comanding *them* to levy and collect, under the powers vested in them that behalf, the requisite taxes.[5]

[1] Rees *v.* Watertown, 19 Wall. (U. 107, *supra*.

[2] Welch *v.* Ste. Genevieve, 1 Dillon C. R. 130.

[3] Lee County *v.* Rogers, 7 Wall. . S.) 175.

[4] Lansing *v.* County Treasurer, 1 lon C. C. R. 522.

[5] A direct effect of the decision in s *v.* Watertown, in connection with protracted and successful evasion he city of Watertown, was to enrage municipalities and counties where to adopt the same mode of ping payment, viz., by successive repeated resignations. This was rtised to a considerable extent in State of *Missouri* by several coun- that were burdened with a large btedness; but it was measurably ked by the action of the executive he State, Governor Hardin, in reng to accept the resignation of the nty court judges when he had good on to believe that the resignation tendered for this purpose.

The case of Lee County *v.* Rogers, all. (U. S.) 175, in which the United tes Circuit Court, after the county ers had evaded the law and disyed the peremptory writ, directed *mandamus* to the *marshal* of the ted States for the District of *Iowa*, commanding *him* to levy and collect the taxes named in the writ, and which was sustained by the Supreme Court, is declared in the Watertown case to depend, in this respect, wholly upon a statute of the State of *Iowa* (Rev. of 1860, § 3770). That statute had no special reference to this class of cases, and was simply to the effect that the court, in cases of *mandamus*, "besides or instead of proceeding against the defendant by attachment, may direct that the *act* required to be done *may be done by the plaintiff or some other person appointed by the court*." The practice of the Federal court in *mandamus* cases is as at common law, and this statute had never been adopted by rule; but it was held "competent to adopt it in the particular case," and that it authorized the court to appoint a third person or officer of its own to levy and collect the required taxes. Looking at this case in the light of the decision and reasoning in the Watertown case, and in Heine *v.* Levee Com'rs, 19 Wall. (U. S.) 655, and of the above suggestions, it would seem to rest upon a very narrow basis. If the court is without power to make such an appointment without the aid of the statute, it was certainly a very broad and liberal view of the language of that statute to hold

§ 1521 (861*b*). **Boutwell's Case not applicable to Corporate Duties; No Abatement by Death or Resignation.** — The principle of Boutwell's case — that a writ of *mandamus* directed to a *public officer abates on his death or resignation* if there be no statute to the contrary — *does not, however, apply to the case of duties devolved by law upon municipal or public corporations in their corporate character.* Some repudiating municipalities sought to evade their duties towards their creditors by encouraging and accepting the resignations of the officers to whom the writs of *mandamus* were directed or upon whom they were served, so that the particular officers upon whom the alternative writ was served would not be in office when the peremptory writ was applied for, or the officer to whom the peremptory writ was directed would resign before the writ could be served, or after the service and before the time fixed for the performance of its command, and the successor would claim that he could not be held liable, as for a contempt or otherwise, for the default of his predecessor. But when the question under such circumstances came before the Supreme Court of the United States that tribunal decided, upon a correct conception of the principles of corporate law, that where the duty was one to be performed by the corporation, *the writ may be directed to the corporation in its corporate name or to the proper officers in their corporate capacity and official style without naming them*, and that when it is once duly served its power remains, notwithstanding changes in the officers by death, resignation, or the election of successors, until the duty which is commanded is performed; that the officers in existence at the time when the act is required to be done are those whom the court will hold responsible for the performance of what is commanded; and hence writs commanding the performance of corporate duties do not, as in Boutwell's case, abate by changes in the officers of a corporation. The writ, although directed to the corporation, is enforced through the members or officers whose duty it is to obey its

that the "act" contemplated by it included the act of levying and collecting taxes, giving acquittances therefor, and selling property to enforce the payment thereof, and making conveyances to complete the sales. See Heine *v.* Levee Com'rs, 19 Wall. (U. S.) 655, referred to in Graham *v.* Folsom, 200 U. S. 248, 252; *ante*, §§ 336, 1482, 1513, 1519, and cases cited. The statement in the opinion of *Nelson*, J., that this statute "is but a modification of the law of England and of the New England States, which provides for the execution of a judgment recovered against a county, city, or town, against the private property of any individual inhabitant, giving him the right to claim contribution from the rest of the people," can hardly be maintained in view of the decision in the Watertown case, and the other cases above referred to, and it seems obvious that the section of the *Iowa* statute referred to was intended for no such purpose.

commands, and if part of the officers or members have done all within their power to comply with the writ, the court will punish only those who are actually guilty of disobedience. Whatever uncertainty might have been supposed to exist on this point is definitely removed by the decisions of the Supreme Court of the United States cited in the note,[1] resting as they do upon sound reason, and

[1] Leavenworth County *v.* Sellew, 99 U. S. 624; Leavenworth *v.* Kinney, 99 U. S. 623; *infra*, §§ 1533-1536, 1546.

Thus where the duty to levy taxes to pay the debt of a county is devolved upon the "board of county commissioners," which is the corporate name by which counties are made capable of suing and being sued, the *writ may be directed to "the board of county commissioners"*; and in the case of a city corporation it may be directed to the *mayor and city council in their corporate capacity*, and it need not be directed to the persons who are mayor and councilmen. And it being provided in the case of legal proceedings against a county that process may be served upon the clerk of the board, a like service of the writ of *mandamus* is assumed, and stated to be sufficient, in the case of Leavenworth County, *supra*. In pronouncing the judgment of the court upon these important points, Mr. Chief Justice *Waite* says:

"In United States *v.* Boutwell, 17 Wall. (U.S.) 604, 607, it was decided that a *mandamus* was used 'to compel the performance of a duty resting upon the person to whom the writ is sent,' directed to a public officer, it abated by his death or retirement from office, because it could not reach the office. That principle does not, as we think, apply to this case. There the officer proceeded against was the Secretary of the Treasury of the United States, and the writ was 'aimed exclusively against him as a person.' Here the writ is sent against the board of county commissioners, a corporation created and organized for the express purpose of performing a duty, among others, which the relator seeks to have enforced. The alternative writ was directed both to the board in its corporate capacity and to the individual members by name, but the peremptory writ was ordered against the corporation alone. As the corporation can only act through its agents, the courts will operate upon the agents through the corporation. When a copy of the writ which has been ordered is served upon the *clerk* of the board, *it will be served on the corporation*, and be equivalent to a command upon the persons who may be members of the board to do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for the contempt. Although the command is in form to the board, it may be enforced against those through whom alone it can be obeyed. One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifested itself in Boutwell's case may be avoided. In this way the office can be reached and the officer compelled to perform its duties, no matter what changes are made in the agents by whom the officer acts. The board is in effect the officer, and the members of the board are but the agents who perform its duties. While the board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failure to do what the law requires of them as the representatives of the corporation. We think, therefore, that *the peremptory writ was properly directed to the board in its corporate capacity.* In this way the power of the writ is retained until the thing is done which is commanded, and it may at all times be enforced through those who are for the time being charged with the obligation of acting for the corporation. If, in the course of the proceedings, it appears that a part of the members have done all they could to obey the writ, the court will take care that only those who are actually guilty of disobedience are made to suffer for the wrong that is done. Those who are members of the board at the time when the board is required to act will be the parties to whom the court will look for the performance of what is demanded. As the corporation cannot die or retire from the office it holds, the writ cannot abate, as it did in Boutwell's case. The decisions in the State courts in which

supported as they are by the decisions of several of the State courts.

§ 1522 (861 *c*). **Resignation to avoid Duty; When ineffectual until Successor is qualified.** — Where a statute in relation to a public or municipal officer provides that such *officer shall continue in office until his successor is qualified, a resignation made in order to avoid auditing or paying a judgment against the corporate town or municipality* is not a sufficient return to an alternative *mandamus* to compel such officer to make such audit and payment. A resignation under such circumstances does not relieve the officer from the responsibility and duties of office until his successor is appointed and qualified. In the opinion of the court, Mr. Justice Hunt says: "The provisions as to these officers and as to the town officers are parts of the same system. The resignations may be made to and accepted by the officers named; but, to become perfect, they depend upon and must be followed by an additional fact, to wit, the appointment of a successor and his qualification. When it is said in the statute that the resignation may be thus accepted, it is like to the expiration of the term of office. In form the office is thereby ended, but to make it effectual it must be followed by the qualification of a successor." [1]

§ 1523 (861 *d*). **Same subject; Principle limited and Case distinguished.** — The *principle referred to in the preceding section does not apply*, where, by statute, an officer has the right to resign at will, and the statute provides that the resignation shall take effect as soon as it is filed with a designated officer. A recent case declares and well illustrates this distinction. By the statute of Wisconsin service of process upon cities must be made "by delivering a copy thereof to the mayor and city clerk," and by the charter of the defendant city, service must be made upon the mayor. At the time when summons against the city in an action of debt was issued there was no mayor or acting mayor of the city, his resignation having

this practice is sustained are numerous. Maddox *v.* Graham, 2 Met. (Ky.) 56; State *v.* Madison Council, 15 Wis. 30, 37; Peagram *v.* Cleaveland County, 65 N. C. 114; People *v.* Collins, 19 Wend. (N. Y.) 65, 68." See also Columbia County *v.* King, 13 Fla. 451; Little Rock *v.* Board of Improvements, 42 Ark. 152.

[1] Badger *v.* United States, 93 U. S. 599, affirming the same case, 6 Biss. 308. Followed in Jones *v.* Jefferson, 66 Tex. 576, where the service of a citation upon officers three years after they had resigned, no successors having been appointed or elected, and there being evidence that the object of the failure to elect was to defeat the collection of debts against the city, was held to be valid.

aken effect. Service of the summons was made upon the last nayor, the city clerk, the city attorney, and the last presiding fficer of the board of street commissioners, the return reciting that he office of mayor was vacant and that there was no president of he common council or presiding officer thereof in office. It was eld that the court had no jurisdiction upon such service to render judgment against the city.[1]

§ 1524 (862). **Distinction between Negotiable Bonds and Ordinary Warrants as to Enforcement.** — What we have heretofore said has reated to the enforcement of municipal bonds where there is an *xpress* authority given or duty enjoined to levy a tax or a special ax to pay them. We have adverted in a preceding chapter[2] to the istinction between negotiable municipal bonds, issued under direct uthority from the legislature, and ordinary municipal or county rders or warrants. The *distinction between the two classes of in-uments* often becomes important when it is sought to enforce yment by means of *mandamus*. The latter class of instruments, t being commercial paper, — being in the nature of vouchers to e ordinary creditor and put in the shape of warrants or orders

[1] Amy *v.* Watertown, 130 U. S. 301, . *Bradley*, J., giving the opinion the court, says: "The case is differ- from those in which we have held t a resignation of an officer did not e effect until it was accepted or until ther was appointed. In those cases er the common law prevailed or the l law provided for the case and pre- ted such a vacancy. Such were the s of Badger *v.* Bolles, 93 U. S. 599; vards *v.* United States, 103 U. S. 471; manca *v.* Wilson, 109 U. S. 627. statutes of *Wisconsin* provided that city officer might resign at pleasure, that his resignation 'should take ct at the time of filing the same.' provisions of the statute law are sive, and preclude the operation ny such rule as was recognized in ger *v.* Bolles and Edwards *v.* United es. The service upon the last or, therefore, was of no force, and no effect whatever. The cases are erous which decide that where a icular method of serving process is ted out by statute, that method t be followed, and the rule is es- ally exacting in reference to cor- tions" (citing cases). "The law *Visconsin* is perfectly clear that the service of process in this case was ineffective and void. City of Watertown *v.* Robinson, 69 Wis. 230. This court in the construction of a State statute in a matter purely domestic, gives great weight to the decisions of the highest tribunals of the State." This case was distinguished from Broughton *v.* Pensacola, 93 U. S. 266, and Mobile *v.* Watson, 116 U. S. 289, where the question was as to the liability of new corporations made out of old ones for the debts of the old corporations. *Ante*, § 416.

Inability to serve process upon a city, although caused by its designed elusion thereof, does not stop the running of the statute of limitations. Amy *v.* Watertown, 130 U. S. 320; Knowlton *v.* Watertown, *Ib.* 327. If a county is primarily liable on the bonds, other counties to which portions of the territory of the obligor county have been attached are not necessary parties to the application for *mandamus* though the latter counties or the territory attached thereto may be under obligation to contribute. Santa Fé County *v.* Coler, 215 U. S. 296, aff'g 14 N. Mex. 134.

[2] *Ante*, §§ 850, 851, 871.

for his convenience, — are to be paid in the manner provided by the charter or legislation of the State. The provisions are variant in different charters and in different States. In some of the States these instruments are to be registered and paid in the order of their registration, and there is no provision for the levy of a special tax to pay them; and it is contemplated that, as they are issued in payment of the ordinary expenses of the city, town, or county, they are to be paid out of the ordinary revenues or resources. It has been quite common for the non-resident holders of such instruments to sue thereon in the Federal courts, hoping to obtain thereby some of the advantages which have been accorded by those courts to the holders of negotiable securities.

§ 1525 (863). **Enforcement of Warrants or Orders in the Federal Courts.** — Where *such warrants or orders have been issued by corporate or quasi corporate organizations* capable of being sued in the State courts, the Federal courts, so far as our observation goes, have held that the non-resident owner thereof may also sue thereon in the Federal court, and by its judgment establish the validity and amount of his debt, and such judgment may become the basis of an application made in due form for the writ of *mandamus;* but the writ when so issued will only command the proper officers to discharge the legal duties they owe, under the charter or statute, to the warrant-holder.[1] The Federal courts cannot overturn or interfere with the policy of the State in respect to the rights or remedies of this class of creditors. The leading case on this subject is Carroll County *v.* United States.[2] Counties in Iowa were authorized to issue, for ordinary expenses, orders or warrants payable to bearer, and were liable to be sued upon them. The statute limited the power of the county authorities "for ordinary county revenue" to the levy each year of "not more than four mills on the dollar." It made no provision (as the statute was construed by the Supreme Court of the State, whose construction was regarded by the Federal courts as binding on them) for the levy of a *special tax* to pay judgments obtained on such warrants. The judgment creditor in the Federal court claimed that he was entitled to the levy of a *special* tax to pay his judgment. But the Supreme Court of the United States held otherwise, and decided that a return to an alternative writ of *mandamus* by the county authorities that they had already

[1] Jordan *v.* Cass County, 3 Dillon C. C. R. 185.

[2] Carroll County *v.* United States, 18 Wall. (U. S.) 71.

evied a four-mill county tax for the current year (that being the *maximum* amount allowed by statute) was a sufficient return.[1]

§ 1526 (864). **Application for the Writ.** — It is not our purpose o treat at large of *the proceedings and practice* in respect to the remdy by *mandamus*. We shall refer to these in a general way only, n order the better to illustrate the application of the writ to municial corporations and municipal officers. The practice in the different States is as at common law, modified by statutory enactment. he *writ is not granted of course, but on motion, based upon affidavits, r upon a suggestion supported by oath,* which must be drawn up ith precision, and state with clearness and certainty the grounds r the application, and must also present a case in which the writ es. If there be another remedy apparently adequate and comlete, the affidavits must show why it is not sufficient or why it ould prove ineffectual.[2]

[1] Carroll County *v.* United States, Wall. (U. S.) 71. The text succinctly ates the principle established by this se. In respect of the local statute of wa (§ 3770 of the Iowa Revision) e court distinguished and explained e case of Butz *v.* Muscatine, 8 Wall. . S.) 575, — perhaps it ought to be id it overruled it on this particular int. *Supra*, § 1520.

The Circuit Court of the United ates for the Eastern District of *Arnsas*, 4 Dillon, 215, in conformity h the doctrines of the text, upon a iew of the legislation of that State ching the indebtedness of counties *warrants*, and the provisions of the r Constitution on the subject of nty indebtedness, declared the foling propositions:

l. That the county court, in case the nty is indebted, owes a legal duty to creditor or warrant-holder to exerthe power of levying taxes to the *imum* limit allowed by law, if essary to pay the outstanding intedness of the county. The *maxin* rate can in no event be exceeded. *e*, § 1515, and cases there cited.

. That a creditor who has obtained dgment in this court against a nty may, after proper demand on county court to discharge its duty in regard, and a neglect or refusal on part of the court to comply with demand, have a *mandamus* to pel the performance of such duty. There must be such a demand or averment of facts of such a nature as will dispense with the demand.

3. Under the new Constitution of *Arkansas* (art. xiv. § 9) as to indebtedness then existing, there is a duty, which creditors may enforce, resting on the county court to levy a tax not exceeding one-half of one per cent. Such tax when levied and collected cannot "be used for any other purpose" than the payment of such indebtedness (art. xvi. § 11), and must, according to present impression, although the court does not hold itself concluded on the point, be collected in money, and not in other warrants.

A judgment creditor of a county in *Missouri*, whose judgment is based on municipal bonds secured by the right to a special tax, who has received under a *mandamus* a county warrant therefor, which is refused payment, may have another *mandamus* to enforce the judgment, and is not bound to take his turn under the statute among ordinary county warrant-holders. This ruling coincides with the distinction pointed out in the text. United States *v.* Vernon County, 2 Cent. L. J. 771; s. c. 3 Dillon, 281.

[2] Rex *v.* Oxford, 7 East, 345; Buller's *Nisi Prius*, 201; Stephens's *Nisi Prius*, 2318; Willc. 357, pl. 43, 44; Rex *v.* Margate Pier Co., 3 B. & Ald. 221, 224; People *v.* San Francisco, 27 Cal. 655; People *v.* Chicago, 51 Ill. 17; Scanlan *v.*

§ 1527 (865). **Official and Private Relators.** — Where the application for the writ *relates to a matter affecting the public,* such as the

Schwab, 103 Ill. App. 93; People *v.* Perrin, 103 Ill. App. 410; People *v.* Helt, 116 Ill. App. 391; Case *v.* Sullivan, 222 Ill. 56; State *v.* Spinney, 166 Ind. 282.

An alternative writ stands in the place of the declaration in an ordinary action, and must show a good prima facie case, or it is demurrable. Ib.; People *v.* Ransom, 2 N. Y. 490; Hoxie *v.* Somerset County, 25 Me. 333; Illinois & Mich. Canal Trs. *v.* People, 12 Ill. 248, 254; State *v.* Bailey, 7 Iowa, 390; State *v.* Haben, 22 Wis. 660; People *v.* Hilliard, 29 Ill. 413; People *v.* Baker, 35 Barb. (N. Y.) 105; State *v.* Johnson County, 10 Iowa, 157; People *v.* Hayt, 66 N. Y. 606.

"In practice," says *Thompson,* J., "the party seeking the remedy by *mandamus* presents to the court a *prima facie case,* entitling him to the writ by way of suggestion [or by affidavit or sworn information]. This being in proper form and sufficient in substance, an alternative *mandamus* may be awarded upon it, reciting the complaint of the relator and his demand for redress, and commanding the party to whom it is directed either to obey it or return his reasons for not doing so. This alternative is what gives the denomination of 'alternative *mandamus*' to the first writ. The establishment of a duty, and the obligation to perform it, is upon the plaintiff to show, and this is considered as done, *prima facie,* when the court awards the writ. The respondent, upon service of it, is bound either to obey, or show that the plaintiff has no right to demand obedience, or that no duty exists which he can be compelled to perform. Whenever this is not accomplished by a demurrer, or by a general traverse of the facts set forth in the writ, it is generally done by matters averred in the return by way of confession and avoidance." Commonwealth *v.* Allegheny County, 37 Pa. St. 277, 279. See also State *v.* Richards, 50 Fla. 284; Bolton *v.* People, 95 Ill. App. 285; People *v.* Palmer, 27 N. Y. Misc. Rep. 569; State *v.* La Grave, 22 Nev. 417.

If there be no special *statutory limitation,* the application for the writ may be made within the period given by statute for bringing ordinary actions for similar injuries. People *v.* Westchester County, 12 Barb. (N. Y.) 446; Prescott *v.* Gonser, 34 Iowa, 175. See also Barnes *v.* Glide, 117 Cal. 1; Jones *v.* San Francisco, 141 Cal. 96; Dodge *v.* Board of Police Com'rs, 1 Cal. App. 608; Manchester *v.* Furnald, 71 N. H. 153; People *v.* Greene, 87 N. Y. App. Div. 346; People *v.* Maxwell, 87 N. Y. App. Div. 391; Milster *v.* Spartanburg, 68 S. Car. 26. The author doubts whether the three years' statute applied to the case above cited. But the writ, not being one of right, there is a discretion to refuse it if the applicant has been guilty of unreasonable laches and delay in asserting his right. Savannah *v.* State, 4 Ga. 26; Wood *v.* State, 155 Ind. 1; State *v.* New Orleans, 107 La. 162; State *v.* Holmes (Neb.), 91 N. W. Rep. 175; True *v.* Melvin, 43 N. H. 503; People *v.* Marsh, 82 N. Y. App. Div, 571, aff'd 178 N. Y. 618; People *v.* Sturgis, 82 N. Y. App. Div. 580; People *v.* Greene, 95 N. Y. App. Div. 397; Queen *v.* Halifax Road Trs., 12 Q. B. 442; Rex *v.* Lancashire, 12 East, 366; Rex *v.* Stainforth & K. Canal Co., 1 M. & S. 132; Regina *v.* Leeds & L. Canal Co., 11 A. & E. 316. Where one who is unlawfully dismissed from a position in the civil service sleeps upon his rights for any considerable length of time, his neglect will defeat a *mandamus* proceeding to secure his reinstatement. People *v.* McCartney, 28 N. Y. App. Div. 138. So in a case where the substantial *right* claimed by the relator is *doubtful.* Life & F. Ins. Co. of New York *v.* Wilson's Heirs, 8 Pet. (U. S.) 291; People *v.* Chicago, 51 Ill. 17; Stephens's *Nisi Prius,* 2293; De La Beckwith *v.* Colusa County Super. Ct., 146 Cal. 496; Kenneally *v.* Chicago, 220 Ill. 485; *ante,* § 1486. *Or is insignificant,* as where only two dollars are involved. People *v.* Hatch, 33 Ill. 91. See also People *v.* Saratoga County, 106 N. Y. App. Div. 381. It seems that the court has the discretion, *if a single levy of taxes* will be oppressive, not to order all the accumulated past due indebtedness to be collected in one year *en masse.* East St. Louis *v.* Amy, 120 U. S. 600; Cleveland *v.* United States, 166 Fed. Rep. 677, 684. See also State *v.* Byrne, 32 Wash. 264. Where individuals apply for *mandamus* or *quo*

ent of an act of the legislature for the public benefit, *the 's attorney*, in a proper case, is entitled to the writ as of : is sufficient, we think, to entitle a person to become an

is discretionary to grant or ule. People *v.* Rock Island, ; McCarthy *v.* Boston, 188 State *v.* Barret, 30 Mont. Ward, L. R. 8 Q. B. 210; ensen, 2 B. & A. 479. Lord ays, "No precise rule can n in these cases; but all the es of the case taken to- guide the discretion of the ex *v.* Stacey, 1 T. R. 13. is ordinarily no discretion e writ, see *infra*, § 1527. limitation in *Mississippi* off a creditor's remedy by Carroll *v.* Tishamingo Miss. 38; Klein *v.* Warren Miss. 578; Klein *v.* Smith Miss. 254. In *Oklahoma*, to levy a tax to pay a ust be applied for within limited by law for the execution on a judgment. Perry Board of Education Pac. Rep. 821. See to the United States *v.* Oswego d. Rep. 55; Dempsey *v.* , 51 Fed. Rep. 97; Lafay- *v.* Wonderly, 92 Fed. Rep. , *In re*, 117 Fed. Rep. 448; tes *v.* Saunders, 124 Fed.

st and useful purpose re- it of mandamus to be granted, as discretion to refuse it. Clark, 24 App. D. C. 487; ston, 146 Ala. 434; Gray *v.* a.), 39 So. Rep. 927; People 0 Cal. 223; Lake County y, 43 Colo. 84; Lurtz *v.* 1 Marv. (Del.) 450; Duval Jacksonville, 36 Fla. 196; State, 43 Fla. 67; State *v.* Fla. 389; People *v.* Kohlsaat, ; People *v.* Olsen, 215 Ill. *v.* Wieboldt, 233 Ill. 572; Sheahan, 73 Ill. App. 118; Education *v.* Bolton, 85 Ill. Terry *v.* Baker, (Ky.) 67 . 258; Williams *v.* Lin- y, 35 Me. 345; State *v.* Md. 351, 374; Fletcher *v.* uit Judge, 136 Mich. 511; ilder, 211 Mo. 305; State City Pol. Com'rs, 80 Mo. State *v.* Cronin, 75 Neb. *v.* Westchester County, 15 Barb. (N. Y.) 607; Testard *v.* Brooks (Tex. Civ. App.), 70 S. W. Rep. 240; State *v.* Willis (N. Dak.), 124 N. W. Rep. 706; Hall *v.* Staunton, 55 W. Va. 684.

"The granting of the writ of *mandamus* rests in the sound judicial discretion of the court, which has cautiously abstained," says *Gray*, C. J., in Attorney-General *v.* Boston, 123 Mass. 460, "from laying down any limits to the exercise of this discretionary power." See also Funk *v.* State, 166 Ind. 455; American R. Frog Co. *v.* Haven, 101 Mass. 398; St. Luke's Church Prop. *v.* Slack, 7 Cush. (Mass.) 226, 239; Commonwealth *v.* Hampden County, 2 Pick. (Mass.) 414; Strong, Petitioner, 20 Pick. (Mass.) 484, 495; Carpenter *v.* Bristol County, 21 Pick. (Mass.) 258; Mackinnon *v.* Auditor-General, 130 Mich. 552; People *v.* McGuire, 31 N. Y. Misc. 324; Moores *v.* State, 71 Neb. 522; Stearns *v.* Sims (Okla.), 104 Pac. Rep. 44; Conshohocken Ave., *In re*, 12 Pa. Super. Ct. 573.

In Strong's Case, 20 Pick. (Mass.) 484, 495, Mr. Justice *Morton* said: "In every well-constituted government, the highest judicial authority must necessarily have a supervisory power over all inferior or subordinate tribunals, magistrates, and all others exercising public authority. If they commit errors, it will correct them. If they refuse to perform their duty, it will compel them, — in the former case by writ of error, in the latter by *mandamus*. And generally in all cases of omissions or mistakes, where there is no other adequate specific remedy resort may be had to this high judicial writ. It not only lies to ministerial, but to judicial officers. In the former case it contains a mandate to do a specific act, but in the latter only to adjudicate, to exercise a discretion upon a particular subject."

[1] Tapping on *Mandamus*, 54, 56, 288. Thus, where the application is to proceed to the election of burgess in the place of one deceased, the motion is *ex debito justitiæ*, and there is no discretion to refuse the writ. *Ib.;* State *v.* Hartford & N. H. R. Co., 29 Conn. 538; People *v.* Attorney-General, 22

applicant or relator in such cases, that *he* is interested as a citizen;[1] but the decisions on this point are not entirely uniform. The principal reasons urged against the doctrine are that the writ is prerogative in its nature, — a reason which is of no force in this country, and no longer in England, — and that it exposes a defendant to be harassed with many suits. An answer to the latter objection is that, as granting the writ is discretionary with the court, it may well be assumed that it will not be unnecessarily allowed.[2] Accordingly, a voter in a municipality may apply for a *mandamus* to compel the council to hold an election to fill a vacancy in their body,[3] or to test the validity of an election.[4] In this country the

Barb. (N. Y.) 114; People *v.* Tracy, 1 Denio (N. Y.), 617; Moses *v.* Kearney, 31 Ark. 261; Benners *v.* State, 124 Ala. 97; State *v.* Preble County, 6 Ohio, Dec. 268.

[1] Fuller, *In re*, 25 Ark. 261; People *v.* San Francisco, 36 Cal. 594; Rizer *v.* People, 18 Colo. App. 40; Cannon *v.* Janvier, 3 Houst. (Del.) 27; Pike County *v.* State, 11 Ill. 202; Ottawa *v.* People, 48 Ill. 233; Hall *v.* People, 57 Ill. 307; Glencoe *v.* People, 78 Ill. 390; People *v.* Suburban R. Co., 178 Ill. 594; People *v.* Harris, 203 Ill. 272; Hamilton *v.* State, 3 Ind. 452; State *v.* Clinton County, 162 Ind. 580; State *v.* Marshall County, 7 Iowa, 186; Bryan *v.* Cattell, 15 Iowa, 538; Gay *v.* Haggard, 133 Ky. 425; 118 S. W. Rep. 299; Watts *v.* Carroll Par. Pol. Jury, 11 La. An. 141; Sanger *v.* Kennebec County, 25 Me. 291; Bates *v.* Plymouth, 14 Gray (Mass.), 163; People *v.* Michigan Univ. Regents, 4 Mich. 98; People *v.* Prison Inspectors, 4 Mich. 187; State *v.* Noonan, 59 Mo. App. 524; People *v.* Keating, 168 N. Y. 390; People *v.* Swanstrom, 79 N. Y. App. Div. 94; People *v.* Doxsee, 136 N. Y. App. Div. 400; People *v.* Van Wyck, 27 N. Y. Misc. 439; People *v.* Brooklyn, 22 Barb. (N. Y.) 404; People *v.* Halsey, 53 Barb. (N. Y.) 547; People *v.* Collins, 19 Wend. (N. Y.) 65; Moses on *Mandamus*, 197, author's opinion; State *v.* Rahway, 33 N. J. L. 110; State *v.* Willis (N. Dak.), 124 N. W. Rep. 706; State *v.* Nash, 66 Ohio St. 612; State *v.* Wyoming County Ct., 47 W. Va. 672; Regina *v.* Archbishop of Canterbury, 11 Q. B. 578; King *v.* Severn & Wye R. Co., 2 B. & Ald. 646; Clarke *v.* Leicester & N. Canal Co., 6 Q. B. 898; Forster *v.* Forster, 4 B. & S. 187, 199; London *v.* Cox, L. R. 2 H. L. C. 239, 280; Worthington *v.* Jeffries, L. R. 10 C. P. 379; Chambers *v.* Green, L. R. 20 Eq. 552.

The rule stated in the text has the support of the judgment of the Supreme Court of the United States. "There is," says *Strong*, J., "a decided preponderance of American authority in favor of the doctrine that *private persons may move for a mandamus to enforce a public duty*, not due to the government as such, without the intervention of the government law officer." Union Pac. R. Co. *v.* Hall, 91 U. S. 343, and cases cited on page 355; s. c. 4 Dillon, 479. See also Pumphrey *v.* Baltimore, 47 Md. 145. In the case last cited a *Mandamus* was sustained, sued out at the instance of private persons, to compel the city of Baltimore to assume charge of a bridge and maintain it as a public highway, in obedience to an act of the legislature, mandatory in its terms, requiring this duty of the city corporation. In *Indiana*, where a *mandamus* proceeding is of public concern, the applicant for the writ need not show any legal or special interest in the result sought. Wampler *v.* State, 148 Ind. 557.

[2] State *v.* Hendee, 74 Neb. 847.

[3] State *v.* Rahway, 33 N. J. L. 110; People *v.* Brooklyn, 77 N. Y. 503.

[4] State *v.* Marshall County, 7 Iowa, 186; State *v.* Bailey, *Ib.* 390.

In *Kansas* a private citizen cannot compel the performance of a purely public duty by *mandamus;* the proper public officer must move. Bobbett *v.* Dresher, 10 Kan. 9; Wyandotte & K. C. Br. Co. *v.* Wyandotte County, 10 Kan. 326, 331. So elsewhere. Territory *v.* Cole, 3 Dak. 301; State *v.* Ware, 13 Oreg. 380; Stegmaier *v.* Jones, 203 Pa. 47.

writ is resorted to for the enforcement, in proper cases, of individual rights, or rights of a private nature, in the absence of any other adequate legal remedy, and to prevent a failure or defect of justice; and, in such cases, the party really or beneficially interested in the performance of the legal duty which the defendant neglects or refuses to perform may apply for the writ.[1]

[1] Marbury *v.* Madison, 1 Cranch (U. S.), 137; Kendall *v.* Stokes, 3 How. (U. S.) 87; State *v.* Wilson, 123 Ala. 259; People *v.* Pacheco, 29 Cal. 210; Ottawa *v.* People, 48 Ill. 233; Bryan *v.* Cattell, 15 Iowa, 538, per *Wright*, J.; Carey Salt Co. *v.* Hutchinson, 72 Kan. 99; Register Newspaper Co. *v.* Yeiser, 117 Ky. 1013; Maddox *v.* Graham, 2 Met. (Ky.) 56 (right of municipal creditors); Brunswick *v.* Bath, 90 Me. 479; Robbins *v.* Bangor R. & E. Co., 100 Me. 496; Elliott *v.* Detroit, 121 Mich. 611; Brophy *v.* Schindler, 126 Mich. 341; State *v.* Osborn, 60 Neb. 415; Mott *v.* Forsyth County, 126 N. Car. 866; Commonwealth *v.* Allegheny County, 37 Pa. 277, 279; Payne *v.* Staunton, 55 W. Va. 202. As to the rights of taxpayers, *post*, chap. xxxi. See Rex *v.* Frost, 8 A. & E. 822, for a case in which an individual having a remote interest in corporation funds was held not entitled to the writ. See also State *v.* Menzie, 7 S. Dak. 535; *ante*, § 507, note.

Who may be a relator. The *inhabitants of a county* who are put to inconvenience in reaching the court-house have such an interest in the erection of a new one in the new county site as will authorize them, as relators, to sue out a *mandamus* to the proper authorities or officers to proceed to the construction of the new court-house, as provided by law, and to levy taxes pursuant to the requirements of the statute. Watts *v.* Carrol Par. Pol. Jury, 11 La. An. 141. See also Union Pac. R. Co. *v.* Hall, 91 U. S. 343; s. c. 3 Dillon, 515; Dillon, 479, and cases; Territory *v.* Cole, 3 Dak. 301; State *v.* Ware, 13 Ireg. 380; 2 Morawetz on Corp. § 1132 and cases; High on Extraordinary Remedies, §§ 431, 433.

Under a provision in the *Ohio* code (§ 570) that the writ "may issue on the information of the party beneficially interested," the writ may properly issue, and the proceedings be conducted *in the name of the State*, on the relation of the party interested. State *v.* Perry County, 5 Ohio St. 497; State *v.* Zanesville & M. Turnp. Co., 16 Ohio St. 308, construing the phrase "beneficially interested." See State *v.* Curler, 26 Nev. 347; People *v.* Board of Trustees, 35 N. Y. Misc. 675. State *v.* Pacific Brewing & Malting Co., 21 Wash. 451; State *v.* Douglas County Super. Ct., 41 Wash. 439.

In *South Carolina*, the State is not a necessary party to an application by a private citizen for a writ of *mandamus* to a public officer to enforce a private right. Lord *v.* Bates, 48 S. Car. 95. The *State* is not a necessary party where it is not concerned in its sovereign capacity. Milster *v.* Spartanburg, 68 S. Car. 26.

The relator in a *mandamus* proceeding may use the name of the United States in such proceeding as a matter of course. Bundy *v.* United States, 25 App. D. C. 459. In *Iowa*, by statute, the writ and proceeding are in the name of the State if a public interest be involved, and of the relator if only a private interest is concerned. Revision of 1860, § 3761; State *v.* Davis, 2 Iowa, 280; State *v.* Bailey, 7 Iowa, 390; Windsor *v.* Polk County, 115 Iowa, 738. And in a matter of public right any citizen may be the relator in an application for a *mandamus*. State *v.* Marshall County, 7 Iowa, 186. In *Connecticut*, private parties cannot have *mandamus* to call public meetings. Lyon *v.* Rice, 41 Conn. 245. In *California*, a private party applying for a writ of *mandamus* must have an interest in the subject-matter of the action which is distinguished from the mass of the community. Linden *v.* Alameda County, 45 Cal. 6; Frederick *v.* San Luis Obispo, 118 Cal. 391; Fritts *v.* Charles, 145 Cal. 512. Similarly it was held in *South Carolina*, in State *v.* Charleston Light & Water Co., 68 S. Car. 540. In *Illinois* the petition may be filed in the name of the parties seeking relief. Higgins *v.* Galesburg, 96 Ill. App. 471; Hall *v.* Mann, 96 Ill. App. 659. In *Michigan*, resident freeholders were held to be proper parties to in-

§ 1528 (866). **Demand and Refusal.** — When the writ is sought to enforce individual rights, the affidavits must show in the applicant or relator a *prima facie* case, and that he has complied with every requisite, to perfect his right to this remedy. Thus, as it is, in general, necessary that the *defendant should have been requested* to do that of which performance is sought by means of the writ (the object being that he sha l have the option to do or to refuse that which is demanded), the affidavits must show the demand and the neglect or refusal, or circumstances, such as unreasonable delay or neglect to discharge a public duty, which clearly evince an intention not to do the act required.[1]

stitute *mandamus* proceedings against the highway commissioner of a township to compel the erection of a bridge. Berube *v.* Wheeler, 128 Mich. 32. In *Washington*, *mandamus* can only be issued on the application of a party beneficially interested. State *v.* Ross, 39 Wash. 233.

An act of the legislature specially commanded the town council *to open a certain alley*, and it was held that the incidental advantages which a certain person would derive from the opening of the alley, by reason of the location of his property, did not entitle *him* to a *mandamus* to compel the performance of the duty enjoined by the act, the relator's right being regarded as one held in common with other inhabitants of the place. Heffner *v.* Commonwealth, 28 Pa. St. 108. *Contra*, Hall *v.* People, 57 Ill. 307; and see chap. xxiv., on Streets, *ante*. So where an obstruction to a sidewalk is no more injurious to the relators than to others, and where there is a remedy by indictment, it was held that *mandamus* was not the proper remedy to compel the city council to open streets and to remove encroachments thereon. Reading *v.* Commonwealth, 11 Pa. St. 196; *ante*, §§ 1131, 1132, 1493.

Canal appraisers, appointed by the State to appraise damages, and who, in a case within the statute refuse to act, may be compelled to proceed by *mandamus*, and estimate the relator's damage, and pay the same. Jennings, *In re*, 6 Cow. (N. Y.) 518 (case growing out of the construction of Erie Canal); People *v.* Seymour, 6 Cow. (N. Y.) 579; Rogers, *In re*, 7 Cow. (N. Y.) 526.

Where a work of public necessity is done under an invalid contract and the legislature makes an appropriation to pay for it by a valid act, a disbursing officer cannot refuse to make payment on the ground of the invalidity of the contract. People *v.* Schuyler, 79 N. Y. 189.

[1] Tapping on *Mandamus*, 283; Wille. 357, pl. 44; United States *v.* Indian Grave Drainage Dist., 85 Fed. Rep. 928; Edinburgh Coal Co. *v.* Humphreys, 134 Fed. Rep. 839; Moseley *v.* Collins, 133 Ala. 326; Buggeln *v.* Doe, 8 Ariz. 341; Wilson *v.* Veteran's Home, 138 Cal. 67; Rizer *v.* People, 18 Colo. App. 40; Park *v.* Candler, 113 Ga. 647; State Board of Equalization *v.* People, 191 Ill. 528; Women's Catholic Order *v.* Condon, 84 Ill. App. 564; Lewis *v.* Jonathan Creek & L. Drainage Com'rs, 111 Ill. App. 222; Windsor *v.* Polk County, 115 Iowa, 738; Maddox *v.* Graham, 2 Met. (Ky.) 56, 70; People *v.* Whittemore, 4 Mich. 27; Stephens' *Nisi Prius*, 2292, 2318, 2319; Presthus *v.* Gogebic Circuit Judge, 142 Mich. 204; State *v.* Associated Press, 159 Mo. 410; State *v.* Holmes (Neb.), 97 N. W. Rep. 243; State *v.* Rahway, 33 N. J. L. 110; State *v.* Jersey City, 38 N. J. L. 259; People *v.* Cruger, 12 N. Y. App. Div. 536; People *v.* Welde, 61 N. Y. App. Div. 580; People *v.* McDonald, 52 N. Y. Supp. 898; Alexander *v.* McDowell, 67 N. Car. 330; Horne *v.* Cumberland County, 122 N. Car. 466; Commonwealth *v.* Pittsburg, 209 Pa. 333; Miller *v.* Henderson, 212 Pa. 263; Commonwealth *v.* Allegheny County, 37 Pa. St. 237; Angell & Ames, § 707, and cases cited; Commonwealth *v.* Allegheny County, 37 Pa. St. 277, 291; *per Thompson*, J., Cavanaugh *v.* Pawtucket, 23 R. I. 102; Milster *v.* Spartanburg, 68 S. Car. 26; State *v.* Lehre, 7 Rich. (S. Car.) 234, 322; State *v.* Reed, 36 Wash. 638.

§ 1529 (867). **Formal Demand not always necessary.** — There may be such an unequivocal manifestation of a settled purpose and determination not to perform a definite public duty as not only to *dispense with a formal demand,* but to justify the court in *awarding the writ before the evil is done,* or the dereliction of duty has actually occurred. Thus, where the city council in violation of statute ordered that a ferry should be run on and after a certain fixed future day free of tolls, it was held, upon a full review of the cases, that the court might, before the day thus fixed had arrived and without a formal demand, award a writ of *mandamus* to the city council commanding them to continue to collect the required tolls.[1]

No demand and refusal need be shown in a *mandamus* proceeding to compel the performance of a public duty or the enforcement of a public right. People *v.* Kipley, 171 Ill. 44. No demand to levy a tax was considered necessary where the duty was imperative. Riverside County *v.* Thompson, 122 Fed. Rep. 860; United States *v.* Saunders, 124 Fed. Rep. 124; State *v.* Byrne, 32 Wash. 264. Demand not necessary where duty to be performed is a public one. Goshen *v.* Jackson, 165 Ill. 17. The objection, as to the neglect of a demand or the absence of a refusal, should, in order to prevent a waste of time, be made in the first instance, viz., in showing cause against the rule for the writ, and may come too late after the merits of the case have been discussed. Chicago *v.* Sansum, 7 Ill. 182.

A *mandamus* is never granted on facts merely raising a presumption that the respondents will refuse to perform their duty when the proper time arrives. State *v.* York County, 8 Neb. 2; State *v.* Ramsey, 8 Neb. 286. It will only issue upon an affidavit setting forth the facts; a verification on information and belief merely, where the defendants did not appear, was held to be insufficient. State *v.* Clay County, Neb. 98.

Further, *as to demand and refusal, and when necessary.* Tapping, 285, 286; Helena *v.* United States, 104 Fed. Rep. 13; People *v.* Grout, 45 N. Y. Misc. 7; Rex *v.* Brecknock & A. Canal Co., A. & E. 217; Rex *v.* Brecknock & A. Canal Co., 3 A. & E. 477; Regina *v.* Bristol & E. R. Co., 4 Q. B. 162; 3 G. D. 384. But an objection for want demand may come too late after the merits of the case have been heard. Tapping, 287, approved; State *v.* Lehre, 7 Rich. 234, 322; Queen *v.* Eastern Counties R. Co., 10 A. & E. 531. The board of supervisors of a county were directed by statute to meet at a specified place and time, and then and there subscribe a specified sum to the stock of a railroad company, and it was held that the company must tender its books to the officers of the county and demand the subscription, before it could apply for a *mandamus* to compel the county to subscribe. Oroville & V. R. Co. *v.* Plumas County, 37 Cal. 354. The Supreme Court of *Kansas* has held that the vote of the people of a county to subscribe for the stock of a railroad company and to issue its bonds does not create a contract between the county and the company, even though such vote was upon conditions which the company subsequently performed; and the court refused on *mandamus* to compel the subscription. Union Pac. R. Co. *v.* Davis County, 6 Kan. 256. See State *v.* Saline County Ct., 45 Mo. 242, *Ante,* § 114. No demand to levy a tax was considered necessary where the duty was imperative. Columbia County *v.* King, 13 Fla. 451; *infra,* § 1529, and note. Where the petition shows that it is the intention of the officers not to perform the duty imposed on them, no demand is necessary. Santa Fé County *v.* Coler, 215 U. S. 296, 304, aff'g 14 N. Mex. 134.

[1] Attorney-General *v.* Boston, 123 Mass. 460; Austin *v.* Cahill, 99 Tex. 172. Where the law imposes on an officer unconditionally *an imperative duty* which he neglects to perform, no personal demand on him to perform the act is required before instituting *mandamus* proceedings against him. Heintz *v.* Moulton, 7 S. Dak. 272. The fol-

§ 1530 (868). Rule to show Cause; Alternative Writ.— If the affidavits, information, or petition under oath show the case to be one

lowing is extracted from the instructive judgment delivered by Chief Justice *Gray* in Attorney-General *v.* Boston, 123 Mass. 460, in support of the propositions contained in the text:

"Applications for writs of *mandamus* being addressed to the sound judicial discretion of the court, the circumstances of each case must be considered in determining whether a writ of *mandamus* shall be granted [*ante*, § 1526, note]; and the court will not grant the writ, unless satisfied that it is necessary to do so in order to secure the execution of the laws. But when the person or corporation against whom the writ is demanded has clearly manifested a determination to disobey the laws, the court is not obliged to wait until the evil is done before issuing the writ. It is said in Tapping on *Mandamus*, 10, that 'a *mandamus* will not be granted in anticipation of a defect of duty or error of conduct.' But the only reference of the learned author in support of this proposition is to Blackborough *v.* Davis, 1 P. Wms. 48; and an examination of that case shows that the passage referred to was but a remark of counsel, not assented to or acted upon by the court. Nor does Queen *v.* Kendall, 1 Q. B. 366, 386, note, s. c. 4 Per. & Dav. 603, 606, support the proposition in Tapping. The passage in High on Extraordinary Remedies, § 12, substantially accords with the statement of Tapping, above quoted. But the only cases there referred to are from *Maryland*, *Kansas*, and *Louisiana*, and differ so widely from the case before us that we need not consider whether they were well decided. In the cases in *Maryland* and in *Kansas*, the only day when the respondents could by law act upon the subject in question, had either passed or had not arrived when the writ of *mandamus* was applied for. Allegany School Com'rs *v.* Allegany County, 20 Md. 449; State *v.* State Canvassers, 3 Kan. 88. The cases in *Louisiana* were attempts by a creditor of a municipal corporation, or of the State, to secure a priority by writ of *mandamus* to its treasurer to pay the debt of the petitioner; and the writ was refused, in the one case, because it appeared by the record that the proceedings were fictitious and collusive, and, in the other, because the treasurer had not received the money, and could not therefore be in fault in not paying it. State *v.* Burbank, 22 La. An. 318; State *v.* Dubuclet, 24 La. An. 16. . . . In Webb *v.* Herne Bay, L. R. 5 Q. B. C. 642, commissioners were incorporated by act of Parliament for the purpose of improving a town, and were empowered to levy rates, to borrow money, and to issue debentures. A holder of such debentures moved for a *mandamus* to compel the commissioners to apply their funds in payment of the interest thereon. It was objected that rates might not be levied, and that the form of the *mandamus* should have been to levy rates out of which to pay the interest on the debentures. But the court held that the *mandamus* should issue as prayed for, and said that if the commissioners should not levy rates, the petitioner would be entitled to another *mandamus* to compel them to do so." See also Farnsworth *v.* Boston, 121 Mass. 173.

Answering the objection of the *want of a demand* the learned and eminent Chief Justice continues:

"It is argued that it does not appear that the city has been requested and has refused to do the act sought to be enforced, and that therefore the writ of *mandamus* should not be issued. But, as Lord *Denman*, observed, it is not necessary that the word 'refused' or any equivalent to it should be used, 'but there should be enough to show that the party withholds compliance, and deliberately determines not to do what is required.' King *v.* Brecknock & A. Canal Co., 3 A. & E. 217, 222, s. c. 4 Nev. & Man. 871. See also King *v.* Lord of Milverton, 3 A. & E. 284 above cited; King *v.* East India Co., 4 B. & Ad. 530; King *v.* Archd. of Middlesex, 3 A. & E. 615; s. c. 5 Nev. & Man. 494; Queen *v.* St. Margaret Vestry, 8 A. & E. 889; s. c. 1 Per. & Dav. 116; Maddox *v.* Graham, 2 Met. (Ky.) 56. As a general rule, indeed, there must have been an express demand of that which the party moving for the writ desires to enforce. Tapping on *mandamus*, 283, 284; United States *v.* Boutwell, 17 Wall. (U. S.) 604, 607. But where a municipal cor-

in which the writ lies, and make out a *prima facie* case for the applicant, *a rule is granted upon the defendants*, that is, to the persons to whom the writ is to be directed, *to appear and show cause why the writ shall not issue*. In the practice in this country the rule *nisi*, or notice, is often dispensed with, and an alternative writ granted *ex parte* in the first instance.[1] If, upon the rule *nisi*, or notice, the defendant does what is sought, the rule will be discharged. The *defendant may show for cause*, by affidavits, that the case is not one in which the writ lies, that there is a specific or other adequate legal remedy, or that the relator or applicant has no title or right to the writ, or that by his neglect or misconduct he is not entitled to the benefit of the remedy or the assistance of the court. If after the defendant has shown cause there remains a reasonable ground of right in the applicant, the rule for a *mandamus* will be made absolute, and an alternative writ will issue, which must substantially follow, and not materially vary from, the affidavits, petition, or rule upon which it is founded.[2]

§ 1531 (869). **Form and Requisites of the Writ.** — The writ of *mandamus* has the usual formalities of other writs, but *no precise formula* is necessary in the language to be employed in framing it. It must show with certanity the duty to be performed, and command those to whom it is directed to perform some specific and definite act or acts. It must follow the rule, or affidavits, or information upon which it is founded, must be properly directed, must bear teste in term time, and, under the practice at common law, it must be tested on the very day on which the rule for the writ is made absolute.[3]

ration or board has distinctly manifested its intention not to perform a finite public duty, clearly required it by law, no demand is necessary fore applying for the writ. Commonwealth *v.* Allegheny County, 37 Pa. St. 7; State *v.* Rahway, 33 N. J. L. 110. the present case, the city of Boston, er purchasing the ferry, and running as a toll ferry according to law for ren years, has then, by [an unauorized] vote of both branches of the y council, ordered that on the first y of January next the tolls on the ries shall be abolished and the ferries n free to the public travel. This ler, unless controlled by the process this court, will go into operation without further action on the part of the city, and shows such a deliberate assertion of an authority not conferred by law, and determination not to perform the duties required of the city by the statutes of the Commonwealth, as to make a peculiarly strong case for issuing a writ of *mandamus*." Attorney-General *v.* Boston, 123 Mass. 460, *supra*.

[1] State *v.* Fairchild, 22 Wis. 110; State *v.* Lean, 9 Wis. 279; Chance *v.* Temple, 1 Iowa, 179. See Stanton *v.* Wolmesdorff, 55 W. Va. 601.

[2] 3 Black. Com. 110, 111; Willc. 387.

[3] State *v.* Atlantic Coast Line, 48 Fla. 114; State *v.* Richards, 50 Fla. 284; People *v.* Dunne, 219 Ill. 346; State *v.* Connersville Natural Gas Co., 163 Ind. 563; Chance *v.* Temple, 1 Iowa, 179, where the practice is fully stated by

§ 1532 (870). **Writ, how directed.** — The *direction of the writ* is one of the most material portions of it. It must be directed to the persons or officers, or to the corporate body legally bound to execute it, and it should be directed to such only. The common-law consequence of a failure to observe this rule is, that the writ may be either superseded or quashed. If a *joint act* is to be performed by two or more, the writ must be directed to all, though only a portion have refused to do the act, and the rest are willing.[1] There may be a *single writ to all of the officers* concerned in the separate, but connected steps relating to the ultimate duty commanded.[2] The writ, when *directed to a corporate body*, should state the title of the corporation with accuracy, using the name prescribed by charter or statute; if there be none such, and a name has been acquired by reputation, the writ may be directed accordingly.[3] The effect of misnaming the corporate body is that the writ will be quashed, unless by the law, or the practice of the particular State, it may be amended.[4]

Isbell, J.; Price *v.* Harned, 1 Iowa, 473; State *v.* District School Board, 97 Mo. App. 613; Commonwealth *v.* Pittsburgh, 34 Pa. 496; Rex *v.* Dublin, 1 Stra. 540; Sterling's Case, 1 Sid. 340; Rex *v.* Willis, 7 Mod. 262; Rex *v.* Kingston, 8 Mod. 210; s. c. 11 Mod. 382; s. c. 1 Stra. 578; Rex *v.* Wildman, 2 Stra. 879, 880; Regina *v.* Conyers, 8 Q. B. 981 (teste); Willc. 387; Stephens' *Nisi Prius*, 2321; Selwyn's *Nisi Prius*, 1061.

The duty required must be specifically stated, and not in the alternative, as that a municipal corporation pay a judgment, or issue its bonds in payment, or levy a tax to pay it. State *v.* Milwaukee, 22 Wis. 397; Rex *v.* Kingston, *supra;* Tapping, 327. See also Commonwealth *v.* Pennsylvania R. Co., 6 Pa. Dist. R. 266. See, however, United States *v.* Key West, 78 Fed. Rep. 88, where a *mandamus* requiring the doing of one act or another was not held bad for uncertainty. A writ commanding the trustees of a town to pay the relator warrants, and in case there should be no money in the treasury, then to levy a tax to pay the same, was held bad, because in the alternative, and as commanding distinct acts. State *v.* Pacific, 61 Mo. 155. *Quære?* Why is such a command uncertain? In Regina *v.* St. Margaret's, 1 P. & D. 116, 8 Ad. & E. 889, it was held to be no ground of objection to a command in the alternative to do one of three things, if the duty enjoined by act of Parliament forms one of them, and there has been a general refusal. Queen *v.* South-eastern R. Co., 4 H. L. Cas. 471. The command must be to perform the act, and not to command others to perform it. Rex *v.* Derby, 2 Salk. 436.

When there is no rule of law or rule of court controlling it, *the writ may be made returnable at the same term* it is issued, or at the next term, in the discretion of the court. Harwood *v.* Marshall, 10 Md. 451; Fitzhugh *v.* Custer, 4 Tex. 391; State *v.* Jones, 1 Ired. L. (N. Car.) 129.

[1] Tapping on *Mandamus*, 310, where an alphabetical series of the usual *directions* of the writ in England is given. People *v.* Yates, 40 Ill. 126; State *v.* Jones, 1 Ired. L. (N. Car.) 129; Rex *v.* Hereford, 2 Salk. 701; Buller *Nisi Prius*, 204; People *v.* Hayt, 66 N. Y. 606; McKie *v.* Rose, 140 Fed. Rep. 145. See Littlefield *v.* Newell, 85 Me. 246.

[2] Labette County *v.* Moulton, 112 U. S. 217; noted *infra*, § 1534, second note.

[3] *Ante*, §§ 347, 348; Rex *v.* Smith, 2 M. & S. 598; Estwick *v.* London, Sty. 43; Carpenter's Case, Raym. 439; Tapping, 314; Tavener's Case, Raym. 446.

[4] Davenport *v.* Lord, 9 Wall. (U. S.) 409; Tapping on *Mandamus*, 314; People *v.* Marsh, 21 N. Y. App. Div. 88; Mason *v.* Ohio River R. Co., 51 W. Va. 183.

Amendments. In England the stat-

But in some cases there is an option to direct the writ either to that *part* of the corporation which alone has the power to execute t and on which alone the particular duty rests, or to the *whole corporation* by its corporate name or title.[1]

§ 1533 (871). **Direction of Writ; English Cases.** — We have hereofore pointed out the difference between an old English municipal

ite of 9 Anne, chap. xx. § 7, extended he statutes of *jeofails* "to all writs f *mandamus* and informations in the ature of *quo warranto*, and all the proeedings thereon for any of the matters this act mentioned." As to the exent of the right in England to amend e writ, and the return. Willc. 433–37; Regina *v.* Conyers, 8 Q. B. 981; ommonwealth *v.* Pittsburgh, 34 Pa. 496, 515. In this last case *Strong*, J., marks: "Formerly, when the docne of amendments remained as at mmon law, the court would not allow e writ of *mandamus* to be amended er return filed; but, as is said by pping, p. 334, the strict rule of the mmon law has been, of late years, ogether departed from, the principle to amendment which now obtains ng that it shall be allowed in all cases en such a course will promote justice. us, in a late case, the court ordered writ to be amended during an ument, in order that such argunt might proceed independently of h objection. Reg. *v.* Newbury, 1 B. 751, 759." Amendments in form l substance may be made at any stage en justice will be thereby promoted; ited States *v.* Union Pac. R. Co., 4 lon, 479; and in this case the alterive writ was amended by striking part of its mandate. *Ib.*; s. c. 91 S. 343; High on Extr. Rem. 519; State *v.* State Bd. of Canv., 13 Fla.

As to amendment of the *peremp- writ. Infra*, § 1541, and cases cited. *Further as to amendments.* Willc. ; Stephens' *Nisi Prius*, 2324; nes *v.* State Auditor, 4 Ohio St. 493; vsheik County *v.* Durant, 9 Wall. S.) 736; State *v.* Milwaukee, 22 . 397; Lyons *v.* People, 38 Ill. 347; te *v.* Elwood, 11 Wis. 17; State *v.* stings, 10 Wis. 518; Springfield *v.* npden County, 10 Pick. (Mass.)

Writ and information amendable. te *v.* Bailey, 7 Iowa, 390; Chance *v.* nple, 1 Iowa, 179; State *v.* Keokuk, owa, 388; State *v.* Johnson County, owa, 237; Regina *v.* Conyers, 8 Q. B. 981. A peremptory writ of *mandamus* held not amendable; its mandate must correspond with that of the alternative writ, and if that be defective, or claim too much, it may be amended. Columbia County *v.* King, 13 Fla. 451; see *infra*, § 1541.

If it appears to the court that the relator is entitled to a *mandamus* the writ will not be quashed because the petition or suggestion or affidavits do not state that the relator is without other adequate remedy. People *v.* Hilliard, 29 Ill. 413.

[1] Tapping on *Mandamus*, 315, 317. The author here refers to the English cases under the old corporations on this subject, and observes that "the result of the above cases, therefore, is, that if the *writ be directed* neither to the corporation by its corporate name, nor to those who should execute it by their proper descriptions [but 'in terms extends the descriptions beyond the part legally liable to execute the writ'], it is clearly bad, and is liable either to be superseded or quashed." *Ib.* 317; Rex *v.* Smith, 2 M. & S. 598; Rex *v.* Abington, 2 Salk. 699, 700; Rex *v.* Norwich, 1 Stra. 55; Pees *v.* Leeds, *Ib.* 640. "The writ," says Mr. Willcock (Corp. 389, pls. 135, 137), "may be directed in the corporate name, although the act commanded is to be done by a select body, without the interference of the rest, for their act in such capacity is the act of the corporation; yet, where the act is to be done by a select body alone, the writ may be directed to them alone in their name as a select body."

"If the writ is directed to the corporation, it has been held good. But if it be directed to those who, by the constitution of the corporation, ought to do the act, without doubt it is good also." *Per Holt*, C. J., Rex *v.* Abingdon, 1 Ld. Raym. 561. See also s. c. 2 Salk. 699, 700; Rex *v.* Oxford, 6 Ad. & E. 349; Rex *v.* Hereford, 1 Ld. Raym. 559; Regina *v.* Ledgard, 1 Q. B. 616; Regina *v.* Stamford, 6 Q. B. 433.

corporation, consisting of integral parts or different classes, and American municipal corporations,[1] and this distinction is to be regarded in the application of the decisions of the English courts respecting the direction of writs of *mandamus*. In England, if the act commanded must be done by the whole corporation, the writ should be directed to the corporation in its corporate name, and not by an enumeration of the classes which compose the corporation, nor should it be directed to all the members as individuals. Thus, if the corporation be styled "Mayor and Commonalty," but consists of mayor, aldermen, and burgesses, the writ must be directed to the "Mayor and Commonalty" (that being the corporate name), and it must be so directed, although the mayor, who is an integral part of the corporation, be dead.[2] Our municipal corporations do not consist of integral parts and distinct classes, but usually have a specific name, and their legislative powers are exercised by a council. These circumstances influence the direction of the writ, for, as we shall presently see, the writ, in all cases where the duty to be performed rests upon the council, may, in the absence of statutory regulation, be directed to the corporation by its corporate name, or to the officers composing the council in their official capacity.

§ 1534 (872). **American Rule.** — In *this country the ancient strictness in respect to the direction of the writ* is somewhat modified by judicial decision and statutory enactment. Where there is a duty resting on the corporation to levy taxes for the benefit of its creditors, the writ may be directed to the individuals, in their official capacity, composing the council or other body, whose duty it is to make the levy and who have the power to execute the writ; and in such a case, the writ may, we think, be properly directed to the corporation by its corporate name, and be served upon the officers thereof who have the power, and whose duty it is, to execute it.[3]

[1] *Ante*, chap. iii.

[2] Rex *v.* Smith, 2 M. & S. 598; Rex *v.* Abingdon, 1 Ld. Raym. 561; Rex *v.* Plymouth, 1 Barnard. 81; Rex *v.* Cambridge, 4 Burr. 2008. Under the Municipal Corporations Act, 5 & 6 Wm. IV. chap. lxxvi., *ante*, § 16, "The corporation," says Mr. Grant, "acts by the agency of the council, and, therefore, the acts of the council are the acts of the corporation. Hence, a *mandamus* ought to be directed to the corporation by their corporate name, though the thing in it required to be done is, by the statute, to be done by the council." Grant on Corp. 355, note, citing Rex *v.* Oxford, 6 Ad. & E. 349; Rex *v.* Gloucester, 3 Bulst. 190; Rex *v.* Abingdon, 2 Salk. 699; Rex *v.* Hereford, *Ib.* 701; Queen *v.* Ledgard, 1 Q. B. 616, 620, 621; Sandwich *v.* Queen, 10 Q. B. 574, 579. This corresponds with the rule in this country, except that with us there is often an election to direct the writ to the corporation by name or to the proper officers in their official capacity, as below stated.

[3] Commonwealth *v.* Pittsburgh, 34 Pa. St. 496; Davenport *v.* Lord, 9 Wall. (U. S.) 409; Maddox *v.* Graham, 2 Met.

A single writ directed to all the officers concerned in the separate but connected steps for levying and collecting a tax is proper; as,

(Ky.) 56; Louisville *v.* McKean, 18 B. Mon. (Ky.) 9, 13; Charleston *v.* Moore, 94 Ill. App. 51; Cooperrider *v.* State, 46 Neb. 84; Territory *v.* Socorro, 12 N. Mex. 177. Where there is no city officer charged with the performance of an act a city is required to do, a writ of *mandamus* to compel its performance may be directed to the city. Williams *v.* New Haven, 68 Conn. 263. The doctrine of the text applied. Glencoe *v.* People, 78 Ill. 382; Wren *v.* Indianapolis, 96 Ind. 206; *supra*, §§ 1520, 1521, and cases cited.

In Commonwealth *v.* Pittsburgh, above cited, the writ was directed "To the Select and Common Councils of the City of Pittsburgh, composed of D. Fitzsimmons," and others [stating the names of all the individuals composing the said bodies, without discriminating which of the persons named belonged to the select, and which to the common, council], and the writ was held to be well directed, although the corporate name of the city was, "The Mayor, Aldermen, and Citizens of Pittsburgh." The misdirection of the writ was set up in the return, and in treating of the objection *Strong*, J., delivering the opinion of the court, observes: "The next averment of the return is, that there is no such corporation or body politic known to the law as the city of Pittsburgh, of whose councils, select or common, the persons named in the writ are supposed to be members, but that the corporate name is, 'The Mayor, Aldermen, and Citizens of Pittsburgh.' The writ is directed to 'The Select and Common Councils of the City of Pittsburgh, composed of D. Fitzsimmons and others, defendants.' It is not directed to the city, but to the individuals who constitute the select and common councils. The question is not, therefore, whether, if an action had been brought at law against the city of Pittsburgh, the misnomer might have been pleaded in abatement, for it is not the corporation which is sued. But, even if it were, the mistake is amendable. [*Supra*, § 1532, note.] It needs no argument to prove that justice would not be prejudiced by turning the relator out of court because he has described the defendants as members of the select and common councils of Pittsburgh instead of members of the select and common councils of the 'Mayor, Aldermen, and Citizens of Pittsburgh.' Even the very act which incorporated the city more than once denominates it the city of Pittsburgh. One of our statutes of amendments authorizes an amendment of the record of an action in any stage of the proceedings, when it shall appear, by any sufficient evidence, that a mistake has been made in the Christian name or surname of any party, plaintiff or defendant. As statutes of *jeofails* are construed liberally, it would seem to be within the spirit of this act to allow an amendment of a corporate name when a corporation is a party; but whether it would or not need not now be decided, for the *mandamus* is not to the artificial being known either as the city of Pittsburgh or as 'the Mayor, Aldermen, and Citizens of Pittsburgh.' It is not, therefore, misdirected. Next, the return avers that the select and common councils are not integral parts of the corporation, but only several and co-ordinate branches of the legislature thereof, acting separately and independently of each other; that the concurrence of both bodies is essential to the validity of all legislative acts affecting the corporation; and that the defendants are without power, of themselves, to assess or impose taxes, or to compel the concurrence of the other branch of said councils in any act. We do not perceive that this is any answer to the mandate of the writ, and no attempt has been made to show us how the fact averred is material. The defendants are *all* the members of *both branches*, and if each discharges his duty, there can be no want of concurrence of councils." 34 Pa. St. 496, *supra*. See also Rex *v.* Tregony, 8 Mod. 111.

In Davenport *v.* Lord, 9 Wall. (U. S.) 409, above cited, it appeared that the municipality was incorporated by the name of "The City of Davenport," and by *that* name had power "to sue and be sued in all courts," and that the "city council," which exercised all the legislative powers of the corporation, and had the sole power to levy and collect taxes, was composed of the mayor and aldermen, and a writ of *mandamus* in favor of a judgment creditor of the city,

for example, where it was the duty of county commissioners to levy and collect a tax for the payment of certain bonds of a township, a writ directed to the Board of County Commissioners was held to be proper, although the commissioners were not parties to the judgment sought to be enforced.[1]

§ 1535 (873). **Direction of Writ; Distinction.** — *A distinction is to be observed between a misdirection,* by being directed to the wrong persons, and a direction to the right persons by an erroneous name. In the former case the writ may be superseded on motion, while in the latter case the defect must be relied upon in the return, and the objection is in the nature of a plea in abatement.[2]

§ 1536 (874). **Direction; Official rather than Personal Name.** — It is advisable that the *writ to officers of a municipal or public corporation* to perform an official duty should be directed to them in their official names, as "To the Mayor and Aldermen of," &c., omitting the personal names of the officers, as this course precludes questions which might be made arising from a change of officers.[3] The writ must be directed to officers in their proper capacity.

commanding the levy of taxes to pay the judgment, was directed "To the Mayor and Aldermen" of the city. The objection was made that the writ ought to have been directed to the city by its corporate title, but the objection was not sustained. The view of the Supreme Court was, that since the affairs of the city were managed by the mayor and aldermen composing the city council, which had the sole power to levy and collect taxes and provide for the payment of the debts of the corporation, the writ was well enough directed. The exact language of the court is: "The point that the writ was misdirected is not well taken, — the direction was *substantially correct.*" There can, we think, be little doubt that the writ could have been properly directed to the corporation by its corporate title; and as the duty was a corporate one, though to be performed by the council, the direction of the writ in such a case to the corporation by its charter name, and service upon the proper officers, would seem to be an equally appropriate mode.

Writ directed to the Mayor and City Council is good, and it need not necessarily be directed to the corporation. People *v.* Bloomington, 63 Ill. 207; followed, Glencoe *v.* People, 78 Ill. 382. But a peremptory writ of *mandamus* against a municipal corporation was said to be governed by different principles, and must be served upon these persons composing the council at the time of service. *Ib.*

[1] Labette County *v.* Moulton, 112 U. S. 217; Cherokee County *v.* Wilson, 109 U. S. 621. Same principle, Farnsworth *v.* Boston, 121 Mass. 173. See People *v.* Raymond, 186 Ill. 407. A writ of *mandamus* to compel a city to levy and collect taxes to pay judgments should be addressed to the city council, since it has supervision of the levying and collection of taxes. State *v.* Norvell, 80 Mo. App. 180.

[2] Rex *v.* Smith, 2 M. & S. 598; Reg. *v.* Ipswich, 2 Ld. Raym. 1232, 1239; s. c. 2 Salk. 435; Rex *v.* Norwich, 1 Stra. 55; Willc. 388, pl. 131.

[3] Tapping on *Mandamus*, 315, 317; Louisville *v.* McKean, 18 B. Mon. 9, 13; *infra*, § 1546; State *v.* Elkinton, 30 N. J. L. 335; Beachy *v.* Lamkin, 1 Idaho, 48; State *v.* Gates, 22 Wis. 210; People *v.* Bacon, 18 Mich. 247; State *v.* Madison, 15 Wis. 30; Rex *v.* West Looe, 3 B. & C. 685; Willc. 391, pl. 140; State *v.* New Orleans, 35 La. An. 68; State

§ 1537 (875). **Service of the Writ.** — The writ must, as we have seen, be directed to those who are to execute it, or do the thing required, and it must be *delivered to, or served upon,* those who are to make the return.[1] Whether the writ be directed to the corporation or to the council,[2] *the service* ought in our opinion to be made upon

v. Williams, 110 Tenn. 549. (The proceeding does not abate because of the change of officials.)

In Regina *v.* Eye, 9 A. & E. 676, where the mayor and assessors, under the English Municipal Corporations Act, had expunged the name of the relator from the burgess roll, and the relator, at the next term, obtained a rule for a *mandamus to the mayor* (the proper officer under the act) to insert his name, the court made the rule absolute, *directing* the *mandamus to the mayor generally,* notwithstanding that the mayor, who had expunged the name, had ceased to be mayor before the rule *nisi* was obtained, that no application had been made to the mayor then in office, and that the year to which the burgess list belonged had expired before making the rule absolute. In one case in England, where it was doubtful whether the last mayor had power to hold over, the court ordered that the writ should be directed to the *late mayor,* without specifying his name. Willc. 389, pl. 133. *Mandamus* may be directed to a *de facto* officer to compel him to perform the duties of his office; he cannot defend by setting up that he is not in possession of his office *de jure.* Kelly *v.* Wimberly, Miss. 548.

[1] Rex *v.* Hereford, 2 Salk. 701; Rex Derby, *Ib.* 436; Pees *v.* Leeds, 1 Ra. 640. See People *v.* Guggenheimer, N. Y. App. Div. 399. Service upon board of county commissioners in *diana* may be made upon the president without service on the other members. Clarke County *v.* State, 61 Ind.

[2] *Supra,* §§ 1532, 1536. On this subject some decisions have been made England which seem to the author to inapplicable, at least in their full tent, to our municipal corporations. thus, it is held, that where a *mandamus* directed to the "mayor, &c.," the mayor alone can make return, and the her integral parts of the corporation nnot disavow it. The reason assigned that the court cannot refuse the mayor's return, he being the principal officer to whom the writ is directed and to whom it is actually delivered, and all the court can do is to compel a return; and if the mayor makes a return contrary to the votes of the majority concerned, it is at his peril, and he may be punished by information in the King's Bench. Rex *v.* Abington, 2 Salk. 431; *Ib.* 699; Stephens' *Nisi Prius,* 2326. Accordingly, it has also been held that if the writ be directed to a corporation, it ought to be served upon the mayor. Rex *v.* Exeter, 12 Mod. 251. So, on a *mandamus to elect a clerk,* it was decided that the writ should be delivered to the mayor, as the most visible part of the corporation, notwithstanding the power of election was in the common council. Regina *v.* Chapman, 6 Mod. 152. (See State *v.* Milwaukee, 22 Wis. 397.) In another case it was held that *personal service on the town clerk* of a peremptory writ to the corporation was sufficient to found an application for an attachment. Rex *v.* Fowey, 4 D. & R. 614. It seems that an attachment may be granted against a mayor, on affidavits that the writ has been left at his house, he having kept out of the way to avoid it. Rex *v.* Tooley, 12 Mod. 312; Willc. 450. At common law *the return* to a writ of *mandamus to a corporation,* being an act to be entered of record, it need not be under the seal of the corporation, or signed by the head or other officer of the corporation, for at common law no officers are obliged to sign their returns. Rex *v.* Exeter, 1 Ld. Raym. 223; Rex *v.* Clark, 2 Ld. Raym. 848; *Ib.* 849; Rex *v.* Wigan, 3 Burr. 1645; Grant on Corp. 63, 228, 229.

In this country the *mode of service* is usually prescribed by statute. State *v.* Mineral Pt., 22 Wis. 396, construing the statute of *Wisconsin* to require the board of supervisors to be served by leaving the original writ of *mandamus* with the chairman, and a copy with each of the supervisors. In *New Jersey* (see State *v.* Elkinton, 30 N. J. L. 335), the writ should be delivered or shown to the person to whom it is addressed. *Ib.* "Service of the writ may

the officers who, under the law, have the power to do the act commanded, and against whom an attachment to enforce obedience should issue.

§ 1538 (876). **The Return and Subsequent Proceedings; Return; By whom made, and Requisites.** — The *return to the alternative writ* must be made by the corporation, body, officers, or persons to whom the writ is directed; must state facts clearly, positively, and without ambiguity or evasion; if it traverses the facts stated in the writ, it must deny or answer all that are material, or it may aver, in accordance with the rules of pleading, other facts in avoidance, and such facts "must also be clearly and specifically set forth in the return with sufficient certainty, and not argumentatively, inferentially, or evasively, so that the court may see at once that such facts, if established or admitted, are sufficient as the alternative for obedience to the writ." [1] The return need not be single, but may state several distinct grounds in answer to the writ, and it is enough if any one of them be sufficient, that is, discloses legal reasons why the act commanded by the writ should not be performed.[2]

§ 1539 (877). **Return not conclusive; What Course open to Respondent.** — Under the statute of Anne, or similar statutes adopted or enacted in most of the States, or by the course of practice therein,

be by delivery of a copy, but the original ought to be shown to each party served at the time of due delivery of the copy." Add. on Torts (4th Eng. ed.), 1074; Reg. *v.* Birmingham & O. R. Co., 1 El. & Bl. 293. Proper mode of making return by county justices or supervisors. Lander *v.* McMillan, 8 Jones L. (N. Car.) 174; McCoy *v.* Harnett County, 4 Jones L. (N. Car.) 180; People *v.* San Francisco, 27 Cal. 655.

[1] Commonwealth *v.* Allegheny County, 37 Pa. St. 277, 279, *per Thompson*, J., where the principle is well illustrated and applied; People *v.* Baker, 35 Barb. (N. Y.) 105; Willc. 401-409; Loute *v.* Allegheny County, 10 Pittsb. L. J. 241; s. c. 2 Pittsb. R. 411; Pollock *v.* Lawrence County, 7 Pittsb. L. J. 373; s. c. 2 Pittsb. R. 137; Tallapoosa *v.* Tarver, 21 Ala. 661; Commonwealth *v.* Pittsburgh, 34 Pa. St. 496; State *v.* Madison, 15 Wis. 30; Grant on Corp. 228-240; Williams *v.* New Haven, 68 Conn. 263; Chicago *v.* People, 116 Ill. App. 564, aff'd 215 Ill. 235; State *v.* Allison, 155 Mo. 325; Douglas *v.* McLean, 25 Pa. Super. Ct. 9. The mandatory part of the alternative writ, if certain, may be general, but the return must be minute in stating facts, showing why the party did not do the act required. Regina *v.* Southampton, 1 Ellis, B. & S. 5. Writ directed to G. and others as Township Committee; a return by them as *late* Township Committee was held sufficient. State *v.* Griscom, 3 Halst. (N. J.) 136. Equitable defence to the demands of the relator, and mode of asserting it. Neuse River Nav. Co. *v.* Newberne, 6 Jones Law (N. Car.), 204. *Mandamus* not allowed where the right was merely equitable. Regina *v.* Balby & W. Tp. Road Trs., 16 Eng. Law & Eq. 276; 22 L. J. Q. B. 164.

[2] Rex *v.* Norwich, 2 Ld. Raym. 1244; s. c. 2 Salk. 436; Reg. *v.* Pomfret, 10 Mod. 107; Rex *v.* Cambridge, 2 T. R. 461; Rex *v.* York, 6 T. R. 495; Wright *v.* Fawcett, 4 Burr. 2044; Legg *v.* Annapolis, 44 Md. 203. See People *v.* Logan County, 63 Ill. 374, as to what return may be made.

return, if false in fact, is not conclusive in the *mandamus* proceed-
g, and the relator or prosecutor is not driven as at common law to
action on the case for a false return, but may directly contest the
th of the return.[1] It may be stated to be *generally true in this*
ntry, that upon service of the alternative writ the respondent, or
rty to whom it is directed, may either (1) obey the command of
writ and show that fact; or (2) he may object to the writ for
fects therein, and move to quash or supersede the same; or (3) he
y demur to the writ; or (4) traverse in the return the facts set
th in the writ; or (5) aver in the return other facts by way of
fession and avoidance of the facts stated in the writ.[2] And the
ues of law and the issues of facts thus presented will be disposed
according to the statutes and the practice of the court.[3]

§ 1540 (878). **Peremptory Writ; When issued; How obeyed.** — If
return to the alternative writ be disallowed as insufficient in
, or if the facts averred in the return be found and adjudged
true, a *peremptory writ will be issued*, which, as its name implies,
uires to be obeyed, and it cannot be disobeyed on any ground
ich might have been urged in resisting the application for the
t.[4] While it is true that the general rule is that no return can be
de to the peremptory writ except obedience, yet a subsequent
d statute, forbidding obedience or making obedience impossible,
from necessity be a sufficient return.[5] If the defendants have

Maddox *v.* Graham, 2 Met. (Ky.) 69; Angell & Ames Corp., §§ 727, People *v.* Hudson, 6 Wend. (N. 559; People *v.* Finger, 24 Barb. Y.) 341; Selma & G. R. Co., *In re*, la. 230.

Commonwealth *v.* Allegheny, nty, 37 Pa. St. 277, 279; Same *v.* e, *Ib.* 237, opinion of *Woodward*, J.; ing on *Mandamus*, 347; Tarver llapoosa, 17 Ala. 527; Common-th *v.* Lyndall, 2 Brew. (Pa.) 425; *v.* Derby, 54 Me. 95. The statute Anne, chap xx., is not in force in *ma.* Tallapoosa *v.* Tarver, 21 661. Nor in *Maryland.* Harwood arshall, 10 Md. 451.

a application for a *mandamus* st the common council, they may in question the constitutionality act which legislates them out of . State *v.* Newark, 40 N. J. L.

Silverthorn *v.* Warren R. Co., 33 . L. 173. The prosecutor or relator may *demur to the return. Ib.* Or *plead* to and controvert the facts stated therein. Maddox *v.* Graham, 2 Met. (Ky.) 56, 68; People *v.* Metropolitan Pol. Board, 26 N. Y. 316; State *v.* Jones, 10 Iowa, 65; Fowler *v.* Pierce, 2 Cal. 165; 9 Anne, chap. xx. §§ 1, 2; Grant on Corp. 228–240; People *v.* Logan County, 63 Ill. 374. This section of the text cited with approval in St. Louis *v.* Green, 7 Mo. App. 468.

[4] Stevens' Case, T. Raym. 432; Rex *v.* Norwich, 2 Ld. Raym. 1244, 1245; People *v.* Seymour, 6 Cow. (N. Y.) 579; Commonwealth *v.* Pittsburgh, 34 Pa. St. 496; Weber *v.* Zimmerman, 23 Md. 45; People *v.* Richmond County, 28 N. Y. 112; People *v.* Woodbury, 88 N. Y. App. Div. 443.

[5] Sedberry *v.* Chatham County, 66 N. C. 486, 492; Bayne *v.* Jenkins, *Ib.* 356. See Preferred Tontine Mercantile Co. *v.* Secretary of State, 133 Mich. 395.

appeared to a rule or notice of an application for a *mandamus*, and have been heard, and there is no controversy in respect to the facts, and the right of the relator is clear, a peremptory writ may, in the discretion of the court, be issued *in the first instance*.[1] Thus, where a specific duty, *e. g.*, the levy of a special tax, required to be performed by public officers at a prescribed time, is omitted to be performed without a reason, or for a reason merely colorable, a peremptory *mandamus*, without a previous alternative, may be issued in the first instance, if the defendant have previously appeared to a notice or rule commanding the duty to be performed *forthwith*.[2] So, where the plaintiff's claim has been reduced to a judgment, a peremptory writ *may*, in a proper case, be awarded in the first instance.[3]

§ 1541 (879). **Form of Peremptory Writ.** — It has been frequently declared to be a well-settled principle that the *peremptory writ must conform strictly to the alternative*, and cannot be limited or varied.[4] It may be doubted whether even the older cases warrant

[1] Knox County *v.* Aspinwall, 24 How. (U. S.) 376; Jennings, *In re*, 6 Cow. (N. Y.) 518, 529; Rogers, *In re*, 7 Cow. 526; State *v.* Elkinton, 30 N. J. L. 335; Harkins *v.* Sencerbox, 2 Minn. 344; Clarke County *v.* Paris, W. & K. R. Turnp. Co., 11 B. Mon. (Ky.) 143; Attala Co. Board of Pol. *v.* Grant, 17 Miss. 77; People *v.* Lindenthal, 173 N. Y. 524; People *v.* Harwick, 48 N. Y. App. Div. 559; Forty-second Street, M. & St. N. R. Co. *v.* Collis, 24 N. Y. Misc. 321; People *v.* Fromme, 30 N. Y. Misc. 323; Mackin *v.* Portland Gas Co., 38 Oreg. 120; Hebb *v.* Cayton, 45 W. Va. 578. So, if no return be made to an alternative writ, the court, instead of proceeding by attachment, may direct the peremptory writ to issue. State *v.* Jones, 1 Ired. L. (N. Car.) 129; People *v.* Pearson, 4 Ill. 271. A peremptory writ in the first instance is proper only when the right of the relator is clear and unquestionable. People *v.* Greene County, 64 N. Y. 600. Where the facts are not in dispute, the right clear, and the matter one of public interest in relation to an officer having a short term, a peremptory writ may properly issue. State *v.* Hudson County, 35 N. J. L. 269. So on the direction of the court after full hearing on the rule to show cause. Cleveland *v.* Jersey City, 39 N. J. L. 629. Peremptory writ will issue only when it appears that the law specially enjoins upon the defendant the performance of the act which it is sought by the writ to compel. State *v.* Whipple, 60 Neb. 650. *Mandamus* cannot issue to compel the issuance of a certificate of election where there are disputed facts to be determined before the relief can be granted. People *v.* Vandervoort, 53 N. Y. App. Div. 283.

[2] Knox County *v.* Aspinwall, 24 How. 376; Horton *v.* State, 60 Neb. 701; *In re* Uvalde Asphalt Paving Co., 33 N. Y. Misc. 699. The court, in its discretion, may order an alternative *mandamus* on making a rule to show cause absolute. A peremptory *mandamus* is allowed in the first instance only when the legal right is clear, where the facts are not in dispute, and the matter is of public and urgent interest. Hugg *v.* Camden, 39 N. J. L. 620.

[3] Lutterloh *v.* Cumberland County, 65 N. C. 403. The practice in the Eighth Federal Judicial Circuit is in general *not* to award a peremptory writ, in the first instance, even to *judgment* creditors.

[4] State *v.* Kansas City Police Com'rs, 80 Mo. App. 206; State *v.* Haverly, 62 Neb. 767; Tapping on *Mand.* 305, 402; 1 Redf. Railways, 649; High, Extr. Remedies, chap. ix., cited by *Folger*,

so broad and unqualified a statement of the general rule; but, if so, the rule in modern times has been relaxed, and the better view is that, within reasonable and proper limits, by amendment of the alternative writ or otherwise, the peremptory writ may be moulded so as to effectuate justice. While the general command of the peremptory writ must be the same as the alternative, it may vary in unsubstantial matter of detail, particularly where the variation is to the ease of the respondent.[1]

§ 1542 (880). **When Peremptory Writ not issued; When set aside.** — Although the return to the alternative writ is insufficient, yet, *if upon the whole case* it clearly appears that the relator is not entitled to the advantage which the peremptory writ would give him, the court will not issue it.[2] If issued, it may, on motion, be set aside, on proof that it was unfairly or improperly obtained, or commands the performance of an illegal act.[3] If when issued it is not fully and effectually obeyed, the relator may oppose the motion to file the return.[4]

§ 1543 (881). **How Obedience is enforced; Attachment.** — Obedience *to the peremptory writ is enforced by attaching the persons* guilty of the disobedience for contempt.[5] If a corporation make no return to a writ duly issued and served, the attachment issues against the individuals guilty of the contempt in their natural capacity.[6] If the

l., in People *v.* Dutchess County, 58 N. Y. 152, where the authorities upon he proper *form of the writ*, and as to *ariance between the alternative and eremptory writ*, are collected and reiewed in a learned and able opinion hich will not fail to commend itself the enlightened judgment of the bar.

[1] People *v.* Dutchess County, 58 . Y. 152; United States *v.* Union Pac. . Co. 4 Dillon, 479; s. c. 91 U. S. 343; ate *v.* Joplin Water Works, 52 Mo. pp. 312. Further, as to *amendments*, e *supra*, § 1532, and cases cited in the tes. The liberality of modern legistion and practice in respect of amendents extends to and pervades the ocedure in *mandamus*, which is imilated to the practice and proedings in ordinary actions.

[2] Willc. 444, pl. 303, citing Rex *v.* mpion, 1 Sid. 14; Rex *v.* Axbridge, Cowp. 523; Rex *v.* Griffiths, 3 B. & d. 735; Legg *v.* Annapolis, 44 Md. 3; *supra*, § 1504.

[3] People *v.* Everett, 1 Caines (N. Y.), 8; Weber *v.* Zimmerman, 23 Md. 45; State *v.* Johnson County, 12 Iowa, 237.

[4] Reg. *v.* Ipswich, 2 Ld. Raym. 1232, 1233.

[5] Commonwealth *v.* Taylor, 36 Pa. St. 263, which contains C. J. *Lowrie's* address on behalf of the Supreme Court of *Pennsylvania* to the members of the municipal council of Pittsburgh, attached for contempt for not levying as commanded a tax to pay creditors. Loute *v.* Allegheny County, 10 Pittsb. Leg. J. 241; s. c. 2 Pittsb. R. 411. See also Ball *v.* Wright, 115 Ga. 729; People *v.* Brice, 62 N. Y. App. Div. 593; Angell & Ames, § 730; Willc. 448. A municipal corporation cannot be guilty of contempt; the contempt is that of individuals, as, *e. g.*, the municipal officers. Bass *v.* Shakopee, 27 Minn. 250; Davis *v.* New York, 1 Duer, 451; London *v.* Lynn Regis, 1 H. Bl. 206.

[6] Mills' Case, T. Raym. 152.

writ be directed to several persons in their natural capacities, unless all join in the return, the attachment must go against all, though such as were willing to do the act commanded will not be punished. But where the writ is directed to a corporation by name, the attachment should issue against the guilty only, not against those who have done all within their power to obey the writ.[1]

§ 1544 (882). **Attachment, how obtained; Practice.** — The *application for an attachment* is by motion for a rule *nisi*, founded upon affidavits, which gives the defendant an opportunity to show cause.[2] But the rule is here often dispensed with, and upon a clear showing that the writ has been served, and that the disobedience is wilful, or the contempt gross, an attachment may be issued at once.

§ 1545 (883). **State Court injunction no Excuse if Federal Court first acquired Jurisdiction.** — The defendants cannot, on being attached for disobedience of a peremptory *mandamus*, issued by a *Federal court*, excuse or justify such disobedience by showing that they have since been enjoined by a *State court* from doing the act commanded by the former court.[3]

§ 1546 (884). **Judgment in Mandamus; Abatement; Change of Membership; Public Officer.** — A *change in the membership of a mu-*

[1] Bailiffs of Brigenoth, 2 Stra. 808; Rex *v.* Salop, Buller's N. P. 198, 201; New Sarum, Comb. 327.

[2] Tidd's Prac. 484; Chaunt *v.* Smart, 1 B. & P. 477. Under the practice at common law, an attachment is not granted for not making a return to the peremptory writ on the day assigned, but it is granted after a peremptory rule to return the writ. Rex *v.* Fowey, 4 D. & R. 614; Coventry's Case, 2 Salk. 429; Willc. 449. If there has been *no service of the writ* according to law, an attachment for contempt will not be issued. State *v.* Mineral Pt., 22 Wis. 396. If a "town council" to which a *mandamus* is directed *adjourn* the corporate assembly *to prevent a return* being made, the members will be punishable for contempt. Regina *v.* Heathcote, 10 Mod. 49, 56. To a rule to show cause why officers of a county should not be attached for contempt in not levying as commanded a tax sufficient to pay the plaintiff's claim against a county, it was held a good answer that a sufficient tax had been levied, and the lists placed in the hands of the collecting officer. Johnston *v.* Cleaveland County, 67 N. Car. 101. Discretion of officers as to raising part by taxation and part by the issue of bonds. *Ib.* See Sedberry *v.* Chatham County, 66 N. Car. 486.

[3] Riggs *v.* Johnson County, 6 Wall. (U. S.) 166; Lansing *v.* County Treasurer, 1 Dillon C. C. 522; Washington County *v.* Durant, 9 Wall. (U. S.) 415; Davenport *v.* Lord, *Ib.* 409; Seibert *v.* Lewis, 122 U. S. 284; *supra*, § 1512, note. A town treasurer, who has collected the money due a judgment creditor, cannot be compelled by *mandamus* to pay it to the creditor while enjoined at the suit of another. State *v.* Kispert, 21 Wis. 387.

Courts of equity will not ordinarily interfere by injunction to stay proceedings upon a writ of *mandamus*. Columbia County *v.* Bryson, 13 Fla. 281. Index — *Equity; Injunction.*

icipal council, pending proceedings in *mandamus* against the coun-il, does not abate the proceedings; and where such a change oc-urred, and the new members were made parties, and afterwards peremptory writ ordered, this was regarded as in effect a judg-nent against the corporation, and binding upon the councilmen in ffice at the time of its rendition, and whose duty it was to execute t.[1] But a judgment in *mandamus*, ordering the performance of an fficial duty, by a public officer who had ceased to be such officer efore the judgment was entered, is void, and does not bind his uccessor if the latter be not made a party to the proceeding and ave due notice thereof and opportunity to be heard.[2] Strangers re neither bound nor estopped by a peremptory writ of *mandamus*.[3]

[1] Maddox *v.* Graham, 2 Met. (Ky.) 6, 63, 71. Approved, Leavenworth County *v.* Sellew, 99 U. S. 624; Louisville *v.* McKean, 18 B. Mon. (Ky.) 9, 13; State *v.* Canfield, 40 Fla. 36; Utter *v.* Franklin, 7 Ariz. 300. Duty to *repair ridge*. Brunswick *v.* Bath, 90 Me. 479. In Louisville *v.* McKean, 18 B. Mon. (Ky.) 9, the city of Louisville was held entitled to prosecute an appeal in its name from a proceeding in *mandamus* against the mayor and the members of the council of the city. In thus holding, the court, by *Simpson*, J., remarks: "The act they [the mayor and council] were required to perform was a corporate act. The judgment against them should, therefore, be regarded as having been rendered against them in their corporate character. Indeed, the proceeding should properly have been against the corporation, or against the general council, as that body represented the corporation. If it should be regarded as a proceeding against the mayor and general council individually, the judgment might have been unavailing if they had not been in office at the time it was rendered; and might, therefore, have been made ineffectual by their resignation during the pendency of the motion. But regarding it as a proceeding against the corporation, it would be obligatory on the members of the general council in office at the time of its rendition; and it would not assume the character of a proceeding against individuals, unless it became necessary to issue an attachment for the enforcement of the judgment. Therefore, the appeal is properly prosecuted in the name of the city." In State *v.* Madison, 15 Wis. 30, it was held that if the mayor and part of the council go out of office after the alternative writ is served, their duties devolve on their successors, and that the peremptory writ may be directed to the mayor and council generally. Approved by the Supreme Court of the United States. Leavenworth County *v.* Sellew, 99 U. S. 624; *supra*, §§ 1520, 1521.

Where a writ is ordered against the *board of commissioners of a county*, and there is a change of membership after the writ is awarded and before it is served, it must be obeyed by those who compose the board at the time when the duty to act arises. Peagram *v.* Cleaveland County, 65 N. Car. 114; *supra*, § 1521.

[2] Secretary of the Interior *v.* McGarrahan, 9 Wall. (U. S.) 298, 313. In such a case the officer is treated as the real defendant, and notice to him, actual or constructive, is essential to jurisdiction. *Per Clifford*, J. *Ib.* See *supra*, §§ 861 *a*, 861 *b*. See Regina *v.* Eye, 9 A. & E. 676; State *v.* Gates, 22 Wis. 210; Beachy *v.* Lamkin, 1 Idaho, 48; State *v.* Madison, 15 Wis. 30; State *v.* Elkinton, 30 N. J. L. 335; Seymour *v.* Nelson, 11 App. D. C. 58; Fox *v.* Trinidad Waterworks Co. 7 Colo App. 401; State *v.* Board of Canvassers, 32 Mont. 13; People *v.* Morton, 156 N. Y. 136; French *v.* State Senate, 146 Cal. 604; Parke *v.* Hays, 11 Colo. App. 415; People *v.* Lantry, 40 N. Y. Misc. 428. In Schrader *v.* State, 157 Ind. 341, it was held that a judgment of *mandamus* against a road supervisor to issue a road tax receipt is binding on the supervisor's successor in office.

[3] Regina *v.* Heathcote, 10 Mod. 48, 56; s. c. Fort. 290; Tapping, 403.

Error and Appeal from judgment in Mandamus; Supersedeas. State *v.* Orleans Par. Dist., 21 La. An. 741; United States *v.* Addison, 22 How. (U. S.) 174; Secretary of Int. *v.* McGarrahan, 9 Wall. (U. S.) 298, *supra* · Louisville *v.* McKean, 18 B. Mon. (Ky.) 9, 13; *supra*, § 1546; Morris, *In re*, 11 Gratt. (Va.) 292; Columbian Ins. Co. *v.* Wheelright, 7 Wheat. (U. S.) 534; Tapping, 397, 398, and cases cited; Moses, chap. xxxviii.; People *v.* Steele, 1 Edm. (N. Y.) Sel. Cas. 505; Milwaukee & M. R. Co., *In re*, 5 Wall. (U. S.) 188; People *v.* Richmond County, 28 N. Y. 112; People *v.* Seymour, 6 Cow. (N. Y.) 579; Chance *v.* Temple, 1 Iowa, 179; State *v.* Marshall County, 7 Iowa, 186; Harwood *v.* Marshall, 9 Md. 83; Blackerby *v.* People, 10 Ill. 266; Pinckney *v.* Henegan, 2 Strob. (S. Car.) 250; *supra*, § 1503, note.

Judgment of Federal Circuit Court in a proceeding for *mandamus* to carry into effect a judgment for a debt is a "*final judgment in a civil action*" within the meaning of that phrase as used in the statutes of Congress regulating writs of error to the Supreme Court of the United States, and such order is reviewable in error if the whole amount of tax ordered to be collected is sufficient to give the United States Supreme Court jurisdiction. Davies *v.* Corbin, 112 U. S. 36; Graham *v.* Folsom, 200 U. S. 248, where such an order was reviewed by the Supreme Court. In England, see Act 7 & 9 Vict. chap. lxvii., printed in Rawlinson Corp. Appendix, 730; 15 & 16 Vict. chap. lxxvi.

CHAPTER XXX

QUO WARRANTO

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§ 1550 (888). **At Common Law; Statute of Anne.** — In England, the ancient method of proceeding against *those who exercised any public franchise without the king's grant, or contrary thereto,* was by the writ of *quo warranto,* which is the foundation of the modern, more convenient, and improved remedy by information in the nature of a *quo warranto.*[1] In the ninth year of the reign of Queen Anne, the famous remedial statute on the subject of *informations* in the nature of a *quo warranto,* in cases of *usurpations or intrusions into the offices and franchises of municipal corporations,* was passed. In substance, this statute has been very generally re-enacted in this country.[2]

[1] Willc. 453; Selwyn's *Nisi Prius,* 2; 2 Kyd on Corp. 395; Angell & Ames, chap. xxi.; Buller's *Nisi Prius,* 0; 3 Black. Com. 262; Stephens' *Nisi Prius,* 2429; High Extraor. Rem. aps. xiii., xiv. *Ante,* chap. i. § 10.

[2] People *v.* Thompson, 16 Wend. (N. Y.) 655. The cases in which *quo warranto* lies, and the nature and mode proceeding, pleading, practice, and dgment, will be found discussed, and e authorities collected by the reporter, a valuable note to People *v.* Richardn, 4 Cow. (N. Y.) 100–123; *infra,* 1567. See also Stephens' *Nisi Prius,* 130-2480. The statute of 9 Anne, hap. xx., does not extend to private corporations. In *South Carolina,* the statute of 9 Anne, chap. xx., is in force, and usurpations by public corporations of unauthorized powers may be tried upon information. State *v.* Charleston, 1 Mill (S. Car.) Const. R. 36, approving Rex *v.* Tenterden, 8 Mod. 114. See also State *v.* Christ Ch. Par. R. Com'rs, 1 Mill Const. (S. Car.) 55, 62. In *Louisiana.* Reynolds *v.* Baldwin, 1 La. An. 162. In *Pennsylvania.* Commonwealth *v.* Jones, 12 Pa. St. 365; Commonwealth *v.* Central Pass. R. Co., 52 Pa. St. 506; 9 Anne, chap. xx., now in force; Commonwealth *v.* Cluley, 56 Pa. St. 270. In *New York.* People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358;

§ 1551. (889). **Same Subject.** — It may be considered as settled that where any *public trust or franchise is exercised without authority,* an information will be granted for usurping it, whether it be a prior franchise of the crown or one under an Act of Parliament. Thus, where, by private Act of Parliament for enlarging and regulating a port, several persons were appointed trustees, and a particular method of filling vacancies was prescribed, and the defendants took upon themselves to act as trustees without such an election as the statute required, leave was given to file an information in the nature of a *quo warranto* against them.[1] The same doctrine exists, as we shall see, in this country, except where it is modified or controlled by statute.

§ 1552 (890). **Municipal Offices and Public Franchises.** — Under the *legislation and practice in the different American States,* an information in the nature of a *quo warranto,* or an equivalent civil action, is the appropriate remedy both for the usurpation of municipal and other public offices, and for the usurpation of a public franchise.[2] Thus this remedy will lie to test the right of a mem-

Attorney-General *v.* Same, 2 Johns. (N. Y.) Ch. 371; People *v.* Richardson, 4 Cow. (N. Y.) 100, 101, 122, 133. In *Massachusetts.* Goddard *v.* Smithett, 3 Gray (Mass.), 116. In *New Jersey.* State *v.* Paterson & H. Turnp. Co., 21 N. J. L. 9; State *v.* Tolan, 33 N. J. L. 195. *Information.* State *v.* Pritchard, 36 N. J. L. 101. *Plea, Replication, and Rejoinder.* State *v.* Crowell, 4 Halst. (N. J.) 390, 392; *Ib.* 432. In *Iowa.* Cochran *v.* McCleary, 22 Iowa, 75. In *Ohio.* State *v.* Cincinnati Gas & C. Co., 18 Ohio St. 262. In *Maine.* 9 Anne, chap. xx., not in force; Dane *v.* Derby, 54 Me. 95. Practice in that State. *Ib.* In *Wisconsin.* State *v.* Milwaukee L. S. & W. R. Co., 45 Wis. 579. In *Illinois.* "Our statute is a substantial if not literal copy of 9 Anne, chap. xx." *Per Scott,* J., in People *v.* Waite, 70 Ill. 25. In *New Mexico,* the statute of 9 Anne, chap. xx., is in force. Albright *v.* Territory, 13 N. Mex. 64.

In *New Hampshire,* the statute of 9 Anne, chap. xx., is not followed. Meehan *v.* Bachelder, 73 N. H. 113. In *Tennessee,* neither the ancient writ of *quo warranto* nor the information in the nature of *quo warranto* was ever in force. State *v.* McConnell, 3 Lea (Tenn.), 332; State *v.* Standard Oil Co., 120 Tenn. 86. In *Indian Territory,* only common-law jurisdiction to grant writs of *quo warranto* exists. The statute of 9 Anne, chap. xx., authorizing the issuance of the writ at the instance of a private relator was never in force there. Painter *v.* United States, 6 Ind. Terr. 505.

[1] Rex *v.* Nicholson, 1 Stra. 299. See also Rex *v.* Bedford, 1 Barnard. 242, 280; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 388; Buller's *Nisi Prius,* 210. Various instances in which *quo warranto* informations, in England, have been exhibited against a corporate officer, to show by what authority he held a franchise which he assumed to exercise in his official capacity, are collected and stated in Stephens' *Nisi Prius,* 2442, 2443.

The necessity of resorting to the remedy by *quo warranto* under the N. Y. Code cannot be evaded by disabling one from entering upon an office, and then claiming that because he has not made an actual entry into the office, the action will not lie. People *v.* Ferris, 16 Hun (N. Y.), 219; *post,* § 1553.

[2] Uniontown *v.* State, 145 Ala. 471; Garms *v.* People, 108 Ill. App. 631; Cochran *v.* McCleary, 22 Iowa, 75; Bartlett *v.* State, 13 Kan. 99; Reynolds *v.* Baldwin, 1 La. An. 162; State *v.* Camden, 35 N. J. L. 217; State *v.*

ber of a city council to a seat in that body,[1] or to test the right of a person to preside over or to vote in a meeting of a municipal body.[2] In such cases equity has, ordinarily, no jurisdiction.[3]

Ocean, 39 N. J. L. 75; *ante*, §§ 514, 517, and cases cited, § 1501; Worthley *v.* Steen, 43 N. J. L. 542; Werts *v.* Rogers, 56 N. J. L. 480; Demarest *v.* Wickham, 63 N. Y. 320; People *v.* Hall, 80 N. Y. 117; State *v.* Davies, 12 Ohio Cir. Ct. R. 218; State *v.* Bingham, 14 Ohio Cir. Ct. R. 245; State *v.* Dayton Traction Co., 18 Ohio Cir. Ct. R. 490; State *v.* Deliesseline, 1 McCord (S. Car.) 52; State *v.* Degress, 53 Tex. 387; State *v.* Van Brocklin, 8 Wash. 557; State *v.* Portage Water Co., 107 Wis. 441; Rex *v.* Williams, 1 Burr. 402; s. c. 2 Kenyon, 75. At *common law* the Attorney-General has the right to file an information, for the usurpation of an office, in the name and on behalf of the Commonwealth, at his own discretion, and the court has no authority to grant or to withhold leave to file it; the mention of relators is mere surplusage, and does not affect the validity of the information of the form of the judgment. Commonwealth *v.* Allen, 128 Mass. 308. And see State *v.* Anderson, 45 Ohio St. 196; *infra*, § 1561. Under the code of *Georgia* the writ may issue "at the suit of some person either claiming the office or interested therein," and the Supreme Court of that State has held that every citizen is sufficiently interested in municipal offices to be qualified to apply for the writ. Churchill *v.* Walker, 68 Ga. 681; *infra*, § 1562, note.

Quo warranto will lie to test the validity of a *franchise or privilege* of a public service corporation to use the *city streets;* see *ante*, § 1311, and cases cited. See also People *v.* Chicago Telephone Co., 220 Ill. 238; State *v.* Des Moines City R. Co., 135 Iowa, 694; Olathe *v.* Missouri & K. Interurban R. Co., 78 Kan. 193; Kavanaugh *v.* St. Louis, 220 Mo. 496; Thirteenth & F. Sts. P. R. Co. *v.* Broad St. R. T. St. R. Co., 219 Pa. 10; Andel *v.* Duquesne St. R. Co., 219 Pa. 635; Lovejoy *v.* Duquesne St. R. Co., 219 Pa. 639; Milwaukee Elect. R. & L. Co. *v.* Milwaukee, 95 Wis. 39; Linden Land Co. *v.* Milwaukee Elect. R. & L. Co., 107 Wis. 493; Allen *v.* Clausen, 114 Wis. 244; State *v.* Milwaukee Ind. Tel. Co., 133 Wis. 588; Beloit, D. L. & J. R. Co. *v.* Macloon, 136 Wis. 218; State *v.* Milwaukee Elect. R. & L. Co., 136 Wis. 179.

[1] Commonwealth *v.* Meeser, 44 Pa. St. 341; s. c. Brightly's Election Cases, 659. See State *v.* Collister, 27 Ohio Cir. Ct. R. 529.

[2] Reynolds *v.* Baldwin, 1 La. An. 162; Cochran *v.* McCleary, 22 Iowa, 75, referred to, *arguendo*, with approval, in *Re* Sawyer, 124 U. S. 200, by *Gray*, J., who says, "The Supreme Court of Iowa, in a careful opinion delivered by Judge *Dillon*, has adjudged that the right to a municipal office cannot be determined in equity upon an original

[3] *Ante*, chap. xiii. § 514. But see § 517; People *v.* Galesburg, 48 Ill. 485; Cochran *v.* McCleary, 22 Iowa, 75, cited in *Re* Sawyer, 124 U. S. 213; People *v.* Rose, 211 Ill. 252; Fort *v.* Thompson, 49 Neb. 772; Clark *v.* Interstate Independent Tel. Co., 72 Neb. 33; Ward *v.* Sweeney, 106 Wis. 44; Clarkle *v.* Wright, 13 Ind. 548; Hagger *v.* Heyberger, 7 Watts & Serg. (Pa.) 94.

The holding of an election will not be enjoined by a court of equity, since *quo warranto* is a complete remedy. People *v.* Galesburg, 48 Ill. 485; Dickey *v.* Reed, 78 Ill. 261; Darst *v.* People, 62 Ill. 306; Walton *v.* Develing, 61 Ill. 201; *ante*, § 379, note. Where the remedy at law is inadequate, a court of equity may, for that reason, in proper cases, take jurisdiction. *Ib. obiter; ante*, § 517. *Re* Sawyer, 124 U. S. 200, where the learned opinion of Mr. Justice *Gray* deals with the jurisdiction and office of *courts of equity* generally and of the Federal courts in respect of the *removal of municipal and public officers. Infra*, chap. xxxi., as to remedy in equity and otherwise in respect of illegal or unauthorized corporate acts. The governor will not be restrained from granting a commission to an officer who has been improperly elected, any more than the courts would restrain the legislature from passing an unconstitutional act. Grier *v.* Taylor, 4 McCord (S. Car.), 206, *per Bay*, J.; Chicago *v.* Evans, 24 Ill. 52; Smith *v.* McCarthy, 56 Pa. St. 359.

§ 1553 (891). **Cumulative Statutory Remedies.** — In a previous chapter we have had occasion to consider *when statutes providing special proceedings with respect to municipal elections* will or will not be held to oust *the revisory or superintending jurisdiction of the superior courts* of law over such proceedings and elections; and we may here repeat that this salutary jurisdiction should not be deemed to be taken away, except in cases where the legislative intent to this effect is plainly manifest.[1]

bill for an injunction. Cochran *v.* McCleary, 22 Iowa, 75."

In the case last cited which involved the question whether under the legislation of *Iowa* the mayor of Iowa City or the president of the city council had the right to preside at corporate meetings, and the further question whether the remedy was by *quo warranto* or in equity, *Dillon*, J., delivering the opinion of the court, says: "We have examined the English and American adjudications with great care, to see whether the remedy by *quo warranto* would lie to test the right of a person to preside over a public corporation. And upon the subject we have no doubt. The authorities are uniform to the point that, to determine a question of this character, *quo warranto* is the proper, if not, indeed, the only legal remedy. We cite some of the more pertinent authorities in a note, some of which, it will be observed, are directly in point." (22 Iowa, 88.) *Ante*, § 514. See Commonwealth *v.* Kempsmith, 13 Pa. Co. Ct. R. 667.

[1] *Ante*, § 377 *et seq.*; State *v.* Elliott, 117 Ala. 150, quoting text; Snowball *v.* People, 147 Ill. 260; State *v.* Fransham, 19 Mont. 273; State *v.* Conser, 24 Ohio Cir. Ct. R. 270; Gray *v.* State, 92 Tex. 396. See Parks *v.* State, 100 Ala. 634; Buckman *v.* State, 34 Fla. 48.

The cases show some conflict of opinion in respect to when a special mode of contesting elections will exclude the mode by *quo warranto*. See on this subject, State *v.* Marlow, 15 Ohio St. 114; distinguished, People *v.* Hall, 80 N. Y. 117; Commonwealth *v.* Garrigues, 28 Pa. St. 9; Commonwealth *v.* Baxter, 35 Pa. St. 263; distinguished, People *v.* Hall, *supra;* Commonwealth *v.* Leech, 44 Pa. St. 332; Commonwealth *v.* Meeser, 44 Pa. St. 341; s. c. Brightly's Election Cases, 659, 663, which the learned editor of the volume last cited regards as in conflict with the Commonwealth *v.* McCloskey, 2 Rawle (Pa.), 369, two judges dissenting; approved, People *v.* Holden, 28 Cal. 123; *ante*, §§ 379–382; Steele *v.* Martin, 6 Kan. 430; *post*, § 1592.

It is held by the courts of some jurisdictions that where the city council is given power to decide the title to an office, but the statute does not declare such power to be exclusive, the remedies by contest of the election before the city council and by *quo warranto*, or information in the nature of *quo warranto*, are concurrent. State *v.* Anderson, 26 Fla. 240; State *v.* Gates, 35 Minn. 385; State *v.* Craig, 100 Minn. 352; State *v.* Cosgrave, 85 Neb. 187; *Ex parte* Heath, 3 Hill (N. Y.), 42; People *v.* Hall, 80 N. Y. 117; State *v.* Kraft, 18 Oreg. 550; State *v.* Morris, 14 Wash. 262; State *v.* Kempf, 69 Wis. 470. See also Little *v.* Davis, 80 Kan. 777; Kane *v.* People, 4 Neb. 509; State *v.* Frazier, 28 Neb. 438; State *v.* Frantz, 55 Neb. 167; Commonwealth *v.* Allen, 70 Pa. 465. As to the rule in *Ohio*, see Holbrock *v.* Smedley, 79 Ohio St. 391.

Some of the decisions deny the power of the legislature to make the determination of the city council exclusive, but in Carter *v.* Sonoma County Super. Ct., 138 Cal. 150, where the statute made the city council the exclusive judges of the election, the court held that it was thereby deprived of all jurisdiction in *quo warranto*.

In *New York* it is held that it is only the *form of proceeding* by *quo warranto* that is done away with by the code. People *v.* Hall, 80 N. Y. 117. The jurisdiction of the superior courts is not touched by legislation of the State. The charter of New York city provided that the board of aldermen shall be the judge of the election returns and qualifications of its own members, subject, however, to the review of any court

§ 1554 (892). **Proper Remedy to try the Title to Public or Municipal Offices.** — We have seen already that it is the doctrine of the English law, quite generally adopted in this country, where *a person is in the actual possession of an office under an election or a commission*, and is thus exercising its duties *under color of right*, that the validity of his election or commission cannot, in general, be tried or tested on a *mandamus* to admit another, but only by an information in the nature of a *quo warranto*.[1] The certificate of election of an

of competent jurisdiction. The courts are not ousted thereby from an inquiry, in the first instance, as to the right to the office of alderman. The following summarizes the views of the court: The fact that the words used are similar to those in the State and Federal Constitutions, conferring a like power on each house of the legislature s to its members, does not exclude the jurisdiction of the courts. In the one case the jurisdiction is conferred by the people upon each branch of the legislature as a co-ordinate body with the courts, and is necessarily exclusive. In England the power of the commons has been acquiesced in as exclusive in relation to this matter, though it was at times claimed and exercised by the king and council, by the House of Lords, and by the chancellor. The power is a necessary incident to every body of that description which emanates directly from the people. But this does not apply to a municipal corporation which is a creation of the legislature. The charter provision above mentioned does not give *exclusive* power in the first instance to the board of aldermen. The jurisdiction of the courts formerly existing is not taken away unless by express or plain provision to that effect. "It is a maxim in the common law that a statute made in the affirmative without any negative, expressed or implied, does not take away the common law." Coke Inst. 199, caps. xx.–xxiv.; Rex *v.* Morely, 2 Burr. 1040; Heath, *In re*, 3 Hill (N. Y.), 52; People *v.* Bristol & R. T. Co., Wend. (N. Y.) 222. That rule applies here. The Supreme Court is not deprived of jurisdiction; a cumulative jurisdiction is created. The phrase in the charter, "subject, however, to the review of any court of competent jurisdiction," does not imply that the words giving the power would, without some restriction, have conferred sole, exclusive, and final jurisdiction. Whenever a new jurisdiction is erected, whether by public or private act, it is subject to inspection by the proper court by writ of error, *certiorari*, or *mandamus*. Lawton *v.* Cambridge, 2 Caines, 179, 181. The rule that where a new right, or the means of acquiring it, is conferred, and an adequate remedy for its invasion given by the same statute, parties injured are confined to the statutory redress (Dudley *v.* Weston, 3 N. Y. 9), does not apply. State *v.* Fitzgerald, 44 Mo. 425; Hummer *v.* Hummer, 3 Greene (Iowa), 42; Wammack *v.* Holloway, 2 Ala. 31; Murfree *v.* Leeper, 1 Overt. (Tenn.) 1; Burginhofen *v.* Martin, 3 Yeates (Pa.), 479; Commonwealth *v.* McCloskey, 2 Rawle, 369. In this case the relator, who claimed the office of alderman against the respondent, had instituted proceedings before the board of aldermen for the office, and this board had decided adversely to the relator, which proceedings had not been reversed when the proceedings in this suit were instituted. While the decision might be *res adjudicata* as to relator, it was not so as to the State. Duchess of Kingston's Case, 20 How. St. Tr. 355; Barr *v.* Jackson, 1 Phillips, 582; King *v.* Clarke, 1 East, 38; State *v.* Hardie, 1 Ired. 42; *ante*, chap. xi., § 379 *et seq.*, where the subject referred to in the text is considered at large.

[1] *Ante*, § 379, §§ 1495, 1499, 1503; Nolen *v.* State, 118 Ala. 154; Ptacek *v.* People, 194 Ill. 125; Marshall *v.* Illinois State Reformatory, 103 Ill. App. 65; Deemar *v.* Boyne, 103 Ill. App. 464; Parsons *v.* Durand, 150 Ind. 203; Peters *v.* Bell, 51 La. An. 1621; Lachance *v.* Mackinac County Board of Canvassers, 157 Mich. 679; Meehan *v.* Bachelder, 73 N. H. 113; *In re* Hart, 159 N. Y. 278, 161 N. Y. 507; People *v.* Yonkers Police Com'rs, 174 N. Y. 450; People *v.* McAdoo, 110 N. Y. App. Div. 432; People *v.* Sheehan, 128 N. Y. App. Div. 743; State *v.* Moffitt,

officer, or his commission, coming from the proper source, is *prima facie* evidence in favor of the holder; and in every proceeding, except a direct one to try the title of such holder, it is conclusive; but in *quo warranto* the court will go behind the certificate or commission, and inquire into the validity of the election or appointment, and decide the legal rights of the parties upon full investigation of the facts.[1]

5 Ohio, 356, 358; State *v.* Bryce, 7 Ohio, 414; State *v.* Choate, 11 Ohio, 511; Warner *v.* Myers, 3 Oreg. 218; Commonwealth *v.* James, 214 Pa. 319; *In re* Murphy, 22 Pa. Co. Ct. R. 29; *In re* Opinion of the Justices (Vt.), 72 Atl. Rep. 754; State *v.* Raisler, 133 Wis. 672; Regina *v.* Leeds, 11 A. & E. 512; Regina *v.* Derby, 7 A. & E. 419; Regina *v.* Chester, 5 El. & Bl. 531; Asken *v.* Manning, 38 Up. Can. Q. B. 345. And see Biggar, *In re*, 34 U. C. Q. B. 144; Regina *v.* O'Hare, 24 P. R. 18; Regina *v.* Lindsay, 18 U. C. Q. B. 51; Regina *v.* St. Martin's, 17 Q. B. 149; Regina *v.* Hertford Col., L. R., 2 Q. B. Div. 590. In People *v.* New York, 3 Johns. Cas. (N. Y.) 79 (*mandamus* to admit aldermen), the *reason for the rule* is thus stated by the court: "Where the office is already filled by a person who has been admitted and sworn, and is in by color of right, a *mandamus* is never issued to admit another person, because the corporation, being a third party, may admit or not, at pleasure, and the rights of the party in office may be injured, without his having an opportunity to make defence. The proper remedy, in the first instance, is by information in the nature of a *quo warranto*, by which the rights of the parties may be tried." People *v.* New York, 3 Johns. Cas. 79, 80. *Quo warranto* lies to terminate right further to hold an office, notwithstanding the officer abandons the office. State *v.* Graham, 13 Kan. 136. See also People *v.* Sweeting, 2 Johns. 184; People *v.* Van Slyck, 4 Cow. (N. Y.) 297, 323; French *v.* Cowan, 79 Me. 426; Brennan *v.* Bradshaw, 53 Tex. 330, quoting the text; Stephens' *Nisi Prius*, 2445 *et seq.*, where the validity and invalidity of corporate elections are fully treated. It has been held that *quo warranto* will only lie when there is an *office de jure*. State *v.* Mackie, 82 Conn. 398; Hedrick *v.* People, 221 Ill. 374; People *v.* Miller, 144 Ill. App. 630. The relator claimed title to the office of deputy building inspector and sought to oust the incumbent. The city had statutory power to create the office of building inspector, but had no authority to create the office of deputy building inspector or to appoint thereto. It was held that *quo warranto* would not lie. State *v.* Mackie, 82 Conn. 398. Title to public office must be tried by *quo warranto;* it cannot be questioned on a *writ of prohibition*. State *v.* Shanks (S. Dak.), 125 N. W. Rep. 122. An *engineer of the city hall* is not an officer, but merely a servant or employee, and *quo warranto* will not lie to test his right to the employment. State *v.* Gray, 91 Mo. App. 438. A person *licensed to sell intoxicating liquors* is not an office holder and his right to sell liquors cannot be tested by *quo warranto*. State *v.* Gibbs, 82 Vt. 526; 74 Atl. Rep. 229. In *New Jersey*, by statute, the court is required in *quo warranto* proceedings to determine not only the title of the respondent to the office or franchise in question, but also the title of the relator to the same office or franchise. Hawkins *v.* Cook, 62 N. J. L. 84; Manahan *v.* Watts, 64 N. J. L. 465; Lane *v.* Otis, 68 N. J. L. 64. It is, however, essential that the question of the relator's title should be raised by proper pleadings. Magner *v.* Yore, 75 N. J. L. 198. When the title of the relator, who is the officer *de facto*, as well as the title of the respondent, is questioned by proper pleadings, and it appears that neither relator nor respondent is entitled to the office, judgment to that effect should be entered. Hawkins *v.* Cook, 62 N. J. L. 84; Bullock *v.* Biggs (N. J. L.), 73 Atl. Rep. 69. See also Anderson *v.* Myers, 77 N. J. L. 186; 71 Atl. Rep. 139.

[1] People *v.* Van Slyck, 4 Cow. (N. Y.) 297; People *v.* Vail, 20 Wend. (N. Y.) 12; People *v.* Richardson, 4 Cow. (N. Y.) 100, 101, note; *Ib.* 297; People *v.* Seaman, 5 Denio (N. Y.), 409; People *v.* Thatcher, 55 N. Y. 525; State *v.* Midgett, 151 N. Car. 1; 65 S. E. Rep.

§ 1555 (893). **Defendant's Pleas or Answer.** — In a proceeding by information in the nature of a *quo warranto the defendant must*

441; State *v.* Marston, 6 Kan. 524; Low *v.* Towns, 8 Ga. 360; Bonner *v.* State, 7 Ga. 473, 479; *ante*, § 379, and note; §§ 381, 382, 413, 1503. When the legislature validates the title of an officer to an office, his right cannot afterwards be questioned on *quo warranto*. People *v.* Flanagan, 66 N. Y. 237; People *v.* Bull, 46 N. Y. 57, distinguished.

In People *v.* Van Slyck, *supra*, which was an information in the nature of a *quo warranto* against one intruding into an office by reason of an unlawful decision of the board of canvassers, *Woodworth*, J., said: "It was contended on the argument that the decision of the board of canvassers was conclusive until reversed, *and could only be reviewed by certiorari*. [See *post*, chap. xxxi. *ante*, § 379.] This objection cannot prevail. They are required by the act to attend at the clerk's office, and calculate and ascertain the whole number of votes given at any election, and certify the same to be a true canvass. This is not a judicial act, but merely ministerial. They have no power to controvert the votes of the electors. If they deviate from the directions of the statute, and certify in favor of an officer not duly elected, he is liable to be ousted on an information in the nature of a *quo warranto* where the trial is had upon the right of the party holding the office. The court will decide upon an examination of all the facts." People *v.* Van Slyck, 4 Cow. (N. Y.) 297, 323.

Effect of choosing or electing a *disqualified* person; *ante*, § 373; Commonwealth *v.* Cluley, 56 Pa. St. 270; Stephens' *Nisi Prius*, 2454.

Acts of officers de facto are valid, unless directly questioned by proceedings against them. Burke *v.* Elliott, 4 Ired. L. 355; Burton *v.* Patten, 2 Jones L. (N. Car.) 124. Difference between *de facto* and *de jure* officers is well stated by *Ruffin*, C. J.; *Ib.* Stephens' *Nisi Prius*, 2448. See also ante, § 413, note, §§ 515, 516, 518; State *v.* Tolan, 33 N. J. L. 295; Cole *v.* Black River Falls, 57 Wis. 310; State *v.* Goowin, 69 Tex. 55 (an election of municipal officers regularly held, declared valid, though ordered by *de facto* officers exercising the powers of mayor and aldermen). A *de facto* officer may be compelled to perform an official duty by *mandamus*. He cannot plead in defence to the proceeding that he does not hold his office *de jure*. Kelly *v.* Wimberly, 61 Miss. 548. Hence, a *de facto* treasurer cannot refuse to pay an order drawn upon him on the ground that the act incorporating the borough is unconstitutional. *Mandamus* lies to him as a *de facto* officer to compel its payment to the same extent as if there was no question about the validity of the organization. Harvey *v.* Philbrick, 49 N. J. L. 374.

An officer *de facto* must be submitted to as such, until displaced by a regular direct proceeding for that purpose. Moore, *In re*, 62 Ala. 471; Duke *v.* Cahaba Nav. Co., 16 Ala. 372; Dillard *v.* Webb, 55 Ala. 468; Rex *v.* Miller, 6 T. R. 269; Rex *v.* Osbourne, 4 East, 326, 327; Buncombe *v.* McCarson, 1 D. & B. (N. Car.) 306; Robinson *v.* London Hosp., 21 Eng. L. & Eq. 371; Heath *v.* State, 36 Ala. 273. The acts of an officer, *de facto*, are valid only so far as the rights of the public and of third persons having an interest therein are involved. He can claim nothing for himself. His title cannot be inquired into collaterally, but may be in a suit in his own right as officer. People *v.* Weber, 86 Ill. 283.

For an exhaustive and valuable review of the English and American authorities upon the question, *What is essential to constitute an officer de facto?* see the learned opinion of *Butler*, C. J., delivering the judgment of the Supreme Court of *Connecticut*, in the State *v.* Carroll, with note of Judge *Redfield*, 38 Conn. 449. It was held in this case where judges were by the Constitution required to be elected by the General Assembly, and a judge of a city court was so elected, and where it was further provided by law that in case of his absence or sickness a justice of the peace should temporarily hold the city court, that the judgments of such justice were not void; that he was an officer *de facto* if not *de jure*, and that he was a *de facto* officer even if the law authorizing him to act was unconstitutional. The court distinctly decided that the acts of an officer appointed [to a *de jure* office] pursuant to an unconstitutional law, and before its unconstitutionality has been adjudged, are valid as respects

either disclaim or justify. If he disclaims, the State is at once entitled to judgment. If he justifies, he must set out his title specifically. It is not enough to allege generally that he was duly elected or appointed to the office. He must plead facts, showing on the face of the plea that he has a valid title to the office. The State is not bound to show anything. Therefore it is no answer to the information that the relator is not entitled to the office. The defendant is called upon to show by what warrant *he* exercises the functions of the office; he must exhibit good authority, or the State is entitled to a judgment of ouster.[1]

§ 1556. (894). **In Cases where the Municipal Corporation does not legally exist; Rex v. Saunders.** — In England it was held, in Rex *v.* Saunders (in which an information in the nature of a *quo warranto* was moved against the defendant, to show by what authority he claimed to be an alderman of Taunton), where the relator showed that the corporation was dissolved and extinct, and that no corporate body in fact existed, or claimed to exist, at the time of the application, that the information should be refused.[2] This case was

the public and third persons. The opinion of *Butler*, C. J., is declared by Mr. Justice *Field* in Norton *v.* Shelby County, 118 U. S. 425, 445, 448, to be "an elaborate and admirable statement of the law, on the validity of the acts of *de facto* officers, however illegal the mode of their appointment." But its doctrine is, and was meant to be, limited "to the unconstitutionality of acts appointing the officer," and it does not extend to unconstitutional "acts creating the office," since there can be no *de facto officer* unless there is a *de jure office*. See also State *v.* Douglass, 50 Mo. 593; approved, Ralls County *v.* Douglass, 105 U. S. 728. Official acts of a person disqualified to hold office for participation "in the rebellion" are not void. Lockhart *v.* Troy, 48 Ala. 579. Whether officers *de facto* can enforce payment of salary. Samis *v.* King, 40 Conn. 298; *ante*, chap. xi. § 429, note. Index — *De facto Officer; Office and Officer.*

[1] State *v.* Foster, 130 Ala. 154; West End *v.* State, 138 Ala. 295; Lyons & E. P. Toll Road Co. *v.* People, 29 Colo. 434; People *v.* Owers, 29 Colo. 535; People *v.* Stratton, 33 Colo. 464; State *v.* Chatfield, 71 Conn. 104; State *v.* Lashar, 71 Conn. 540; State *v.* Hatch, 82 Conn. 122; Clark *v.* People, 15 Ill. 213; Massey *v.* People, 201 Ill. 409; Gorman *v.* People, 78 Ill. App. 385; Latham *v.* People, 95 Ill. App. 528; Garms *v.* People, 108 Ill. App. 631; State *v.* Powles, 136 Mo. 376; State *v.* Grimm, 220 Mo. 483; State *v.* Davis, 64 Neb. 499; Davis *v.* Davis, 57 N. J. L. 203; State *v.* Beardsley, 13 Utah, 502; Cole on Crim. Inf. 210, 212; Wille. 486, 487, 488, where the requisites of pleas are stated; Angell & Ames on Corp. § 756; Stephens' *Nisi Prius*, 2431, 2464; 2 Kyd, 399. It is not sufficient for the defendant to aver that he is "duly elected." Commonwealth *v.* Gill, 3 Whart. (Pa.) 228; Crook *v.* People, 106 Ill. 237; Attorney-General *v.* Foote, 11 Wis. 14; State *v.* Gleason, 12 Fla. 190; People *v.* Thatcher, 55 N. Y. 525.

[2] Rex *v.* Saunders, 3 East, 119. In this case the relator, in 1802, stated that the defendant had been elected alderman in 1788, and that the corporation was dissolved in 1792, since which no acts had been attempted to be done by the corporate body, but that the defendant had made his appearance at Taunton at the last election for members of Parliament, and had there claimed, as alderman, to be returning officer, and had received votes as such, and had executed a separate return.

referred to in South Carolina, and the opinion expressed that *quo warranto* would not lie against one claiming office under a private corporation which has no legal existence.[1] In New York, however, under the legislation in that State, it is expressly decided that *the question whether a municipal or public corporation has been legally created or erected* may be tested in an action or proceeding in the nature of *quo warranto* brought against any one exercising an office in such corporation.[2]

Lord *Ellenborough*, C. J., delivering the judgment of the court, observed that "the corporation being stated to be actually dissolved, and no corporate body, claiming to be such, in existence, the act of this individual person was a mere nullity, and of no more effect than if a mere stranger had come into the town and claimed to be an alderman and returning officer. Here are no civil rights in controversy, which would warrant the court to interfere by their own authority; but what he claimed was a mere nullity. There was no such office in existence, and therefore no ground for our interference"; and the rule was refused.

[1] State *v.* Lehre, 7 Rich. L. 234, 324; *per Glover*, J., who said: "It was contended, in argument, that there was no corporation, and that the election [for bank directors and president] is therefore void. If no corporation exist it would be nugatory and fruitless to proceed any further in the *quo warranto*, and call in question a harmless and pretended claim, where no civil right is in controversy. If there was no such corporation, there was no such officer, and it would be, as was said by Lord *Ellenborough*, in Rex *v.* Saunders (3 East, 119), as if a stranger had come into town and claimed to be president or director."

[2] People *v.* Carpenter, 24 N. Y. 86. This action was in the nature of *quo warranto* in the name of the people, and was brought to test the right of the defendant to exercise the duties and powers of supervisor of the town of Afton, and the case turned upon the sole point whether that town had been legally created. It was contended in argument that *this form of action* was not the appropriate remedy to bring up that point for decision. Defendant's argument was, that if there was, as the plaintiffs allege, no such town as Afton, then it was impossible that defendant should exercise the duties of an office which had no existence. "But," says *Davies*, J., "we think the objection too technical. The object of the framers of the code, in the provisions in reference to these actions, manifestly was to provide a speedy and effective mode of determining the claims of persons to exercise the duties of any office within this State, and this necessarily involves the determination of the existence of the particular office." See also, where same view was taken, People *v.* Draper, 15 N. Y. 532, an action of like character, to test right of the defendants to the office of police commissioners under the Metropolitan Police District Act. And see note in People *v.* Richardson, 4 Cow. (N. Y.) 100 *et seq.*; State *v.* Carbindale Indep. Sch. Dist., 29 Iowa, 264; People *v.* Albertson, 55 N. Y. 50; People *v.* Clute, 52 N. Y. 576; State *v.* Uridil, 37 Neb. 371. The *New York* rule, stated in the text, is adopted and followed in *Minnesota*, where the provision of the statute in respect to *quo warranto* is taken from the *New York* code, and is considered by *Berry*, J., to enlarge the common-law scope of the proceeding. State *v.* Parker, 25 Minn. 215; see State *v.* Brown, 31 N. J. L. 355, 356; People *v.* Maynard, 15 Mich. 463; People *v.* Bennett, 29 Mich. 451. The legality of an incorporation under the General Village Act must, it seems, be tested, not in equity, but by *quo warranto*. People *v.* Clark, 70 N. Y. 518.

In *Massachusetts* it was held that where a new county had been created by an act of the legislature which contained a provision that it should not take effect until a future day mentioned, an appointment by the governor to an office for such county before the act took effect was void, and that an information in the nature of a *quo warranto* would lie to remove the appointee. Commonwealth *v.* Fowler, 10 Mass.

In Missouri it is admitted, in the opinion of the judge who delivered the judgment of the court, that in a proceeding in the nature of *quo warranto* against the trustees of a town, to oust them from exercising the powers of such trustees on *the ground that the town was not legally incorporated*, the question of the existence or non-existence of the supposed town corporation may be put in issue; and it is furthermore admitted that, if in such case there is no corporation either *de facto* or *de jure*, the relator would be entitled to judgment; but it was held that where the town corporation is actually in existence under the order of a court, regular on its face, establishing it, the question whether such order was procured by fraud, or was void because the petition for the incorporation was not signed by the requisite number of taxable inhabitants, cannot be inquired into and determined in a proceeding against the trustees, but only, it is to be inferred, in a direct proceeding against the corporation itself.[1]

290; s. c. 11 Mass. 339. In People *v.* Maynard, 15 Mich. 463, which was a *quo warranto* against a person acting as county treasurer, the result depended upon the constitutionality of a statute creating a new county, and the statute was held to be unconstitutional. *Quo warranto* is the proper remedy to test the validity of the incorporation of a municipality; People *v.* Stratton, 33 Colo. 464, citing text; People *v.* Spring Valley, 129 Ill. 169; People *v.* Anderson, 239 Ill. 266; State *v.* Alexander, 129 Iowa, 538; or the validity of proceedings for the annexation of territory to a city or other municipality. State *v.* Birmingham, 160 Ala. 196; Ogle *v.* Belleville, 143 Ill. App. 514; aff'd 238 Ill. 389. See also Osborn *v.* People, 103 Ill. 224; Evans *v.* Lewis, 121 Ill. 478.

[1] State *v.* Weatherly, 45 Mo. 17. It may be suggested in reference to the opinion in this case that, notwithstanding what is said on this subject in the opinion, the logical effect of the decision seems to be that the question whether a corporation has been legally created or not cannot be tried in proceedings against persons assuming to act as officers in such a corporation. See, however, State *v.* McReynolds, 61 Mo. 203; State *v.* Coffee, 59 Mo. 59.

In *Missouri*, the validity of the incorporation of a town may be attacked in a proceeding in the nature of *quo warranto*, brought by the State by its Attorney-General, or by the prosecuting attorney of the county. State *v.* Bellflower, 129 Mo. App. 138; citing State *v.* Fleming, 158 Mo. 558; State *v.* Birch, 186 Mo. 205; First Nat. Bank *v.* Rockefeller, 195 Mo. 15. The validity of the incorporation of a drainage district can only be determined in *quo warranto*. State *v.* Wilson, 216 Mo. 215. In *quo warranto* to determine the validity of the incorporation of a municipality the usurping officers exercising municipal powers are the proper parties defendant. State *v.* Coffee, 59 Mo. 59; State *v.* McReynolds, 61 Mo. 203; State *v.* Fleming, 147 Mo. 1; State *v.* Fleming, 158 Mo. 558; State *v.* McClain, 187 Mo. 409; State *v.* Louisiana, B. G. & A. Gravel Road Co., 116 Mo. App. 175; State *v.* Small, 131 Mo. App. 470. See also State *v.* Huff, 105 Mo. App. 354.

The London Law Times, vol. liv. p. 228, referring to § 1556 of the text, somewhat inaccurately remarks: "A curious example of the different views which have been taken in the two countries is afforded by *quo warranto* informations in cases where no corporation exists. It has been held in England in Rex *v.* Saunders, 3 East, 119, and more recently in Lloyd *v.* Queen, 6 L. T. Rep. N. S. 610, that an information may go where there is no corporation in existence. Rex *v.* Saunders was referred to in a case in *South Carolina*, and the opinion was expressed that *quo warranto* would not lie against one claiming office under a private

§ 1557 (895). **Usurpation of Franchises; Distinction.** — It is held in England that if the information be for usurping a franchise by a corporation, it should be *against the corporation;* but if for usurping the franchise to be a corporation, it should be *against the particular persons* guilty of the usurpation.[1] In the United States the courts have generally, although not uniformly, adopted the same rule.[2] In Ohio, under the statutes of the State, the proceeding to question the franchise of being a private corporation must be against the individuals who usurp the franchise; and information in the nature of *quo warranto* will not lie against a *de facto* corporation, in its assumed corporate name, to compel it to show by what title it exercises the franchise to be a corporation. The court admitted, however, that in such cases municipal corporations might be an exception; but the point was not decided.[3]

orporation which has no legal existence. But in *New York* the English doctrine was accepted, it being expressly decided (People *v.* Carpenter, 24 N. Y. 5) that the question whether a municipal or public corporation has been legally created or erected may be tested by an action or proceeding in the nature of *quo warranto* brought against any one exercising an office in such corporation." Legal existence of a corporation must, in *Illinois*, be tested by *quo warranto*. Renwick *v.* Hall, 84 Ill. 162. In *Connecticut*, an information in the nature of a *quo warranto* will not lie to try the right to an office that is not a legally authorized public office. State *v.* North, 42 Conn. 1; see Norton *v.* Shelby County, 118 U. S. 425, 445–448, noticed *supra*. In *Pennsylvania*, it has been held that the validity of a charter granted a corporation cannot be inquired into in *quo warranto* proceedings to determine the right of the parties to the office of trustee thereof. Commonwealth *v.* Yetter, 190 Pa. St. 488.

[1] Rex *v.* Cusack, 2 Roll. R. 113, 115; People *v.* Richardson, 4 Cow. (N. Y.) 100, 109, note. See Mr. *Willcock's* observations, Willc. 500, pl. 488.

An information in the nature of *quo warranto* will not lie against an alleged township whose organization is invalid on the face of the record; it will lie, however, against the several town officers for usurping franchises. Scrafford *v.* Gladwin County, 41 Mich. 647.

[2] People *v.* Stratton, 33 Colo. 464; People *v.* Peoria, 166 Ill. 517, citing text; State *v.* Coffee, 59 Mo. 59; State *v.* McReynolds, 61 Mo. 203; State *v.* Fleming, 147 Mo. 1; State *v.* Fleming, 158 Mo. 558; State *v.* McClain, 187 Mo. 409; State *v.* Louisiana, B. G. & A. Gravel Road Co., 116 Mo. App. 175; State *v.* Small, 131 Mo. App. 470; State *v.* Lincoln Street R. Co., 80 Neb. 333. Where a village has been disincorporated by the vote of the people, pursuant to statute, an elector whose property is being assessed for village purposes may maintain *quo warranto* against the persons assuming to act as trustees of the village after disincorporation. State *v.* Greer, 86 Neb. 88; 124 N. W. Rep. 905. In *Kansas*, *quo warranto* by the State, to test the validity of a corporate organization, will lie either against the persons who undertake to officially exercise its powers and franchises, or against the organization itself by the name it assumes. Gardner *v.* State, 77 Kan. 742; citing State *v.* Ford County, 12 Kan. 441; and State *v.* Inner Belt R. Co., 74 Kan. 413.

[3] State *v.* Cincinnati Gas & C. Co., 18 Ohio St. 262; Commonwealth *v.* Central Pass. R., 52 Pa. St. 506. *Scott*, J., in the first case says this question was left open in London's Case, 8 How. St. T. 1340, and it seems to have been decided otherwise in Rex *v.* Chester, cited 2 T. R. 565, but that in this country the weight of authority is otherwise. People *v.* Saratoga & R. R. R. Co., 15 Wend. (N. Y.) 114; People *v.* Richardson, 4 Cow. (N. Y.) 100, 109, note; Angell & Ames, § 756. And he

§ 1558 (896). **No Forfeiture of Municipal Charter or Franchises.** — In no instance known to the author have the courts of this country declared *forfeited the charter or franchises* of a municipal corporation for the acts or misconduct of its agents or officers. That this was done by the English courts prior to the revolution of 1688 is well known. The case of the city of London is the most conspicuous historical example. It is believed by the author that such a remedy is not applicable to our corporations, created, as they are, by statute, for the benefit not of the officers or a few persons, but of the whole body of the inhabitants residing therein, and the public. If the officers usurp rights which belong to the State, the law, by *quo warranto*, by injunction, by action, by declaring their acts void, and in other ways, can correct the usurpation, and should do it, without forfeiting the rights and franchises of the citizens, who are blameless.[1]

§ 1559 (897). **Against Municipal Corporations for Excess of Power.** — We have elsewhere treated of the mode in which illegal or unauthorized corporate acts may be prevented, and the remedies afforded by the law in respect thereto;[2] but it may be here observed that an information in the nature of a *quo warranto* has in some cases been *resorted to as a remedy for the illegal usurpation*, by a municipal corporation, *of the powers not granted* to it by its charter or the law.[3] Thus, in South Carolina it has been adjudged that the right of a municipal corporation to exercise public powers — as, for example, its right under its charter to tax certain descriptions of property — may be determined on an information in the nature of a *quo warranto*,

admits that municipal corporations may be an exception, because the inhabitants of the place may be so numerous that it would be impossible to proceed against them individually.

Judgment in *quo warranto* against a municipal corporation and officers therein acting under a charter which had not legally been accepted by reason of fraudulent voting. State *v.* Bradford, 32 Vt. 50. Acceptance of charter. *Ante*, § 69.

[1] See, on this subject, Commonwealth *v.* Pittsburgh, 14 Pa. St. 177; State *v.* Mansfield, 99 Mo. App. 146; *ante*, chap. ix., on the Dissolution of Municipal Corporations, §§ 330–333; City of London's Case, *ante*, chap. i. § 10. A municipal corporation cannot, in any collateral proceeding, be declared or held to have forfeited its charter for non-user or other cause; it retains its corporate character until it is repealed or the forfeiture declared by direct judicial proceeding. Harris *v.* Nesbit, 24 Ala. 398 (ferry controversy). Under the code of *Alabama*, an information in the nature of a *quo warranto* will not lie to vacate the charter of a municipal corporation on account of the passage of unauthorized ordinances by the council. State *v.* Cahaba, 30 Ala. 66. Performance of omitted duty cannot be enforced by *quo warranto*, as judgment of forfeiture would be inapplicable. Attorney-General *v.* Salem, 103 Mass. 138. Explained, Attorney-General *v.* Boston, 123 Mass. 460.

[2] *Post*, chaps. xxxi, xxxii.

[3] People *v.* Peoria, 166 Ill. 517.

iled by the Attorney-General against the corporation.[1] Such use of the remedy is very rare. But in Massachusetts it is held that an nformation in the nature of a *quo warranto* will not lie against a nunicipal corporation to *enforce the performance of a corporate duty* eglected by the corporation. The court distinguish between such eglect and the usurpation of a franchise not granted, and remark hat they "do not feel called upon to consider whether under our olitical system this remedy can, under any circumstances, be mainined against a municipal corporation."[2]

§ 1560 (898). **Same Subject; Must be instituted by Attorney-Genal.** — The right to be a municipal corporation is a franchise which e State may withhold or grant at its pleasure. The right to file an formation in the nature of a *quo warranto*, or to institute a civil tion or proceeding to arrest a usurpation of such a franchise, does t belong to the individual citizen; the right to institute such proedings against an existing *de facto* municipal corporation is in the

[1] State *v.* Charleston, 1 Mill Const. (S. Car.) 36; Buller's *Nisi Prius*, . See in *Iowa*, State *v.* Lyons, 31 ra, 432, where the nature of the rem- was discussed, and it was held that ceedings in *quo warranto* will not be ertained for the purpose of *annul- a city ordinance* passed in the irreg- r and improper exercise of a power ferred by law. In *Illinois* it has been d that the constitutionality of an extending the corporate boundaries not be tried in *quo warranto*, ques- ning the right of the city officers act within the extended boundary. ple *v.* Whitcomb, 55 Ill. 172. An *inance* cannot be declared void nor the corporation's power to pass it tested in a *quo warranto* proceeding. te *v.* Nebraska Telephone Co., 127 ra, 194; State *v.* Newark, 57 Ohio 430.

Quo warranto will not lie against a poration for taking land without king compensation as required by ; trespass is the remedy. People *v.* lsdale & C. T. Co., 2 Johns. (N. Y.) . This remedy is not appropriate to the legal right of a gas company ler municipal sanction to lay down pipes in a public street. People *v.* tual Gasl. Co., 38 Mich. 154. As to edy, see chapter on *Mandamus*, .

Simple error of judgment on the part of officers of municipal corporations as to the extent of their powers will not authorize the court, on *quo warranto*, to declare a forfeiture of their offices. State *v.* Cahaba, 30 Ala. 66.

[2] Attorney-General *v.* Salem, 103 Mass. 138, *per Morton*, J. This case is commented on and explained and in some respects limited by the more recent case of the Attorney-General *v.* Boston, 123 Mass. 460, referred to *infra*, § 1585.

Quo warranto will lie to oust a city from the unauthorized exercise of the power of *indirectly levying and collecting license taxes* on liquor dealers within the city, and also licensing the keeping of gambling houses. State *v.* Coffeyville, 78 Kan. 599. It lies against a municipality which exercises without right the franchise or privilege of *operating a dispensary for the sale of liquors*. Uniontown *v.* State, 145 Ala. 471. In *Illinois*, the validity of a *dram-shop license* is properly challenged by *quo warranto* proceedings. People *v.* Heidelberg Garden Co., 233 Ill. 290, aff'g 124 Ill. App. 331. But in *Vermont* it is held that a *license to sell liquor* is not a franchise, and its validity cannot be tested by *quo warranto*. State *v.* Gibbs, 82 Vt. 526; 74 Atl. Rep. 229.

State, and the institution of the action is a matter in the discretion of the Attorney-General.[1]

§ 1561 (899). **Discretion to grant; How exercised.** — Leave to grant an information in the nature of a *quo warranto* is within the sound discretion of the court or judge. Leave is not granted as a mere matter of right; on the other hand, the court cannot arbitrarily refuse it. It must exercise a sound discretion, in accordance with the principles of law.[2]

[1] People *v.* Colorado E. R. Co., 8 Colo. App. 301; Robinson *v.* Jones, 14 Fla. 254; State *v.* Bryan, 50 Fla. 293; Porter *v.* People, 182 Ill. 516; State *v.* Shufford, 77 Kan. 263; Clark *v.* Interstate Independent Telephone Co., 72 Neb. 883; Meehan *v.* Bachelder, 73 N. H. 113; People *v.* McClellan, 107 N. Y. App. Div. 272; People *v.* Hinsdale, 43 N. Y. Misc. 182; State *v.* McLean County, 11 N. Dak. 356; Ney *v.* Whiteley, 26 R. I. 464.

In *California*, the statutory action for usurpation — in the nature of *quo warranto* — may be maintained against the defendant in its assumed corporate name without joining the trustees. People *v.* Riverside, 66 Cal. 288. In *Arizona*, the district attorney is, by statute, required to bring *quo warranto* against the usurper of any franchise upon the verified complaint of any person, and his refusal to institute *quo warranto* proceedings is a violation of his duty when the uncontradicted facts show the usurpation of the franchise. Under such circumstances, he may be compelled to perform his duty by *mandamus*. Duffield *v.* Ashurst (Ariz.), 100 Pac. Rep. 820.

[2] People *v.* Waite, 70 Ill. 25; People *v.* Callaghan, 83 Ill. 128; People *v.* North Chicago R. Co., 88 Ill. 537; People *v.* Anderson, 239 Ill. 266; People *v.* Hepler, 240 Ill. 196; Martens *v.* People, 85 Ill. App. 66; People *v.* Arcola Drainage Com'rs, 123 Ill. App. 604; State *v.* Brown (Iowa), 123 N. W. Rep. 779; State *v.* Bowden, 80 Kan. 49; Boucha *v.* Alger Circuit Judge, 159 Mich. 610; Attorney-General *v.* Erie & K. R. Co., 55 Mich. 15; State *v.* Dahl, 69 Minn. 108; State *v.* School Dist. No. 108, 85 Minn. 230; State *v.* McDonald, 101 Minn. 349; State *v.* McClain, 187 Mo. 409; State *v.* Mansfield, 99 Mo. App. 146; Tillyer *v.* Mindermann, 70 N. J. L. 512; Clark *v.* Searing, 70 N. J. L. 517; State *v.* Nohle, 16 N. Dak. 168; Ohio Turnpike Co. *v.* Waechter, 25 Ohio Cir. Ct. R. 605; Commonwealth *v.* McCarter, 98 Pa. 607. See People *v.* People's Gas & Coke Co., 205 Ill. 482. This subject is thoroughly discussed and the authorities cited in State *v.* Kent, 96 Minn. 255. In *Washington*, in certain cases the information is not addressed to the discretion of the court. Mills *v.* State, 2 Wash. St. 566.

Opposing affidavits may be taken into consideration in determining whether the writ should be issued. Where a corporation, by the exercise of powers not conferred by its charter, does no private injury, but commits an offence against the public alone, the State may proceed or waive the right to do so, as may be deemed by the proper public officials most beneficial to the public interest. If a wrong is done by the abuse of a franchise, it is a public wrong, and a proceeding by *quo warranto* must be by the public prosecutor or other authorized officer of the State, who may act either on his own motion or at the instance of a private relator, but he must act in his official capacity, under a sense of official duty, and not merely lend his name for the use of a private party. The proceeding must be official in fact, and not in form only. The law has wisely placed the control of all matters that concern the public alone in the hands of its officers chosen for that purpose; and public proceedings ought not to be used for the promotion of private ends. The court in the exercise of its discretion should take into consideration the circumstances showing the character of the proceeding; and if satisfied that the purpose is merely to allow a private party to institute proceedings in a matter concerning the public alone, its duty is to refuse to allow the information

§ 1562 (900). **Same Subject.** Accordingly, in proceedings in the nature of *quo warranto*, even the rule to show cause will not be granted in all cases, though the incumbent be ineligible and the relator have sufficient interest to prosecute; the court will look at the relator's motive and the public good in the exercise of the discretion confided to it.[1] On this ground, a rule was refused against

to be filed. People *v.* North Chicago Ry. Co., 88 Ill. 537, *per Scholfield*, J.; Dorsey *v.* Ansley, 72 Ga. 460; see *supra*, § 1552, note; *infra*, §§ 1562, note, 1563.

[1] People *v.* Campbell, 138 Cal. 11; People *v.* Waite, 70 Ill. 25, applying the doctrine of the text; People *v.* Mineral Marsh Drainage Dist., 193 Ill. 428; State *v.* Moriarity, 82 Minn. 68; Miller *v.* Seymour, 67 N. J. L. 482; State *v.* Taylor, 5 Ohio St. 120; Commonwealth *v.* Jones, 12 Pa. St. 365; Commonwealth *v.* Cluley, 56 Pa. St. 270; Deaver *v.* State, 27 Tex. Civ. App. 453; Watkins *v.* Venable, 99 Va. 440; Rex *v.* Parry, 6 Ad. & El. 810, 2 N. & P. 414; Rex *v.* Brown, 3 T. R. 574, note; Rex *v.* Sargent, 5 T. R. 466; Rex *v.* Wardroper, 4 Burr. 1964; Rex *v.* Dawes, 4 Burr. 2022.

Who may be a relator, and what will constitute a sufficient interest to give a private relator the writ in the case of public right, or to test the right to a public or municipal office. Commonwealth *v.* Cluley, 56 Pa. St. 270, and cases cited. As to right of *defeated candidate* to bring *quo warranto* against the successful candidate. Commonwealth *v.* Jones, 12 Pa. St. 365; Commonwealth *v.* Meeser, 44 Pa. St. 341; s. c. Brightly's Election Cases, 659, and note, and cases cited. The chief burgess of a borough has the right to take proceedings in the nature of a *quo warranto* to oust a councilman for being interested in a contract for furnishing materials to said borough. He has a sufficient interest to make him a competent relator. Commonwealth *v.* Shepp, 10 Phila. (Pa.) 518. See also as to interest of relator, Brightly's Election Cases, 146, 289, 664; Eaton *v.* State, 7 Blackf. 65; State *v.* Schnierle, 5 Rich. L. 299. A citizen who claims a seat in the select council of Philadelphia, in place of one who has removed from the ward, has sufficient interest to entitle him to a writ of *quo warranto* to determine the question of forfeiture. Commonwealth *v.* Bumm, 10 Phila. (Pa.) 162. Private citizens, having no special interest to be affected, have not the right to ask for a *quo warranto* to oust a member of council. Commonwealth *v.* Horne, 10 Phila. (Pa.) 164. *A voter in a city* was held to have a sufficient interest in the due election of members of the city council to become the relator in *quo warranto* against persons exercising the duties of councilmen. State *v.* Tolan, 33 N. J. L. 195; *post*, §§ 1575 *et seq.*

Property owner and taxpayer in village can bring the action. State *v.* Leischer, 117 Wis. 475. Any *citizen* of a town may bring *quo warranto* proceedings to test the right to municipal office. Whitehurst *v.* Jones, 117 Ga. 603. Any citizen of a municipality has sufficient interest to be a relator in a *quo warranto* proceeding against an officer. State *v.* Kohnke, 109 La. 838. *The owner of agricultural lands* illegally included within the boundaries of a city or village, who is not a voter therein, may maintain proceedings by *quo warranto* to determine the validity of the incorporation. State *v.* Dimond, 44 Neb. 154. In *Kentucky*, a citizen or taxpayer, who claims no title to any of the offices, cannot maintain a suit to oust members of the city council upon the ground that they have failed to take the required oaths. King *v.* Kahne, 27 Ky. Law Rep. 1080, 87 S. W. Rep. 807.

See also as to relator. Supra, 1552; Rex *v.* Hodge, 2 B. & Ald. 344, note; Rex *v.* Parry, 6 A. & E. 810; Queen *v.* Quayle, 11 A. & E. 508; Rex *v.* Ogden, 10 B. & C. 210; Rex *v.* Marten, 4 Burr. 2120; Rex *v.* Trevenen, 2 B. & Ald. 479, 482; Rex *v.* Slythe, 6 B. & C. 242; Regina *v.* Anderson, 2 Q. B. 740; Regina *v.* Greene, 2 Q. B. 460. See rule of Queen's Bench of November 8, 1839; 11 A. & E. 2; Rawlinson on Corp. (5th ed.) 359, 360; Willc. 476; Stephens' *Nisi Prius*, 2433; *ante*, § 507, note, as to right of freeman in borough to call a meeting and mode of enforcing the right. A civil action in *quo warranto* in the plaintiff's private right must be brought in the county in which

the defendant, the acting mayor, where it appeared there was no adverse claimant to the office.[1] So the court refused to allow an information in the nature of a *quo warranto* where the election day was suffered to lapse, and the election was held in good faith on the wrong day.[2]

§ 1563 (901). **Same Subject; Rules to guide Judicial Discretion.** — Accordingly, where it appeared that an election for municipal officers was held on the wrong day, but the mistake was not discovered by any one, either officers, candidates, or voters; and there was no fraud, and the election was participated in by a large majority of the voters, — *the court refused to allow an information against an alderman* chosen at such election, the refusal being strengthened by the consideration that the proceeding, if successful, would leave the council without a quorum for nearly a year. The rules which usually guide the discretion of the court in such cases are thus stated: (1) The relator must not be a mere stranger or intermeddler; (2) He must not have concurred in the act of which he now complains; (3) Unless there is fraud or intentional violation of law, it must appear that public or private interests will not be seriously affected by the ouster of the incumbent.[3]

§ 1564 (902). **Where there can be no Trial during Officer's Term.** — In England there is a discretion in the court to grant an information in the nature of a *quo warranto* although the case cannot be tried until *the term of the officer is at an end*, satisfactory reasons for the delay being given; and it has even been granted though the office be determined at the time the application for the information is made.[4] In this country the authorities are conflicting. In some

the defendant resides or is summoned. State *v.* Thompson, 34 Ohio St. 360, 365.

[1] State *v.* Schnierle, 5 Rich. L. (S. Car.) 299. Where the town claims an organization and existence under it, *quo warranto* will lie against an individual for usurping the office of mayor; and in that proceeding the question of the corporate existence of the town can be tried and passed upon. State *v.* McReynolds, 61 Mo. 203. *Ante*, § 1556.

[2] State *v.* Tolan, 33 N. J. L. 195. The requirement to give *notice of the regular annual election*, of which the time is fixed by charter, is directory. People *v.* Hartwell, 12 Mich. 508; People *v.* Witherell, 14 Mich. 48; *ante*, §§ 374, 409, 413, 1496; Stephens' *Nisi Prius*, 2446, 2447. So where the election was held at the wrong place when the rule was applied for by a defeated candidate. People *v.* Waite, 70 Ill. 25; High Extraor. Rem. § 646. Where the Attorney-General is the relator, a *quo warranto* may issue without a rule to show cause. As the law officer of the Commonwealth, he is presumed to be impartial. Commonwealth *v.* Bank of America, 10 Phila. (Pa.) 156.

[3] State *v.* Tolan, 33 N. J. L. 195, 198, *per Depue*, J.; State *v.* Mansfield, 99 Mo. App. 141, citing text; People *v.* Hanker, 197 Ill. 409; State *v.* Hoff, 88 Tex 297 Pomeroy *v.* Kelton, 78 Vt. 250

[4] Rex *v.* Williams, 1 W. Black. 93,

of the States it has been held that an information will not be granted when it is not possible to enter a judgment before the term of the officer proceeded against expires. In other cases it has been adjudged, and we think correctly, that *quo warranto* may be properly brought during the official term of the officer, and if so brought, that it may be tried, and the proper judgment entered afterwards.[1] In North Carolina the doctrine of the English courts above mentioned has been followed, and it has not been considered absolutely necessary that the information should be applied for while the defendant is continuing to hold the office. The cases on this subject are referred to in the note.[2]

§ 1565 (903). **User by Defendant necessary.** — Under the statute of 9 Anne, chap. xx. sec. 4, re-enacted in many of the States literally or in substance, it is settled, that there must be some *act* of

95; Rex *v.* New Radnor, 2 Ld. Kenyon's N. 498; Rex *v.* Harris, 6 Ad. & El. 475 (33 Eng. C. L. 117); Rex *v.* Powell, Sayer, 239; Rex *v.* Warlow, 2 M. & S. 76; Rex *v.* Payne, 2 Chitty, 366, 367; Angell & Ames, § 744. Present state of legislation and adjudications in England on the effect of delay in commencing proceedings. Rawlinson on Corp. (5th ed.) 357; Stephens' *Nisi Prius*, 2432. In Regina *v.* Blizard, L. R. 2 Q. B. 634, it is held that although the officer had disclaimed, the relator was entitled to judgment of ouster.

[1] Commonwealth *v.* Swasey, 133 Mass. 538; Dean *v.* State, 56 Neb. 301; Albright *v.* Territory, 13 N. Mex. 64.

[2] "The resignation of the incumbent, or even the termination of his office, will not prevent the information being prosecuted to a final judgment, if the proceedings were commenced prior to the resignation or the expiration of the term." *Per Wagner*, C. J. Hunter *v.* Chandler, 45 Mo. 452; s. p. Commonwealth *v.* Smith, 45 Pa. St. 59; People *v.* Hartwell, 12 Mich. 508. But in *Georgia* it is held that the title to an office will not be tried on *quo warranto*, when at the time of trial the term of office is expired and no judgment of *ouster* can be rendered. Morris *v.* Underwood, 19 Ga. 559. In *Massachusetts* an information was refused, for reasons partly peculiar, where the office was annual, and there could be no determination during the year. Commonwealth *v.* Athearn, 3 Mass. 285; Howard *v.* Gage, 6 Mass. 462. See also People *v.* Sweeting, 2 Johns. (N. Y.) 184; State *v.* Jacobs, 17 Ohio, 143. Compare People *v.* Loomis, 8 Wend. (N. Y.) 396. It has been held in *Iowa*, that a judgment of ouster will not be entered against an officer after his term has expired where no rights of third parties are involved. State *v.* Powell, 101 Iowa, 382. In *Kansas*, where plaintiff's term had expired before the hearing of his proceeding to determine title to office, the case was dismissed. Hurd *v.* Beck (Kan.), 45 Pac. Rep. 92. *Georgia*, similarly, Holmes *v.* Sikes, 113 Ga. 580.

Following the decisions in England, it has been held that an information in the nature of a *quo warranto* may, in certain cases, be filed against public officers after the expiration of their office, or against special commissioners after they have acted. Burton *v.* Patton, 2 Jones (N. Car.) Law, 124. In King *v.* Williams, 1 W. Black. 93, there was a judgment of ouster, although the usurpation (for unlawfully holding a court in the corporation of Denbigh) was not continued to the trial, Lord *Mansfield* observing, "Judgment of ouster must be given, lest the defendant repeat the act." *Ib.* 95.

Effect of acquiescence and lapse of time on the remedy by quo warranto. People *v.* Oakland Co. Bank, 1 Doug. (Mich.) 282, 285; People *v.* Bank of Pontiac, 12 Mich. 527; State *v.* Pawtuxet Turnp. Co., 8 R. I. 521; State *v.* Cincinnati Gas & C. Co., 18 Ohio St. 262; Angell & Ames, Corp. § 743.

usurpation — a *user* or *possession* of the office of franchise — to authorize an information in the nature of a *quo warranto*. It is not sufficient to allege *merely* that the defendant *claims* to use or exercise the office or franchise.[1]

§ 1566 (904). **Effect of Judgment.** — The judgment of ouster on *quo warranto*, until reversed, conclusively and finally determines the right as to all persons whomsoever; and it may be given in evidence by the parties and others, without being pleaded, on an issue involving the rights upon which it has passed.[2]

§ 1567 (905). **Practice.** — It does not belong to the present work to treat of the practice in proceedings in informations in the nature of a *quo warranto*. This is regulated to a considerable extent by the statutes of the different States, which modify and render more simple, speedy, and effectual the common-law modes of procedure. But the nature of the remedy, and the principles which govern it, remain substantially as at common law, as amended by remedial Acts of Parliament; and the practice, as near as practicable, is the same as in the King's Bench, except when altered by the legislation of the particular State.[3] It must suffice to refer the reader to some of the sources of information on this subject.[4]

[1] Rex *v.* Ponsonby, 1 Vesey, 1, leading case, where defendants were charged with usurping a municipal office, cited and approved and followed by Supreme Court of *New York*, in People *v.* Thompson, 16 Wend. (N. Y.) 655. See also Roberson *v.* Bayonne, 58 N. J. L. 325; Attorney-General *v.* Superior & St. C. R. Co., 93 Wis. 604; Rex *v.* Whitwell, 5 T. R. 86; Buller's *Nisi Prius*, 211; Willc. on Mun. Corp. 462, pl. 254 *et seq.*; Angell & Ames Corp. § 744; Stephens' *Nisi Prius*, 2457. The statute of Anne commences, "If any person or persons shall usurp, or intrude into, or unlawfully hold and execute, the offices of," &c.

[2] Utica Ins. Co. *v.* Scott, 8 Cow. (N. Y.) 708, 709, 721, *per Colden*, Senator, and authorities there digested. In *Missouri*, see Hunter *v.* Chandler, 45 Mo. 452. A former judgment on an individual relation in *quo warranto* by the district attorney was held to be no bar to a public proceeding by the Attorney-General. State *v.* Cincinnati Gas & C. Co., 18 Ohio St. 262. And a decree of a Federal court enjoining a party from obeying an ordinance does not affect the right of the State, not a party to that proceeding, to proceed by *quo warranto* to test the validity of the ordinance. *Ib.* A judgment of ouster in a proceeding on *quo warranto* is not evidence against one who in no way holds under the defeated party. People *v.* Murray, 73 N. Y. 535; Dodge *v.* People, 113 Ill. 491. See also Herman on Estoppel, Index thereto, title *Quo Warranto*. Enforcement of judgment in *quo warranto* by punishment for contempt. See State *v.* Cahill, 131 Iowa, 286.

[3] Commonwealth *v.* Jones, 12 Pa. St. 365, where the practice under the act of 1836 is stated. Former practice no longer obtains under code of *New York*. People *v.* Conover, 6 Abb. Pr. R. 220.

In *New Jersey*, although a town may be joined as a party defendant in *quo warranto* to determine the right to the office of mayor, because of the unconstitutionality of the statute under which the incumbent was elected, the town is not a necessary party. State *v.* Riordan, 75 N. J. L. 16.

[4] Willc. 453 *et seq.*; Angell & Ames,

.; 3 Black. Com. 262; Buller's *us*, 210; Stephen's *Nisi Prius*, *q.*, 2460. *Rule to show cause.* wealth *v.* Jones, 12 Pa. St. ıen dispensed with. State *v.* all, 24 N. J. L. 529.

upon filing information. 1; Commonwealth *v.* Smead, 74; State *v.* Gummersall, 24 529. *Forms of information; replication in proceedings in nto.* People *v.* Bank of Niag- ɔw. (N. Y.) 196, approving used in the celebrated case ıe city of London (3 Hargr. 15), and in Rex *v.* Amery (2 '. R. 515). For further forms, d and valuable note to the Richardson, 4 Cow. (N. Y.) *et seq.*, and authorities there ɔple *v.* Van Slyck, 4 Cow. 97. See also Eaton *v.* State, (Ind.) 65; Lavalle *v.* People, 2. In a proceeding by *quo* an information based on the that a certain law, in point ill apply to but a single city, efore "local" and unconstitu- ıst set forth the facts in a e form, showing this to be State *v.* Parsons, 40 N. J. L. ıformation in the nature of *nto* is a civil suit in such a t it may, if other requisites emoved from the State to the ɔurts under the act of March ımes *v.* Kansas, 111 U. S. 449; Kansas, 112 U. S. 201.

Form of verdict. Thompson *v.* People, 23 Wend. (N. Y.) 537, reversing s. c. 21 Wend. 235.

Form of judgment of ouster. 2 Kyd on Corp. 407; Utica Ins. Co. *v.* Scott, 8 Cow. (N. Y.) 708; Commonwealth *v.* Fowler, 10 Mass. 290; s. c. 11 *Ib.* 339, where the form of judgment is given. See also as to form of judgment, Miner's Bank of Dubuque *v.* United States, 5 How. (U. S.) 213. If relators are successful, they are entitled to *costs*, and hence are entitled to a judgment of *ouster*, although the term of office in question has expired. People *v.* Loomis, 8 Wend. (N. Y.) 396; People *v.* Clute, 52 N. Y. 576. *Contra*, State *v.* Jacobs, 17 Ohio, 143. Angell & Ames Corp. § 745; *supra*, § 1564. In *quo warranto* to try title to office, if the defendant is adjudged to have unlawfully intruded himself into the office, costs must be awarded to the relator, even if he fails to establish his own right to the office, the terms of the statute being express. State *v.* Jenkins, 46 Wis. 616. Judgment, under statute, of *ouster* against the defendant without passing upon the plaintiff's right. Gano *v.* State, 10 Ohio St. 237.

The refusal of the court to allow a claimant to a public office to file an information is a *final judgment*, reviewable on error, and this, notwithstanding the court has a discretion in granting or refusing leave. State *v.* Burnett, 2 Ala. 140; Ethridge *v.* Hill, 7 Port. (Ala.) 47.

CHAPTER XXXI

REMEDIES TO PREVENT, CORRECT, AND REDRESS UNAUTHORIZED OR ILLEGAL CORPORATE ACTS

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THIS subject will be considered in the following order: —

1. Of the Remedy in *Equity* — secs. 1570–1590.
2. Of the Remedy by *Certiorari* — secs. 1591–1595.
3. Of the Remedy by *Prohibition* — sec. 1596.
4. Of the Remedy by *Indictment* — secs. 1597–1601.

The remedy by *mandamus* and by *quo warranto* has already been considered. The remedy by *private or civil action* is treated in the next chapter.

§ 1570 (906). **Remedy in Equity; Equity Jurisdiction exceptional.** — Courts of equity will sometimes interfere to prevent the

municipal authorities from transcending, or from making a wrongful use of, their powers, and will in proper cases relieve against their unauthorized or wrongful acts; but on a principle well known n our jurisprudence, there must, in the absence of remedial egislation, be *some distinct ground or head of equity* to justify a esort to this jurisdiction, such as the want of an adequate remedy t law,[1] multiplicity of suits, irreparable injury, fraud, breach of ust, or the like.[2]

§ 1571 (907). **Usual Remedy is at Law, not in Equity.** — Usually e question whether municipal and public corporations are acting, have acted, within the limits of the authority which the law nfers upon them, involves an examination of purely legal prinples, as contradistinguished from the peculiar principles of equity risdiction. Therefore, the Court of Chancery has no general risdiction to restrain, review, or set aside, even if irregular or egal, the proceedings of such a corporation. Such jurisdiction longs, except in special cases which will be mentioned and ich generally relate to the rights of property or other prite rights of the citizen, *to the supervisory power and control of the nmon-law courts.*[3]

[1] Stubenrauch *v.* Neyenesch, 54 va, 567; Orange City *v.* Thayer, Fla. 502; Hill *v.* Anderson, 122 Ky. See Taylor *v.* Crawfordsville, 155 l. 403. If *mandamus* will lie to npel payment of municipal indebtedes or a levy of taxes for that purpose, re is an adequate remedy at law, l injunction will not be awarded. usneister *v.* Porter, 21 Fed. Rep. ; *ante*, §§ 1482, 1485, 1506, 1507, l chapters on Municipal Bonds and o *Warranto*.

[2] *Infra*, §§ 1571, 1572, 1601; *Re* wyer, 124 U. S. 200, referred to in apter on *Quo Warranto;* Rico *v.* Sni-r, 134 Fed. Rep. 953; Coast Co. *v.* ring Lake, 56 N. J. Eq. 615.

[3] Brooklyn *v.* Meserole, 26 Wend. . Y.) 132, *per Nelson*, C. J., who mits only two classes of such cases which equity has jurisdiction — (1) eparable injury, and (2) Multicity of suits — and approves Mooers Smedley, 6 Johns. Ch. (N. Y.) 28. also Dewey Hotel Co. *v.* United tes Elect. Lighting Co., 17 App. C. 356, 365, citing text; Dows *v.* icago, 11 Wall. (U. S.) 108; Butler Thomasville, 74 Ga. 570 (where the building of a sewer, which endangered health, through private property was enjoined); Marshall *v.* Illinois State Reformatory, 103 Ill. App. 65; Deemar *v.* Boyne, 103 Ill. App. 464; Raycraft *v.* Harrison, 108 Ill. App. 313; Greenhood *v.* MacDonald, 183 Mass. 342; Heywood *v.* Buffalo, 14 N. Y. 534; Susquehanna Bank *v.* Broome County, 25 N. Y. 312; People *v.* Howe, 177 N. Y. 499; Douglass *v.* Harrisonville, 9 W. Va. 162, applying doctrine of the text; Smith *v.* Oconomowoc, 49 Wis. 694; Schlitz Brewing Co. *v.* Superior, 117 Wis. 297.

In Heywood *v.* Buffalo, 14 N. Y. 534, the court admits *three classes of cases in which equity has jurisdiction:* "(1) Where the proceedings of the subordinate tribunal will necessarily lead to a multiplicity of actions; (2) Where they lead in their execution to the commission of irreparable injury to the freehold; (3) Where the claim of the adverse party to the land is valid upon the face of the instrument or of the proceedings sought to be set aside, and extrinsic facts are necessary to be proved, in order to establish the invalidity or illegality." *Per T. A. Johnson*, J., 14 N. Y. 534,

§ 1572 (907 *a*). **Jurisdiction in Equity of the Federal Courts over Municipal Authorities.** — The Circuit Courts of the United States

541, approved and followed. Minnesota Linseed Oil Co. *v.* Palmer, 20 Minn. 468, 474; Brehm *v.* New York (cloud on title), 104 N. Y. 186; Strusburgh *v.* New York (cloud on title), 87 N. Y. 452; Jex *v.* New York (action to recover back illegal assessment), 103 N. Y. 536; Guest *v.* Brooklyn (multiplicity of suits), 69 N. Y. 506, *Church*, C. J., states New York doctrine, *infra*, § 1590, note; Boyle *v.* Brooklyn (cloud on title), 71 N. Y. 1.

Injunction does not lie to restrain the *holding of a public election* authorized by law. Morgan *v.* Wetzel County Ct., 53 W. Va. 372. Injunction will not lie *to contest an election* and determine the right to a public office. Wilder *v.* Underwood, 60 Kan. 859. Where a portion of the territory of an organized school district is *arbitrarily detached* therefrom, injunction held to be the proper remedy. School Dist. No. 44 *v.* Turner, 13 Okla. 71. Taxpayer's action cannot be maintained to restrain *payment of salary* to public officers holding presumptively valid appointments. Greene *v.* Knox, 175 N. Y. 432. Removal of a public officer not enjoined. Palmer *v.* Board of Education, 47 N. Y. App. Div. 547; *ante*, chapter on *Quo Warranto*. A municipal corporation will not be enjoined from exercising its *discretionary powers* in making public improvements within the scope of its charter. See Bell *v.* Rochester, 30 N. Y. Supp. 365.

Injunction to prevent a municipal corporation from maintaining gratings over the entrance to sewers in the gutters of a street, because in cases of unusual storms or floods, leaves, &c., gathered therein and caused an overflow upon the adjoining sidewalk, refused. Paine *v.* Delhi, 116 N. Y. 224; distinguishing Seifert *v.* Brooklyn, 101 N. Y. 136; 1 Pomeroy Eq. Juris., § 259, and comments; Mayall *v.* St. Paul, 30 Minn. 294; Miller *v.* Mobile, 47 Ala. 163, 166.

Where an attempt was made under an unconstitutional act to detach property from one town and annex it to another mostly within the limits of a city, if the city undertakes to exercise its powers over the property of the town, the town may, on the ground of trust and irreparable injury, have a bill in equity to restrain such interference and the attempt to exercise municipal jurisdiction within the territorial boundaries of the town. Hyde Park *v.* Chicago, 124 Ill. 156; Peoria *v.* Johnston, 56 Ill. 45, 52; Smith *v.* Bangs, 15 Ill. 399; People *v.* Whitcomb, 55 Ill. 172; McCord *v.* Pike, 121 Ill. 288.

In the *Federal courts* it is well known there can be no case of equitable cognizance where there is a plain and adequate remedy at law. Ewing *v.* St. Louis, 5 Wall. (U. S.) 413, citing with approval Brooklyn *v.* Meserole, 26 Wend. (N. Y.) 132; and Heywood *v.* Buffalo, 14 N. Y. 534, above mentioned; Hanewinkle *v.* Georgetown, 15 Wall. (U. S.) 548; Dows *v.* Chicago, 11 Wall. (U. S.) 108; *ante*, § 1047, and note; *post*, §§ 1589, 1590, and cases in notes.

So, in *New Jersey*, by a long-established practice, *courts of law are regarded as the proper tribunals* to review the irregularities or errors in the acts and proceedings of municipal corporations; but equity will, where the facts make a case for equitable interposition, entertain jurisdiction. Morris Canal & B. Co. *v.* Jersey City, 12 N. J. Eq. 252; s. c. in error, *Ib.* 547; State *v.* Jersey City, 29 N. J. L. 441; Carron *v.* Martin, 26 N. J. L. 594; State *v.* Newark, 25 N. J. L. 399; Holmes *v.* Jersey City, 12 N. J. Eq. 299; Attorney-General *v.* Paterson, 9 N. J. Eq. 624; State *v.* Jersey City, 30 N. J. L. 521; *Ib.* 247; Bond *v.* Newark, 19 N. J. Eq. 376; Cross *v.* Morristown, 18 N. J. Eq. 305. The right to interfere to protect the constitutional and plain legal rights of the citizen is recognized where the necessary elements and grounds of equity jurisdiction exist. Matthiessen & W. S. Ref. Co. *v.* Jersey City, 26 N. J. Eq. 247; Foley *v.* Passaic, 26 N. J. Eq. 216; Liebstein *v.* Newark, 24 N. J. Eq. 200; Jersey City *v.* Lembec, 31 N. J. Eq. 255; Lewis *v.* Elizabeth, 25 N. J. Eq. 298; Bogert *v.* Elizabeth, 25 N. J. Eq. 426; Smith *v.* Newark, 32 N. J. Eq. 1; *infra*, § 1593.

As a general rule courts will not interfere with selectmen in the exercise of their judgment as to the mode of making a highway safe for public travel (*ante*, §§ 242, 818, chap. xxiv.), but will do so where their object is merely to promote the comfort of travellers, and

itting in equity have no jurisdiction to restrain the municipal authori-ies of a city from proceeding, no matter how wrongfully, *to remove*

n so doing they invade private rights. uffield *v.* Hathaway, 44 Conn. 521; *nfra*, § 1593. See also Gartside *v.* ast St. Louis, 43 Ill. 47; Oakland *v.* arpentier, 13 Cal. 540, 643; Living-on *v.* Pippin, 31 Ala. 542, 551, *per one*, J.; Baltimore *v.* Baltimore & O. .Co., 21 Md. 50. When the *abutter* who mplains of proceedings in respect *opening and improving streets* may ort to equity for relief in *Massachu-ts*, see Whiting *v.* Boston, 106 Mass. ; Jones *v.* Boston, 104 Mass. 461; *te*, chap. xxiv., on Streets. An *owner a lot and building* cannot maintain bill in equity to enjoin a city from *xating part of a street three and one f blocks distant*, so as to permit it be occupied by the Board of Trade th its building, one ground of this cision being that the plaintiff had special property-right in the part the street proposed to be vacated ferent from the public generally, and nce was not specially injured. Chi-go *v.* Union Building Assoc., 102 . 379, 399; *ante*, chap. xxiv.; *post*, ap. xxxii.

An injunction to restrain a city om *changing the grade of a street* on the complaint of a railway com-ny, which had purchased the right way over the street, refused; ample medy being given by statutory pro-edings for the recovery of whatever mages may result to it. Ridge Av. ss. R. Co. *v.* Philadelphia, 10 Phila. ; *ante*, § 1047; *post*, § 1591. Where city conveyed land for value to a ilroad company, under a contract ich provided that a street through ch land shall be forever closed; and e company took possession, and ex-nded large sums in improving the emises for railroad purposes; and e city then proceeded to open the eet, proposing to pay damages as other cases where land is taken, — was held that a bill would lie in uity, in behalf of the company, for ncellation of the contract, or other oper relief. Atlanta *v.* Macon & W. Co., 59 Ga. 251; *infra*, § 1573, note.

In *Indiana*, in a case where a road s being laid out on a line other than e one established by the proper author-es, it was held that the land-owners uld not join as plaintiffs in an action to enjoin the trespasser, because they had separate and distinct causes of action, Heazy *v.* Black, 90 Ind. 534; but this ruling was afterwards limited "to a case where the wrong to each property-owner is a distinct and in-dependent trespass"; and the court ruled that owners of lots abutting upon a street, along which a town threatened to wrongfully construct a drain, might join in a suit for an injunction. Sul-livan *v.* Phillips, 110 Ind. 320; *ante*, § 1132, note. More fully, see Index, tit. *Abutters*.

Where an act authorized the issue of municipal bonds to *secure natural gas for public and private use*, the payment whereof and of the interest thereon was to be met by the income to be received from such use, and from a tax to be levied to provide for any deficiency, it was held, in an action to enjoin the issue of the bonds, that the injunction should not be granted, be-cause it did not appear but that the revenues would be sufficient to meet the payments without resort to tax-ation. *Per Jackson*, J.: "*Injunctions are not granted in cases like the present* except when complainant's rights are clear, and where an injury more or less irreparable is likely to result to complainants unless defendants are enjoined. In this case complainants' rights are not clear, and the injury likely to result to them is not shown to be irreparable or even serious. On the other hand, the allowance of an injunction would be attended with serious and possibly irreparable loss and damage to the city of Toledo." Fellows *v.* Walker, 39 Fed. Rep. 651. Index — *Equity; Injunction*.

As to relief in equity against *for-feitures* under municipal ordinances, see chap. xv. *ante*, §§ 624, 650. Juris-diction and relief in equity, see Index, tit. *Equity;* 2 Spence Eq. Jurisd. 32.

Injunction, when granted in matters concerning *Municipal Elections*. Bright-ly's Election Cases, 573, 622. And see chapters on Municipal Officers and *Mandamus*, *ante;* Index, tit. *Injunc-tion*. Right of county, or the official body which represents it, to file bill in chancery to restrain an *illegal appro-priation of a public highway*. Pike County *v.* Griffin & W. P. Pl. R. Co.,

a municipal officer from his office contrary to or without authority of law. One ground of this doctrine is special; viz., that the appointment and removal of officers of a municipality are not subjects within the cognizance of the courts of the United States, and that the remedy of the party aggrieved must be found under the laws and in the tribunals of the State. Another ground of the doctrine is general; viz., that the jurisdiction of a court of equity, Federal or State, unless enlarged by statute, *is limited generally to the protection of the rights of property*, and does not extend to entertaining bills to restrain or to relieve against proceedings for the punishment of offences, or for the removal of public officers, these being matters within the jurisdiction of courts of common law, or of the executive and administrative departments of the government.[1]

9 Ga. 475; and compare 15 Ga. 39. In *Georgia* the court refused, on the case made, to enjoin extensive municipal improvements of grading streets, at the suit of a lot-owner whose property was threatened with damage by the work. Moore *v.* Atlanta, 70 Ga. 611. See *ante*, chapters on Dedication and Streets; Index, tit. *Equity; Injunction.* Varick *v.* New York, 4 Johns. Ch. (N. Y.) 53. *Discretionary or legislative powers* will not be interfered with by a court of equity unless manifest oppression or abuse is shown. *Ante*, §§ 242, 818; *infra*, § 1573, note. Index — *Discretion.*

The subjects of *Mandamus* (*ante*, chap. xxix.) and *Quo Warranto* (*ante*, chap. xxx.) are separately treated. The true rule undoubtedly is "that when no misapplication of funds held upon a public trust (*post*, § 1574 *et seq.*), and no nuisance to the public are shown, the appropriate remedy to compel the performance of a duty imposed upon a corporation by statute is *not* by *decree in equity*, but by a writ of *mandamus* at common law." *Per Gray*, C. J., in Attorney-General *v.* Boston, 123 Mass. 460, 479, cited *post*, § 1574, note; *Re* Sawyer, 124 U. S. 200.

A municipal corporation *cannot be guilty of contempt* in disobeying an injunction; the contempt is that of individuals; as, for instance, the officers of a city. Bass *v.* Shakopee, 27 Minn. 250; Davis *v.* New York, 1 Duer (N. Y.), 451; London *v.* Lynn Regis, 1 H. Bl. 206; *ante*, chap. xxix. But because a municipal corporation is not capable of looking after its interests with the same vigilance as a private person, it has a much stronger claim for relief, notwithstanding the laches and negligence of its officers and attorneys, than an individual, under like circumstances, acting in behalf of his own interests. Lewis *v.* Elizabeth, 25 N. J. Eq. 298.

[1] *Re* Sawyer, 124 U. S. 200; White *v.* Berry, 171 U. S. 366; Cleveland City R. Co. *v.* Cleveland, 94 Fed. Rep. 385; Greenwich Ins. Co. *v.* Carroll, 125 Fed. Rep. 121; Heffran *v.* Hutchins, 160 Ill. 550; Howe *v.* Dunlap, 12 Okl. 467; Brower *v.* Schuylkill County, 21 Pa. Co. Ct. R. 311, 7 Pa. Dist. R. 702.

In *Re* Sawyer, 124 U. S. 200, the *police judge* of the city of Lincoln, *Nebraska*, filed his bill in equity against the mayor and councilmen of that city, charging that they were proceeding in a high-handed manner *to remove him from his office* by virtue of an *ex post facto* ordinance, thereby depriving him of the protection guaranteed to him by the Constitution of the United States, and particularly the Fourteenth Amendment, and obtained a temporary injunction from the Circuit Court to proceed no further with the charges until further order. The city council disregarded the injunction and justified their disobedience on the ground that the Circuit Court had no jurisdiction to make the restraining order. The Circuit Court committed the mayor and eleven members of

§ 1573 (908). **Remedies for Corporate Excess of Power.** — But since municipal corporations are invested with large powers to enable them to execute specific objects, or to promote the welfare of the people who are subjected to their rule; and since experience shows how frequently their officers abuse or transcend their rightful authority to the detriment or injury of the inhabitants, and how necessary it is that the latter should have easy and effectual remedies to restrain or correct municipal excesses of power; and perhaps because in the Code States the ancient line of separation between Law and Equity is not so distinctly maintained as formerly, — the general *tendency of the later cases* is to favor a relaxation, rather than a strict application of the rule adverted to in the preceding sections, which denies the right to resort to equity if there exists an adequate remedy at law.[1] The state of the law

the city council for contempt. *Re* Sawyer, 124 U. S. 200, *supra*, was their application for a writ of *habeas corpus*. The Supreme Court of the United States decided that the Circuit Court had no jurisdiction of such a cause, that its order of injunction was *absolutely void*, as well as its order punishing for contempt, based thereon, and that the relators were entitled to be discharged on the *habeas corpus*.

The opinion of the majority of the court, delivered by Mr. Justice Gray, who, in his learned opinion, reviews many of the cases, English and American, *as to the nature of the jurisdiction in equity* where not enlarged by statute. He says: "It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorari*, error, or appeal, or by *mandamus*, prohibition, *quo warranto*, or information in the nature of a writ of *quo warranto*, according to the circumstances of the case, and the mode of procedure established by the common law or by statute. No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer." He cites in support of the foregoing the following: Hagner *v.* Heyberger, 7 Watts & S. 104; Updegraff *v.* Crans, 47 Pa. St. 103; Cochran *v.* McCleary, 22 Iowa, 75; Delahanty *v.* Warner, 75 Ill. 185; Sheridan *v.* Colvin, 78 Ill. 237; Dickey *v.* Reed, 78 Ill. 261; Harris *v.* Schryock, 82 Ill. 119; Beebe *v.* Robinson, 52 Ala. 66; Moulton *v.* Reid, 54 Ala. 320. He concludes that whether the proceedings in question be considered as criminal or judicial or administrative, still their only object being the removal of a public officer from his office, they are equally beyond the jurisdiction and control of a court of equity. Mr. Justice *Field* concurred, but on the ground that such questions belong to the domain of State jurisprudence. *Waite*, C. J., and *Harlan*, J., dissented from the judgment of the court.

The *several States have power* to provide and regulate proceedings for the removal of a person from a State office, and such legislation is not in conflict with the Constitution of the United States where it provides for bringing the party into court, with notice of the case against him, gives opportunity to be heard, and provides for a judicial determination. Foster *v.* Kansas, 112 U. S. 201. Notice *ante*, chap. on Taxation.

[1] The courts profess loyalty to the rule mentioned in the text; but it seems to the author evident, upon a study of the course of decision, that the greater directness and superior efficiency of the equity jurisdiction have insensibly led the courts in these

as moulded by the courts, on the subject of relief against unauthorized, wrongful, and illegal corporate acts, threatened or consummated, can only be satisfactorily ascertained by a general survey of the field of judicial judgments. Generally speaking, equity will interfere in favor of, or against, municipal corporations, on the same principles by which it is guided in cases between other suitors.[1]

later times, and especially in the Code States, to an extension of the equity jurisdiction on the ground of the inadequacy of the remedy at law, when such remedy would not formerly have been regarded as inadequate within the original meaning of the rule. This is a natural result of the situation in the Code States. It is, perhaps, one not to be regretted if the auxiliary writ of preliminary injunction had not come at the same time to be much abused by the ease, liberality, and even improvidence with which it has too commonly been granted, instead of being limited, as it ever ought to be, to cases where this writ is shown to be reasonably necessary to preserve *pendente lite*, a right which would be otherwise imperilled. This and following sections are cited in Meyer *v.* Boonville, 162 Ind. 165. Text approved in Scott *v.* La Porte, 162 Ind. 34. See Rogers *v.* O'Brien, 153 N. Y. 357.

[1] Attorney-General *v.* Plymouth, 9 Beav. 67; Sherburne *v.* Portsmouth, 72 N. H. 539, 541, citing text; Minneapolis Brew. Co. *v.* McGillivray, 104 Fed. Rep. 258; McMahon *v.* New Orleans, 52 La. Ann. 1226, quoting text; Riverside *v.* MacLain, 210 Ill. 308. See Macon *v.* Hughes, 110 Ga. 795. Accordingly, it was held where the *owner conveyed property to a city for a public way*, in the confidence of receiving compensation, which the corporation failed to make, that he was entitled to relief. Walker *v.* Charleston, 1 Bailey Eq. (S. Car.) 443; *ante*, § 1571, note; Pittsburgh's Appeal, 118 Pa. St. 458. So also, where a city, by ordinance, had granted to *a street railway company the right of way over streets and a public square*, it was enjoined, at the suit of the company, from closing the square against it. Springfield R. Co. *v.* Springfield, 85 Mo. 674. A town cannot enjoin a natural-gas company from using the streets on the ground that it had granted the exclusive right to use them to another company; but it is entitled to enjoin such a company when attempting to use the streets without its license. Citizens' Gas & M. Co. *v.* Elwood, 114 Ind. 332; *ante*, chap. xxv. The property of an incorporated village in *Illinois* is held by the corporate authorities as a trust for the use of the public; any unlawful interference with it calculated to inflict upon the community an irreparable injury presents a clear case for equitable relief. In this case, a city was enjoined from exercising municipal jurisdiction within the territory of a village, and from interfering with its property and effects. Hyde Park *v.* Chicago, 124 Ill. 156.

Bill by corporation to set aside *fraudulent grant* by its council. Oakland *v.* Carpentier, 13 Cal. 540. See s. c. subsequently reported, 21 Cal. 642. See also O'Brien County *v.* Brown, 1 Dillon C. C. R. 588 (bill to set aside fraudulent judgment); Attorney-General *v.* Wilson (bill for relief against fraudulent alienation of corporate property), 9 Simons, 30; affirmed, 1 Cr. & Ph. 1; *infra*, §§ 1574, 1575. It seems that a municipal corporation, in its corporate character, where the alleged illegal action is not aimed at, and cannot affect the *corporate* rights or *corporate* property, cannot maintain an action to restrain or to be relieved against the levy of an illegal tax upon the taxpayers, as where the board of supervisors of the *county* are proceeding to levy and collect an illegal tax upon the taxable property of the citizens of one of the *towns* in the county. Guilford *v.* Chenango County, 13 N. Y. 143, *per Denio*, J., who says: "The principles affirmed in this court by Lorillard *v.* Monroe, 11 N. Y. 392, seem to me hostile to this action." And see subsequent case of Doolittle *v.* Broome County, 18 N. Y. 155, and Roosevelt *v.* Draper, 23 N. Y. 318, below mentioned, *infra*, § 1585; *infra*, chap. xxxii.

Where the *mayor is invested with*

For the reason that these corporations are intrusted for defined objects, or for public purposes, with large powers, the courts have

e power of seeing that the charter of e corporation is faithfully executed, is is a duty with which he is intrusted r the common benefit of all the cor- orators, and gives him the right to lect the means best calculated to scharge it; and in the exercise of is right he may, according to the eral, but somewhat questionable, ew of the Supreme Court of *Louisi- a*, in his official name and capacity *ing suit* to test the legality of the dinances and to restrain the alder- en or officers of the corporation om issuing warrants or doing acts violation of the laws of the State or e charter of the city. Genois *v.* ockett, 13 La. 545. In Pieri *v.* hieldsboro', 42 Miss. 493, the town uncil passed an ordinance ordering e plaintiff, without showing any use for the order, *to remove lumber om his private property*, and stating at, if he failed thus to remove it, e corporate officers would remove or estroy it. It not appearing that it as a nuisance, the court restrained e corporation from interference with e plaintiff's property. It will be served that the property threatened be disturbed was personal, and that e court makes no reference to the int whether an action at law for mages would not be an adequate medy.

Injunction in favor of individuals to event the municipal authorities from croaching upon private property. Ante, 1132, 1244, and cases; Dudley *v.* ankfort, 12 B. Mon. (Ky.) 610; arick *v.* New York (streets), 4 Johns. h. (N. Y.) 53; Boughner *v.* Clarks- rgh, 15 W. Va. 394; Peoria *v.* hnston, 56 Ill. 45; Carter *v.* Chicago, Ill. 283, 170; Holmes *v.* Jersey City treets), 12 N. J. Eq. 299; Tainter *v.* orristown (streets), 19 N. J. Eq. ; Clark *v.* Syracuse (destroying ill-dam), 13 Barb. (N. Y.) 32; mporia *v.* Soden, 25 Kan. 588 (noted *te*, § 1033, note); Mason City S. & . Co. *v.* Mason (town of), 23 W. Va. 1 (an injunction restraining a town m opening a street through land thout the owner's consent and thout having condemned it); Bris- Door & Lumber Co. *v.* Bristol, 97 . 304. Injunction to prevent location and establishment of a public road through private property. Wenger *v.* Fisher, 55 W. Va. 13; *ante*, chap. xxiv., on Streets. Where the power exercised is *legislative or discretionary*, a clear case must be made to justify judicial interference. Lane *v.* Schomp, 20 N. J. Eq. 82; *ante*, §§ 242, 818, 1047, 1570, 1571, and note; *post*, § 1635, note; Galloway *v.* London, L. R. I H. L. 34.

Multiplicity of suits. See Glucose Refining Co. *v.* Chicago, 138 Fed. Rep. 209; Hutchinson *v.* Beckham, 118 Fed. Rep. 399; International Trading Stamp Co. *v.* Memphis, 101 Tenn. 181. Where a city corporation had commenced in the Justices' Court *seventy-seven actions against the plaintiff* at the same time, to recover a separate and distinct penalty of $50 for running cars without a license, contrary to ordinance, the court awarded an injunction against the prosecution of more than one of such actions until that one could be finally determined, it appearing that the local court had no power to consolidate the actions or grant the relief sought, and that the concurrent prosecution of all would be unnecessarily oppressive. The ground of the injunction was the power of a court of equity, in a proper case, to restrain the prosecution of a *multiplicity of suits*. Third Av. R. Co. *v.* New York, 54 N. Y. 159, distinguishing West *v.* New York, 10 Paige (N. Y.), 539. The subject of granting an *injunction to restrain the enforcement of municipal ordinances* underwent consideration in a case in Illinois (Des Plaines *v.* Poyer, 123 Ill. 348).

The municipality of Des Plaines adopted an ordinance prohibiting any person from renting or permitting the use of any yard, ground, &c., for any purpose whereby disorderly persons were congregated. It was not questioned that the general subject-matter of the ordinance was within the scope of the power conferred by the charter of the municipality. The municipality commenced seven distinct prosecutions against the same person for violation of this ordinance. One of them was brought to trial, and the defendant therein found guilty, whereupon he brought a bill in equity

evinced some anxiety not to allow their authority to be used to oppress the inhabitants within their jurisdiction; and it may safely be affirmed that there is a remedy, according to the nature of the case, by *certiorari, mandamus, quo warranto*, prohibition, appeal, indictment, civil action, or in equity, for all injurious abuses of power and all invasions of the legal rights of persons subjected to municipal control or affected by municipal action.[1] There can ordinarily be no judicial restraint or interference with the *bona fide* exercise of powers, legislative or discretionary in their nature, and which do not violate private rights.[2] We have had occasion

to enjoin the municipality and its officers from prosecuting the other suits, which were pending, and from instituting, as it threatened, other like prosecutions against him under the ordinance, alleging his innocence of the offence charged; the illegality of the ordinance under which he was prosecuted; that he had no adequate remedy at law to prevent irreparable injury of the prosecutions or the multiplicity of such prosecutions. The bill in equity was dismissed on demurrer. The Supreme Court of Illinois affirmed this decree, holding that the question of the legality or illegality of the ordinance was, on the case made, a question for the common-law court, and not a court of equity, to decide; that a court of equity would not determine the validity of an ordinance in any case where the defendant had an adequate remedy at law; and that this case did not come within the recognized head of equity jurisdiction, based on irreparable injury or multiplicity of suits. *Shope*, J., cites the leading adjudications, and distinguishes the case from Third Av. R. Co. *v.* New York, 54 N. Y. 159, and Wood *v.* Brooklyn, 14 Barb. (N. Y.) 425, considering it rather to fall under the principle of Davis *v.* American Society, 75 N. Y. 362.

Injunction to *restrain the enforcement of municipal ordinances*. See Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. Rep. 720; Cleveland *v.* Cleveland City R. Co., 194 U. S. 517; Old Colony Trust Co. *v.* Atlanta, 83 Fed. Rep. 39; Los Angeles City Water Co. *v.* Los Angeles, 103 Fed. Rep. 711; Chicago *v.* Ferris Wheel Co., 60 Ill. App. 384; United Traction Co. *v.* Watervliet, 35 N. Y. Misc. 392; Austin *v.* Austin City Cemetery Ass'n, 87 Tex. 330. *Irreparable injury*. Cicero Lumber Co. *v.* Cicero, 176 Ill. 9; Rico *v.* Snider, 134 Fed. Rep. 953. A court of equity has jurisdiction to enjoin the enforcement of a *void* ordinance at the suit of a person whose interests will be injuriously affected by enforcement. Deems *v.* Baltimore, 80 Md. 164. See generally as to injunction against the enforcement of ordinances, *ante*, § 650.

Where *numerous warrants* had been issued against an individual for violations of an ordinance which imposed a fine for each day's occupation of the public streets, — the amount of the fine not being sufficient to give him an appeal, — and the defendant *claimed a right of property* in the street, an injunction was granted to him restraining the prosecution of the warrants until the right of property could be determined. Shinkle *v.* Covington, 83 Ky. 420.

[1] See Westbrook *v.* Middlecoff, 99 Ill. App. 327.

[2] *Ante*, § 242; *infra*, § 1593; New Orleans Water Co. *v.* New Orleans, 164 U. S. 471; Torpedo Co. *v.* Clerendon, 19 Fed. Rep. 231; Alpers *v.* San Francisco, 32 Fed. Rep. 503 (application to *restrain the passage of an ordinance* repealing an ordinance under which the city had contracted for the removal of dead animals, refused); Hamerick *v.* Rouse (county-seat removal), 17 Ga. 56; State *v.* Woody, 17 Ga. 612; Bacon *v.* Walker, 77 Ga. 336; Valparaiso *v.* Hagen, 153 Ind. 337; Jenkins *v.* Andover, 103 Mass. 94, 104; Cape May & S. L. R. Co. *v.* Cape May, 35 N. J. Eq. 419; Brodnax *v.* Groom, 64 N. Car. 244; Waterbury *v.* Laredo, 60 Tex. 519; State *v.* Milwaukee County, 105 Wis. 651. See Roby *v.* Chicago, 215 Ill.

already to some extent to state, in connection with special topics discussed, in what cases, and in what mode, corporate acts and proceedings may be judicially examined or reviewed,[1] but the subject is of sufficient importance to require some further separate consideration.[2]

§ 1574 (909). **Where Corporation is a Trustee of Property or Funds.** — In respect of *property* or *funds* held by municipal corporations *in trust, or clothed with public duties*, equity, in virtue of its jurisdiction in respect of trusts and property, has always asserted its power to see that the trusts were observed and their public duties in respect of such property discharged.[3] In England, and probably also in this country, the bill may in such cases be filed against the municipal corporation and its officers by the Attorney-General, on his own motion or on behalf of the corporators, taxpayers or persons interested; or the latter may perhaps, in certain cases under the line of decisions in this country presently to be mentioned, exhibit the bill in their own names. The jurisdiction of chancery in such cases over municipal corporations is forcibly asserted by the House of Lords, in an interesting and important case in which the corporation of Dublin, under an Act of Parlia-

04; Poppleton *v.* Moores, 62 Neb. 51.

Where a council was empowered to determine finally certain facts, as, in this case, whether real estate was rural or not, it was said that if "the discretion was abused, no doubt the power of a court of equity would be adequate to restrain the perpetration of a palpable wrong." Erie *v.* Reed, 13 Pa. St. 468. In Spring Valley Water Works *v.* Bartlett, 16 Fed. Rep. 15, it was held by *Sawyer*, J., that municipal corporations may be enjoined from passing an ordinance which is not within the scope of its powers, and which would work an *irreparable injury*, citing Davis *v.* New York, 1 Duer (N. Y.), 452; affirmed, 9 N. Y. 53, 264. See Spring Valley W. W. *v.* Schottler, 110 U. S. 347; *post*, chap. xxii.

[1] *Ante*, §§ 379, 517, 752, and note 947; *ante*, § 1559. See also Richardson *v.* Baltimore, 8 Gill (Md.), 433; Alexander *v.* Baltimore, 5 Gill (Md.), 383; Dudley *v.* Frankfort, 12 B. Mon. (Ky.) 610, 615.

[2] Mr. High has collected and stated many of the American cases upon the subject of injunctions against municipal corporations. High on Injunctions, §§ 783–795. See also Joyce, Injunc. 716.

[3] Attorney-General *v.* Liverpool, 13 Eng. Ch. (1 Mylne & Cr. 171) 343, 359; Attorney-General *v.* Dublin, 1 Bligh N. R. 312; *ante*, §§ 107, 131, 334; chapter on Corporate Property, *ante*, §§ 982–986; chapter on Dedication, *ante*, § 1106; Baltimore *v.* Baltimore & O. R. Co., 21 Md. 50; Barnum *v.* Baltimore, 62 Md. 275; Sherburne *v.* Portsmouth, 72 N. H. 539, 541, 542, citing text; *post*, § 1585, note and cases.

It is "a distinctive characteristic of a *corporation* that it is accountable in equity for *misapplication of trust funds*, whereas any other body of men, as a parish, can only (where relief can be had at all) be touched through the individuals, or their representatives, who have committed the actual breach of trust." Grant on Corp. 138. Mr. Spence discusses the subject of the equity jurisdiction over corporations as trustees satisfactorily. 2 Spence Eq. Jurisd. 32–35.

ment, was *the trustee of funds raised from water-rates*, to supply the city with water, and where the bill charging the corporation with breaches of trust and mismanagement was filed by the Attorney-General on behalf of the inhabitants of Dublin paying water-rates.[1] Here the public were interested in the proper administration of the authority which had been conferred upon the city corporation in respect to the supply of water to the city; it is obvious that there was no adequate remedy at law, and hence the propriety of a resort to equity by the ratepayers, in the name of the officer authorized to represent the king.[2]

§ 1575 (910). **Fraudulent Dispositions of Corporate Property and Funds and Abuses of Powers relating thereto.** — So the Court of Chancery, in England, notwithstanding another remedy (which is considered to be cumulative) is given by statute, will relieve against *fraudulent dispositions of corporate property*. It will also interfere to prevent municipal councils from *abusing powers relating to property and funds* intrusted to them to be exercised in conformity with law for the benefit of the incorporated place or its inhabitants. The just, salutary, and sound view is taken, that the powers conferred by the Municipal Corporations Act upon councils in respect to the *corporate funds and corporate property are public trusts*, and the property owned by the corporations is held by them in trust for the purposes specified or authorized in the act; and hence, if these powers are abused, — as, for example, the power of a council to award compensation to officers of the corporation, or if corporate property is collusively alienated, —

[1] Attorney-General *v.* Dublin, 1 Bligh N. R. 312. See also Attorney-General *v.* Liverpool, 13 Eng. Ch. (1 Mylne & Cr. 171) 343. The doctrine of these cases was approved by *Gray*, C. J., in Attorney-General *v.* Boston, 123 Mass. 460, who, referring to Attorney-General *v.* Salem, 103 Mass. 138, says, "if the *water-rents* had been collected and misapplied by the city (of Salem), there would have been such a misappropriation of *trust funds* held by the city for a public charitable purpose as would have supported an information in equity in the name of the Attorney-General." Noticed more fully, *infra*, § 1585, note.

The principles on which equity will enjoin the proceedings of *public officers* are stated by Lord *Cottenham*. Frewin *v.* Lewis, 18 Eng. Ch. (4 Mylne & Cr.) 249. See also Baltimore *v.* Horn, 26 Md. 194; Holland's Case, 11 Md. 186; Baltimore *v.* Porter, 18 Md. 284; Attorney-General *v.* Heelis, 2 Sim. & St. 67; People *v.* Canal Board, 55 N. Y. 390 (1874), where the subject is discussed by *Allen*, J.; Attorney-General *v.* Boston, 123 Mass. 460; *infra*, § 1585, note. Duties and liabilities of public officers. *Ante*, §§ 433–444.

[2] In England it is settled that in cases such as those mentioned in the text, or where the corporation is a trustee of property or funds for public uses, it can be made to account to the *crown*, on an information, but not to *private persons* in a suit in equity. Grant on Corp. 138; Skinners' Company *v.* Irish Soc., 12 Cl. & F. 487. See also 2 Spence Eq. Jurisd. 32–35.

this is *a breach of trust* of which equity will take cognizance.[1] The uniform and settled mode of proceeding in England in such cases

[1] Attorney-General *v.* Poole, 4 Mylne & Cr. 17, 30, and overruling 2 Keen, 190, 206; Parr *v.* Attorney-General, 8 Cl. & F. 409; Attorney-General *v.* Aspinwall, 2 Mylne & Cr. 13, overruling Master of the Rolls, Keen, 513; Attorney-General *v.* Wilson, 9 Sim. 30; affirmed by the Lord Chancellor, 1 Cr. & Ph. 1, noted *infra;* Avon *v.* Avon, 29 Beav. 44. Text cited and approved; Place *v.* Providence, 12 R. I. 1; Roper *v.* McWhorter, 77 Va. 4 (lease of ferries enjoined). See Allen *v.* Clausen, 114 Wis. 244.

In explanation of the English decisions referred to in this note, it may be observed that by § 92 of the Municipal Corporations Act of 1835 before mentioned (*ante*, §§ 10, 175), the income of all the property belonging or payable to any of the old corporations was to be paid to the treasurer of the new or remodelled corporation, and the fund so created was to be subject to the payment of the debts of the old corporation, to the payment of the salaries of municipal officers, of municipal election expenses, municipal court expenses, and all other expenses incident to carrying the act into effect; with a provision that any surplus should be applied, under the direction of the council, for the public benefit of the inhabitants and the improvement of the borough. In case the borough fund thus obtained should prove insufficient for the enumerated purposes, power is given to the council to raise the deficiency by taxation or a borough rate. The author does not see that property thus held, income thus derived, and public powers thus to be exercised, are in essence different from the property, income, and powers ordinarily appertaining to our American municipalities. If this be so, the English cases below cited are especially instructive.

Summary of leading English cases: In the leading case of the Attorney-General *v.* Aspinwall, *supra*, Lord Chancellor *Cottenham* held that the property in question became, upon the enactment of the Municipal Corporations Act, subject to the public trusts declared by that act, and was not under the absolute control of the corporation; and that if any given appropriation of this fund or property be not consistent with the trust, but for purposes foreign to it, the Attorney-General has a right to file an information or bill in equity, asking "that the fund may be recalled, secured, and appropriated for the public, or in other words, charitable purposes, to which it is by the act devoted." Attorney-General *v.* Aspinwall, 2 Mylne & Cr. 613, 618. He says: "I cannot doubt that a clear trust was created by this act *for public, and therefore, in the legal sense of the term, charitable purposes,* of all the money belonging to the corporation at the time of the passing of the act." *Ib.* 623.

On the same principle Lord *Cottenham*, in the case of the Attorney-General *v.* Poole, 4 Myl. & Cr. 17, *supra*, held that chancery had jurisdiction on an information of the Attorney-General filed on the relation of certain ratepayers of the corporation, to *prevent the municipal council from awarding unauthorized compensation to the officers of the corporation out of the borough fund*, and that it was immaterial that the means of payment were to be raised by a *rate or tax* over the levy of which the court *might* not have any control. The ground of interference was that the *fund of the corporation, however acquired, is a trust fund,* to be used for, and only for, purposes consistent with the provisions of the Municipal Corporations Act, and that trustees may in equity be restrained from committing breaches of trust. To the objection that "the information did not impute fraud in the proceedings of the council" the Lord Chancellor said: "But a trustee may be guilty of a breach of trust from error or ignorance of his duty, and if it were necessary to impute fraud, the term itself need not be used; it is sufficient if the facts stated amount to a case of fraud." Conformably to these principles, where the municipal council, *without authority of law, gave a bond to secure compensation out of the corporate funds to an officer* of the corporation, this was held to be a breach of their trust, cognizable in chancery. Parr *v.* Attorney-General, 8 Cl. & F. 409.

So in the Attorney-General *v.* Lichfield, 13 Simons, 547, the *corporation was enjoined* on an information

is by information or by bill filed in the court of equity by the Attorney-General. The king, as *parens patriæ*, institutes the suit by his

by the Attorney-General from ordering their treasurer to pay out of the borough fund or any funds of the corporation the amount of a promissory note to one Mallett for £200 borrowed money, and the ground of the order was, in the language of Vice-Chancellor *Shadwell*, that, "taking all the Acts of Parliament together, it is quite clear that the corporation had no authority to give the promissory note to Mallett."

So, also, in Attorney-General *v.* Norwich, 16 Simons, 225, the corporation was restrained, in a suit by the Attorney-General at the instance of ratepayers, from *using the borough fund for an unauthorized purpose;* viz., to pay the expenses of procuring an Act of Parliament to improve the navigation of a river flowing through the corporation. See Attorney-General *v.* Wigan, 34 Eng. Ch. (5 De Gex, M. & G.) 52; Frost *v.* Belmont, 6 Allen (Mass.), 152.

So *in this country*, it has been held that a New England town cannot appropriate money to pay the expenses of a committee to petition the legislature for the annexation of the town to another town, thereby merging its own organization. Minot *v.* West Roxbury, 112 Mass. 1; *ante*, § 824, note. In Sherlock *v.* Winnetka, 59 Ill. 389, a fraudulent and illegal exercise of the powers of the municipal council looking to *the creation of unauthorized debt* of the municipality was treated as a breach of trust and a fraud upon the law, against which equity would relieve at the instance of taxpayers and property-owners.

So in *Canada*, the members of the council are not the corporation, but the agen s of the corporation for the management of its affairs and funds. When these agents are shown so to misappropriate the funds of the corporation as to put the money into their own pockets when not authorized so to do, a bill in equity at the instance of a ratepayer, Blakie *v.* Staples, 13 Grant (Can.), 67, or an action at the suit of the corporation, will lie against them to recover it back; and when that misappropriation is mixed up with what may have been rightfully paid, it is but right, in order to operate as a safeguard to the corporation, to cast the burden of proof on the agent, to separate from the appropriation he has received that portion which he would be legally entitled to take. East Nissouri *v.* Horseman, 16 Up. Can. Q. B. 588. In *Canada* the:e is not only a civil but a criminal remedy. Daniels *v.* Burford, 10 Up. Can. Q. B. 481. See further, Baxter *v.* Kerr, 23 Grant (Can.), 367. The treasurer should not pay money on any or every draft and order which the reeve for the time being may direct him to pay. The township moneys will probably be considered as still in his hands, unless paid out on a proper legal authority, for purposes contemplated and authorized by law, at least until he has received a formal acquittance and discharge from the municipality. East Nissouri *v.* Horseman *et al.*, 9 Up. Can. C. P. 191, *per Draper*, C. J. Nor should he pay money on an illegal order or resolution, for an Act of Parliament should be regarded by him as a higher authority than the resolution or by-law of a corporation created by an Act of Parliament. Daniels *v.* Burford, 10 Up. Can. Q. B. 481. And if a treasurer so pay money on an illegal order or resolution, he would be probably subject to criminal prosecution. East Nissouri *v.* Horseman, 16 Up. Can. Q. B. 580. But he is not now liable to any action at law for moneys paid by him in accordance with a by-law or resolution of the council. Harrison's Munic. Man. for Canada (5th ed.), p. 186; Biggar, Municipal Manual (Canada, 1900), 301.

In Attorney-General *v.* Wilson, 9 Simons, 30, affirmed by the Lord Chancellor, 1 Cr. & Ph. 1, which was an information and bill in equity by the Attorney-General at the relation of the corporation of Leeds, it was held that chancery had jurisdiction (notwithstanding a special remedy in the Municipal Corporations Act) to relieve against *fraudulent alienations of corporate property*, and that the corporation could impeach the fraudulent acts of its officers, and maintain a suit to set aside transactions fraudulent against it, though carried into effect in the name of members of its council; and this right the Lord Chancellor considered not to be affected by the

proper officer, the Attorney-General, who files the necessary information, or information and bill, as a prerogative right, — the right which the sovereign has to call, by his appropriate officers, upon the several courts of justice, according to the nature of their respective jurisdictions, to see that right is done to his subjects, who are incompetent to act for themselves. While it is usual to join relators in the suit, it is not necessary. The object in joining them is that the defendants may not be oppressed, without remedy, by vexatious suits, since the relators are liable to costs, while the crown is not.[1]

§ 1576 (911). **Extent and Mode of Equitable Interference in this Country.** — In this country the *preventing* or the *redressing* of the *excesses of municipal power by a resort to a court of equity* has given rise on some points to much contrariety of judicial opinion. Corporations here derive their powers from express legislative enactment. Most, if not all, of the States have an officer styled an Attorney-General, whose duties are prescribed by statute; and these duties differ in many respects from the duties of the Attorney-General in England. The question has several times arisen how far this officer, or the public law officer of the State, may exercise the powers which belong to the office of the Attorney-General at common law, — to file informations or bills in equity, to prevent

circumstance that the Attorney-General had the like power. A similar *power to protect corporate property* was asserted by the Master of the Rolls in Attorney-General *v.* Liverpool, 13 Eng. Ch. (1 Mylne & Cr. 171) 343, where the information was filed by the Attorney-General at the relation of two merchants of Liverpool, one of whom was a burgess or ratepaying citizen, against the corporation of Liverpool. The line of English decisions cited in §§ 1574 and 1575 is referred to at length, and distinguished by *Allen*, J., in People *v.* Ingersoll, 58 N. Y. 1; *post*, §§ 1578, 1585, note, and cases, 1587; *ante*, § 1573, note.

If members of a corporation contrive a scheme to defraud a corporation of its property, they are personally liable. Attorney-General *v.* Wilson, 9 Simons, 30, aff'd 1 Cr. & Ph. 1, *supra*. See also Attorney-General *v.* Lichfield, 11 Beav. 120; Attorney-General *v.* Leicester, 9 Beav. 546; Attorney-General *v.* Plymouth, 9 Beav. 67; Regina *v.* Liverpool, 9 A. & E. 435; Grant on Corp. 137–139, 142; *ante*, §§ 433–444, note.

Whether funds derived by a municipality from taxation for municipal improvements, the payment of municipal expenses, &c., are *charitable funds*, see Attorney-General *v.* Brown, 1 Swanst. 265; compare Attorney-General *v.* Heelis, 2 Sim. & St. 67. Both of these cases are referred to in Attorney-General *v.* Dublin, 1 Bligh N. R. 312, 334. See Carlton *v.* Salem, 103 Mass. 141, referred to *infra*, § 1585, note.

[1] *Per* Lord *Redesdale*, in the Attorney-General *v.* Dublin, 1 Bligh N. R. 312; Attorney-General *v.* Birmingham, 3 L. R. Eq. 552; Attorney-General *v.* Exeter, 51 Eng. Ch. 507; 29 Beav. 44. The answer of a municipal corporation to a bill in chancery need not be signed by an officer thereof; where the name of the corporation is written to such an answer, and there is nothing to show that it is unauthorized, it will be sufficient. Harrison *v.* Peoria, A. & D. R. Co., 77 Ill. 11.

or redress the illegal acts of municipal officers and corporations; and connected with this inquiry is the further one, when or in what cases private persons may in their own names resort to equity to prevent the municipal authorities from passing beyond the line of their rightful powers, or to have unauthorized corporate acts set aside or the injury caused thereby redressed or corrected. How far a court of equity may control the acts of municipal and public corporations or of their officers, and in what manner or at whose instance it will exercise its jurisdiction where it exists, are questions upon which, as above observed, the courts in this country are by no means fully agreed. It must suffice, in our further treatment of this subject, to notice briefly the adjudications respecting it, and to state what, in the absence of controlling legislative enactments, would appear upon principle and sound public policy to be the correct doctrine, as to the extent and mode of equitable interference with the exercise of municipal powers, or with the acts of municipal officers.

§ 1577 (912). **Suit by Attorney-General of the State.** — The weight of authority seems to be that *the Attorney-General of a State*, or its other public law officer, has by virtue of his office the right in his name, or in the name of the State, upon the relation of persons interested, to bring, in *cases which are properly of equitable cognizance and which affect the public*, a bill in equity to prevent municipal corporations from exceeding the line of their lawful authority, or to have their illegal acts set aside or corrected.[1]

[1] Davis *v.* New York, 2 Duer, 663. In this case the subject is very learnedly discussed by Mr. Justice *Duer*, who cites and reviews the principal English authorities, and deduces from them the doctrine that when the act of a municipal corporation, which is the subject of complaint, affects injuriously and equally the entire public within the jurisdiction of the corporation, the Attorney-General is a necessary party. See also People *v.* Lowber, 7 Abb. (N. Y.) Pr. 158, — an action by the Attorney-General to prevent the corporation from completing an alleged unauthorized contract for the purchase of land on which to erect a market-house. People *v.* New York, 9 Abb. (N. Y.) Pr. 253, 10 Abb. (N. Y.) Pr. 144; Same *v.* Same, 32 Barb. (N. Y.) 102. In Doolittle *v.* Broome County, 18 N. Y. 155, 157, referred to *infra*, § 1585, *Denio*, J., admits that the Attorney-General may file an information in equity to prevent an act which would be a breach of trust. The right of the Attorney-General to bring a suit to prevent the illegal issue of bonds by an incorporated town to a railroad company was denied by *Mullin*, J., in the Supreme Court, and the previous cases in that State above cited were disapproved; but it is observable that the learned judge seems to proceed upon the basis, believed to be fundamentally erroneous, "that the people, that is, the State in its corporate capacity and character, has no manner of interest" in a litigation where the question is whether corporate powers which it has granted have been exceeded or not. People *v.* Miner, 2 Lansing (N. Y.), 396; reaffirmed, People *v.* Albany & Susq. R. Co., 5 Lansing (N. Y.), 25.

This doctrine has been asserted by an able court, in a case where there was no statute giving the Attorney-General power to interfere to prevent an abuse of corporate powers, or prescribing the terms of such interference, and where the injury complained of by the relators was a disregard of the provisions of a municipal charter, which required contracts to be let to the *lowest responsible bidder*. It was conceded in that case that the Attorney-General would have the right to enjoin the misappropriation of a *charitable fund* held by the corporation; and the court considered that there was no substantial distinction between such a case and one where, under legislative authority, a corporation, authorized to raise funds by taxation for specified purposes or on certain conditions only, threatens effectually to abuse its powers in this respect by a misappropriation or unwarranted use of corporate moneys or funds.[1]

In the People *v.* Ingersoll, 58 N. Y. 1, and People *v.* Fields, 58 N. Y. 491, the Court of Appeals decided that the Attorney-General could not intervene by civil action in the name of the State to recover money due to the city of New York (*infra*, § 1578).

In *California*, it has been decided that where a suit is instituted in the name of the State by the Attorney-General, on the relation of the real party in interest seeking relief, and the State has no interest therein, the Attorney-General, *as such*, has no power to control the suit or withdraw his consent to the use of the State's name, to the prejudice of the relator. People *v.* North San Francisco H. & R. Assoc., 38 Cal. 564. See *ante*, chap. xxix., *as to relator*. The Attorney-General may institute an action in the name of the people to enjoin or abate a public nuisance caused by obstructions upon a public street. People *v.* Beaudry, 91 Cal. 213, 220. The district attorney is, by statute, authorized to maintain an action in the name of the county to recover moneys unlawfully paid on account of the county. See Tehama County *v.* Sisson, 152 Cal. 167.

In *Missouri*, a very able lawyer, sitting as a special judge (*Shepley*, J.), upon a review of the English cases, held that an information in equity by a law officer of the State would lie to prevent the county authorities from doing an unauthorized act, such as issuing railroad bonds. State *v.* Saline County, 51 Mo. 350, *Wagner*, J., dissenting; *infra*, §§ 1579, note, 1584, note. In *Missouri*, the Attorney-General, or the prosecuting attorney of a county, in which a public nuisance exists, may maintain an action to abate the nuisance, independent of any statute. Such action possesses the characteristics of a bill in equity. State *v.* Vandalia, 119 Mo. App. 406.

Suit on behalf of all *taxpayers*, when once entertained by the court, cannot be dismissed without an order of court. McAden *v.* Jenkins, 64 N. Car. 796, before *Pearson*, C. J.

In *Upper Canada* the mayor is the head of the council, and the head and chief executive officer of the corporation, and it is held that a bill will lie in equity by some of the inhabitants of a municipality alleging an illegal misapplication of its funds by the mayor. Patterson *v.* Bowes, 4 Grant (Can.), 170. The Attorney-General is not a necessary party to such suit. *Ib.* Where the mayor of a city secretly contracted to purchase at a discount a large number of the debentures of the city, which it was expected would be issued under a contemplated by-law of the city council, and was afterwards himself an active party in procuring and giving effect to the by-law subsequently passed, he was held to be a trustee for the city of the profit derived from the transaction. Toronto *v.* Bowes, 4 Grant (Can.), 489, affirmed in appeal, 6 Grant (Can.), 1, and afterwards affirmed by the privy council; more fully *ante*, § 772; Harrison's Munic. Man. (5th ed.) 320, 321; Biggar, Municipal Manual (Canada, 1900), 115.

[1] Attorney-General *v.* Detroit, 26

§ 1578 (913). **Same Subject; Tweed Frauds in New York City.** — In cases arising out of the well-known municipal frauds in New York of Tweed and his confederates, it was held by the Court of Appeals that an action, unless given by statute, *could not be maintained in the name of the State by the Attorney-General* to recover a judgment in the name of the State for moneys illegally and fraudulently taken by the defendants from and belonging to the city of New York. As the ownership of such moneys was in the city corporation, and not the State of New York, the court decided that the right of action to recover the same was in that corporation and not in the State. And it was further decided that the fact that the city corporation through its officers fraudulently colluded with the defendants, to protect them from civil actions to enforce their liability, did not give a right of action to the State or authorize the Attorney-General, without express legislative sanction, to bring suit in the name of the State to recover such moneys, making the wrong-doers and the municipality defendants.[1]

Mich. 263; "Every misuse of corporate authority is in a legal sense an abuse of trust, and the State, as the visitor and supervisory authority and creator of the trust, is exercising no impertinent vigilance when it inquires into and seeks to check it." *Ib. Per Cooley*, J., who in his opinion carefully considers what kind and degree of abuse of corporate power will justify the interference of the Attorney-General. It was held in this case that where the *council awarded the contract to the highest of two bidders for* putting down pavements, but the difference in the bids was less than $200, of which less than $30 was to be paid by the city, and the contractors had gone on without objection and incurred large expenses, and the lot-owners did not complain, the amount involved was too small to warrant the intervention of the Attorney-General, especially as it appeared that the error of the council, if any, was not intentional, but one of judgment only. *Ante*, § 1130. Index — *Lowest Bidder*.

A judgment of the Supreme Judicial Court of *Massachusetts* sustained in its reasoning the principles laid down in the text and approved by the Supreme Court of *Michigan* in the case just cited. Attorney-General *v.* Boston, 123 Mass. 460; *infra*, § 1585, note; *ante*, § 274, as to *injunction*, for restraining tax or assessment for paving street with *patented pavement*. Hobart *v.* Detroit, 17 Mich. 246; Attorney-General *v.* Detroit, 26 Mich. 263; Dean *v.* Charlton, 23 Wis. 590; Harlem Gasl. Co. *v.* New York, 33 N. Y. 309; *ante*, § 803. Index — *Patented Articles* and *Patented Pavement*.

[1] People *v.* Fields, 58 N. Y. 491; People *v.* Ingersoll, 58 N. Y. 1; *Church*, C. J., and *Rapallo*, J., dissenting. The English cases referred to in §§ 1574 and 1575 of this work, holding that the Attorney-General, on behalf of the crown, may resort to equity to prevent the abuse of corporate powers relating to property and funds, even if the doctrine of those cases prevailed in *New York*, which was not decided, were considered as distinguishable from the case before the court, as this *was a civil action for the recovery of money, which could only be brought by the owner*, and the owner was the corporation and not the State. The courts of *New York* had previously held, erroneously as we think, that the taxpayers, as such, were without remedy in such cases. *Post*, § 1585. This condition of practical helplessness against fraud was remedied by the Acts of 1872 and 1881. Ayers *v.* Lawrence, 59 N. Y. 192; Metzger *v.* Attica & Arcade R. Co., 79 N. Y. 170, 171; Osterhoudt *v.* Rigney, 98 N. Y. 222; *infra*, §§ 1579, 1585, and note.

579 (914). **When Taxpayers and Property-holders may have :tion.** — In this country, the right of *property-holders* or *tax-nhabitants* to resort to equity to restrain municipal corpora- and their officers from transcending their lawful powers or :ing their legal duties in any mode which will injuriously the property-holders or taxpayers,[1] — such as making an un-ırized appropriation of the corporate funds, or an illegal or ;ful disposition of the corporate property,[2] or levying and col-g void and illegal taxes and assessments upon real property · circumstances presently to be explained,[3] — has, without the f statute provision to that effect, been affirmed or recognized merous cases in many of the States. It is the prevailing, we now add, almost universal doctrine on this subject.[4] It can,

'ong Wai *v.* Williamson, 103 Rep. 1. See Keen *v.* Waycross, a. 588. A taxpayer may enjoin eation of an illegal debt by a or city. Scott *v.* Allen, 53 Ill. :41.

hamberlain *v.* Tampa, 40 Fla. Iolden *v.* Alton, 179 Ill. 318; y *v.* Gilbert, 46 Ill. App. 623; e *v.* Spring Lake, 112 Mich. 91; d *v.* Easterling, 61 Neb. 882; *v.* Manchester Electric Light 3 N. H. 340.

radford *v.* San Francisco, 112 :37, approving text; Cascaden erloo, 106 Iowa, 673, citing text. oberts *v.* Bradfield, 12 App. 453; Davenport *v.* Buffington, d. Rep. 234; Inge *v.* Mobile of Public Works, 135 Ala. 187, iting text; Russell *v.* Tate, 52 :41, 545, citing text; Gibson *v.* y County, 80 Cal. 359; Winn *v.* 87 Cal. 631, 636, citing text; *v.* Goad, 89 Cal. 215, 223; Rosa Light Co. *v.* Woodward, al. 30; Johnston *v.* Sacramento y,137 Cal. 204, 210; Chamber- Tampa, 40 Fla. 74; Anderson ler, 51 Fla. 380; Americus *v.* 114 Ga. 871, 884; Fluker *v.* Point, 132 Ga. 568; Stevens *v.* ary's Training School, 114 Ill. 15; Chicago *v.* Nichols, 177 Ill. 4; Adams *v.* Brenan, 177 Ill. Holden *v.* Alton, 179 Ill. 318; West Hammond, 230 Ill. 310; n *v.* Tidholm, 94 Ill. App. 371; t *v.* New Albany, 88 Ind. 473; aiso *v.* Gardner, 97 Ind. 1; ond *v.* Davis, 103 Ind. 449; *v.* Booneville, 162 Ind. 165, 173, citing text; Scott *v.* La Porte, 162 Ind. 34; Jordan *v.* Logansport, 171 Ind. 280; Macy *v.* Miami County (Ind. App.), 80 N. E. Rep. 553; Miller *v.* Des Moines, 143 Iowa, 409; 122 N. W. Rep. 226; Ramsey *v.* Shelbyville, 119 Ky. 180, 184; Dyer *v.* Newport, 123 Ky. 203; Johnson *v.* New Orleans, 105 La. 149; Sugar *v.* Monroe, 108 La. 677, citing text; Murphy *v.* St. Mary's Parish Police Jury, 118 La. 401, 409, citing text; Saxon *v.* New Orleans, 124 La. 717, quoting text; Handy *v.* New Orleans, 39 La. An. 107, 109, citing text; Reynolds *v.* Waterville, 92 Me. 292; Blood *v.* Beal, 100 Me. 30; St. Mary's Ind. School *v.* Brown, 45 Md. 310, citing text; Baltimore *v.* Keyser, 72 Md. 106, 108; Packard *v.* Hayes, 94 Md. 233, 252; Bennett *v.* Baltimore, 106 Md. 484, 496; Curtenius *v.* Grand Rapids & Ind. R. Co., 37 Mich. 583; Alpena *v.* Alpena County Circuit Judge, 97 Mich. 550; Bates *v.* Hastings, 145 Mich. 574, 580, citing text; Cone *v.* Wold, 85 Minn. 302, 306; Schiffman *v.* St. Paul, 88 Minn. 43; Patterson *v.* Barber Asphalt Pav. Co., 96 Minn. 9; Davenport *v.* Kleinschmidt, 6 Mont. 502, 523, quoting text; Tukey *v.* Omaha, 54 Neb. 370, 378; Shepard *v.* Easterling, 61 Neb. 882; Grand Island & W. C. R. Co. *v.* Dawes County, 62 Neb. 44; Poppleton *v.* Moores, 62 Neb. 851; s. c. 67 Neb. 388; Ballard *v.* Cerney, 83 Neb. 606; State *v.* White Pine County, 22 Nev. 80, 87, citing text; Blood *v.* Manchester Elect. Light Co., 68 N. H. 340; Merrimon *v.* Southern Pav. & Const. Co., 142 N. Car. 539, citing text; Roberts *v.*

we think, be vindicated upon principle, in view of the nature of the powers exercised by municipal corporations and the necessity of affording easy, direct, and adequate preventive relief against their misuse. It is better that those immediately affected by corporate abuses should be armed with the power to interfere directly in their own names than to compel them to rely upon the action of a distant State officer. The equity jurisdiction may, in such cases, usually rest upon fraud, breach of trust, multiplicity of suits, or the inadequacy of the ordinary remedies at law. It is advisable, in view of its importance, briefly to examine the doctrine above mentioned, and the grounds upon which it rests, in the light of some of the leading judgments of the courts, the better to see its scope, limitations, and application.[1]

Fargo, 10 N. Dak. 230; Pierce *v.* Hagans, 79 Ohio St. 9, 19, quoting text; Walker *v.* Dillondale, 30 Ohio Cir. Ct. R. 623, 625, quoting text; Kellogg *v.* School Dist. No. 10, 13 Okla. 285, 298; El Reno *v.* Cleveland Trinidad Pav. Co. (Okla.), 107 Pac. Rep. 163; Carman *v.* Woodruff, 10 Oreg. 133, 135, quoting text; State *v.* Pennoyer, 26 Oreg. 205; Dorothy *v.* Pierce, 27 Oreg. 373; Brownfield *v.* Houser, 30 Oreg. 534; Burness *v.* Multnomah County, 37 Oreg. 460, 468; Sank *v.* Philadelphia, 8 Phila. 117; Frame *v.* Felix, 167 Pa. 47; Wolff Chemical Co. *v.* Philadelphia, 217 Pa. 215; Graves *v.* Jasper School Township, 2 S. Dak. 414, 418, citing text; Roper *v.* McWhorter, 77 Va. 214; Lynchburg & R. St. R. Co. *v.* Dameron, 95 Va. 545, 546, 547, citing text; Woldenberg *v.* Sampson, 55 Wash. 152; 104 Pac. Rep. 184; Webster *v.* Douglas County, 102 Wis. 181; Siegel *v.* Liberty, 111 Wis. 470, 473; Kircher *v.* Pederson, 117 Wis. 68, 74; Allen *v.* Milwaukee, 128 Wis. 678; McMillan *v.* Fond du Lac, 139 Wis. 367.

In *Ohio*, it is made the duty of the city solicitor to apply in the name of the corporation for an injunction to restrain the misapplication of the funds of the corporation or the abuse of its corporate power, or the execution or performance of any contract made in contravention of the laws or ordinances governing the same, or which was procured by fraud or corruption. If the city solicitor fails, upon the request of any taxpayer, to apply for an injunction, then the taxpayer is authorized to apply. If there is no solicitor in the municipality, or other legal counsel whose duties require him to apply for the injunction, a resident taxpayer may apply to the court for an injunction restraining the illegal use of the funds of the corporation. Pierce *v.* Hagans, 79 Ohio St. 9. See also Cincinnati St. R. Co. *v.* Smith, 29 Ohio St. 291; Weir *v.* Day, 35 Ohio St. 143; Hensly *v.* Hamilton, 3 Ohio Cir. Ct. R. 201; Wood *v.* Pleasant Ridge, 12 Ohio Cir. Ct. R. 177; Pullen *v.* Smith, 26 Ohio Cir. Ct. R. 549; Cope *v.* Wellsville, 25 Weekly Law Bull. 250; Kissel *v.* Columbus Grove, 34 Weekly Law Bull. 50; aff'd 53 Ohio St. 650; Hallock *v.* Columbus, 1 Ohio N. P. N. S. 205; Smith *v.* Rockford, 4 Ohio N. P. N. S. 513.

One who is a taxpayer and property-owner in a city may invoke equity jurisdiction to set aside the action of a city board in awarding a contract in violation of law. Frame *v.* Felix, 167 Pa. St. 47.

[1] Equity has the power to restrain *the collection of taxes*, where fraud has occurred, or on proper case made, where the assessment or levy is without legal authority. *Infra*, §§ 1589, 1590, and cases; First Nat. Bank of Shawneetown *v.* Cook, 77 Ill. 622; Brandriff *v.* Harrison County, 50 Iowa, 164; Dupage County *v.* Jenks, 65 Ill. 275; Riley *v.* Western Union Tel. Co., 47 Ind. 511; Lebanon *v.* Ohio & M. R. Co., 77 Ill. 539.

The doctrine of the text was approved and applied by *Pardee*, J., in the case of the Liberty Bell, where the city of New Orleans was enjoined, at the suit

§ 1580 (915). Same Subject. Rationale of Doctrine; Author's View. — The doctrine of the preceding section is also supported

of a taxpayer, from appropriating city funds to pay for the transportation of the old Liberty Bell from Philadelphia to New Orleans for a centennial exposition in the latter place. The learned judge well observed: "Municipal corporations exhibit the highest patriotism in obeying the laws made for their government." The Liberty Bell case (Bayle *v.* N. O.), 23 Fed. Rep. 843. See also Harrington *v.* Plainview, 27 Minn. 224; Willard *v.* Comstock, 58 Wis. 565; Lynch *v.* Eastern L. F. & M. R. Co., 57 Wis. 430 (to enjoin delivery of railway aid bonds); Robertson *v.* Breedlove, 61 Tex. 316 (restraining issue of bonds by a county); Richmond *v.* Crenshaw, 76 Va. 936, and cases cited; followed Shenandoah Valley R. Co. *v.* Clarke County, 78 Va. 269; Roper *v.* McWhorter, 77 Va. 214; Sackett *v.* New Albany, 88 Ind. 473; Butler *v.* Detroit, 43 Mich. 552; Scott *v.* Alexander, 23 S. Car. 120 (aldermen required to pay the costs personally in an action restraining them from increasing the municipal debt beyond the statutory limit). The *municipal corporation* itself was held not to be entitled to invoke a court of equity to restrain the collection of a tax by State and county officers upon private property within its limits, though the tax was levied to pay its bonds alleged to be illegal. Waverly *v.* Auditor, 100 Ill. 354.

To entitle a party to relief in equity, *he must bring his case under some acknowledged head of equity jurisdiction;* the mere illegality of the tax without more, or the threat to sell property for its satisfaction, is generally held not to be sufficient, but the authorities on this point are not uniform, since some courts will, at the instance of the taxpayer, enjoin the collection of any tax or assessment that is admitted or clearly shown to be illegal or void. Dows *v.* Chicago, 11 Wall. (U. S.) 108; Hannewinkle *v.* Georgetown, 15 Wall. (U. S.) 547; Weaver *v.* State, 39 Ala. 535; Alabama Gold L. Ins. Co. *v.* Lott, 54 Ala. 499; Mobile *v.* Baldwin, 57 Ala. 61; Elkton Land Co. *v.* Ayers, 62 Ala. 413; Montgomery *v.* Sayre, 65 Ala. 564; Floyd *v.* Gilbreath, 27 Ark. 675; Savings & L. Soc. *v.* Austin, 46 Cal. 415; Columbia County *v.* Bryson, 13 Fla. 281; Cook County *v.* Chicago, B. & Q. R. Co., 35 Ill. 460; Porter *v.* Rockford, R. I. & St. L. R. Co., 76 Ill. 561; Chicago, B. & Q. R. Co. *v.* Siders, 88 Ill. 321; Lemont *v.* Singer, &c. Stone Co., 98 Ill. 95; Jeffersonville *v.* Patterson, 32 Ind. 140; Williams *v.* Pinney, 25 Iowa, 436; Burnes *v.* Atchison, 2 Kan. 454; McDonald *v.* Murphree, 45 Miss. 705; Sayre *v.* Tompkins, 23 Mo. 443; Barrow *v.* Davis, 46 Mo. 394; Heywood *v.* Buffalo, 14 N. Y. 534; Corrothers *v.* Clinton Dist. Bd. of Education, 16 W. Va. 527; Warden *v.* Fond du Lac County, 14 Wis. 618; Union Pac. R. Co. *v.* Lincoln County, 2 Dill. C. C. 297. But see *post*, §§ 1589, 1590. The payment of such portion as is alleged to be legal may be made a condition precedent to the granting of the relief sought. Deeflir *v.* Bowen, 61 Ind. 29. "The collection of a legal tax will not be restrained to prevent the enforcement of an illegal one." Covington *v.* Rockingham, 93 N. Car. 134; London *v.* Wilmington, 78 N. Car. 109; Stilz *v.* Indianapolis, 81 Ind. 582. See also High on Injunctions, § 498; more fully, *infra*, §§ 1589, 1590, and notes as to restraining the collection of illegal taxes. A resident cannot enjoin the collection of license tax for which he is liable, but a city may enjoin him from carrying on his business until he pays it (New Orleans *v.* Becker, 31 La. An. 644), upon the ground that he might by appeals, &c., protract the litigation for a long period of time, and thus carry on his business without paying tax, and after tedious litigation there might be no property out of which to collect it. *Ib.*

The author directs attention to the decision below cited of the United States Supreme Court, as *to the equitable conditions* which should be met before a court of equity will enjoin the collection of taxes. State Railroad Tax Cases, 92 U. S. 575, holding that no injunction, preliminary or final, can be granted to stay collection of taxes until it is shown that all the taxes conceded to be due or which the court can see ought to be paid, or which can be shown to be due by affidavit, have been paid or tendered

by an analogy supplied by a settled rule of equity applicable to private corporations. In these the ultimate *cestuis que trust* are the stockholders. In municipal corporations the *cestuis que trust* are in a substantial sense the inhabitants embraced within their limits. In each case the corporation, or its governing body, is a trustee.[1] If the governing body of a private corporation is acting *ultra vires* or fraudulently, the corporation is ordinarily the proper party to prevent or redress the wrong by appropriate action or suit in the name of the corporation. But if the directors will not bring such an action, our jurisprudence is not so defective as to leave creditors or shareholders remediless, and either creditors or shareholders may institute the necessary suits to protect their respective rights, making the corporation and the directors defendants. This is a necessary and wholesome doctrine. Why should a different rule apply to a municipal corporation? If the property or funds of such a corporation be illegally or wrongfully interfered with, or its powers be misused, ordinarily the action to prevent or redress the wrong should be brought by and in the name of the corporation. But if the officers of the corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant,

without demanding a receipt in full. Later cases to the same effect: National Bank *v.* Kimball, 103 U. S. 732; Albuquerque Bank *v.* Pere , 147 U. S. 87; Norwood *v.* Baker, 172 U. S. 269; People's National Bank of Lynchburg *v.* Marye, 191 U. S. 272. Suggested distinction between enjoining local and municipal taxes and State taxes levied for general revenue. Parmley *v.* St. L., I. M. & S. R. Co., 3 Dillon, 25. Where a city had disregarded the forms prescribed in its charter for the letting of wharves and in not inviting competition by publication or otherwise, and had passed an ordinance authorizing a lease of wharves upon terms disadvantageous to itself and its inhabitants, the Supreme Court of Louisiana held that individual taxpayers suing for themselves, and others in a like situation, had a standing in court in an action to prevent the execution of the lease and to annul the ordinance. Handy *v.* New Orleans, 39 La. An. 107. To same effect Conery *v.* New Orleans Water Works Co., 39 La. An. 770.

A city may be enjoined from selling land dedicated as a common, at the suit of an inhabitant whose individual rights as to his own property are threatened. Cummings *v.* St. Louis, 90 Mo. 259; see *ante*, chap. on Dedication. Where a city had reached the limit of indebtedness permitted by its charter, it was enjoined from carrying out a contract for its water supply which might have made it liable for a large increase. Davenport *v.* Kleinschmidt, 6 Mont. 502; see *ante*, chap xiv., on effect of transcending the authorized limit of indebtedness; *infra*, § 1584, note. The plaintiff in an action to contest the validity of an election authorizing the issue of county bonds for erecting public buildings, is not entitled merely upon his verified petition, as a matter of right, to a temporary injunction restraining the issue of the bonds. Johnson *v.* Wilson County, 34 Kan. 670; *supra*, § 1577, note; *post*, § 1584, note; Richmond *v.* Davis, 103 Ind. 449 (action to enjoin the unauthorized expenditure of corporate funds or making a bad investment of them). See *post*, §§ 1584, 1589, notes.

[1] Russell *v.* Tate, 52 Ark. 541, 545, citing text; Blood *v.* Manchester Electric Light Co., 68 N. H. 340.

and particularly any taxable inhabitant who will be injuriously affected, be allowed to maintain in behalf of all similarly situated a class suit to prevent or avoid the illegal or wrongful act? Such a right is especially necessary in the case of municipal and public corporations, and if it be denied to exist, they are liable to be plundered, and the taxpayers and property-owners on whom the loss will eventually fall are without effectual remedy.[1]

§ 1581 (916). **Same Subject. Judgment of the Supreme Court of the United States.** — This doctrine has received, since the foregoing sections were written, the weighty sanction of the Supreme Court of the United States. It is said by Mr. Justice Field, in delivering the judgment of the court, that "of *the right of resident taxpayers* to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property-holders of the county, may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere, upon the application of the taxpayers of a county, to prevent the consummation of a wrong, when the officers of these corporations assume, in excess of their powers, to create burdens upon property-holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be *no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate power.* The courts may be safely trusted to prevent the abuse of their process in such cases."[2]

[1] McIntyre *v.* El Paso County, 15 Colo. App. 78, quoting and approving text; Independent School Dist. No. 5 v. Collins, 15 Idaho, 535; 98 Pac. Rep. 857, citing text; Fullerton *v.* Des Moines (Iowa), 115 N. W. Rep. 107; Tukey *v.* Omaha, 54 Neb. 370, approving text; Sherburne *v.* Portsmouth, 72 N. H. 539, 541; citing text; Pierce *v.* Hagans, 79 Ohio St. 21, quoting text.

[2] Crampton *v.* Zabriskie, 101 U. S. 601, 609, *per* Mr. Justice *Field*, who refers to the preceding sections of this treatise in his opinion.

Crampton *v.* Zabriskie, *supra*, is cited, approved, and followed in the following cases: The Liberty Bell, 23 Fed. Rep. 843, 845; Roberts *v.* Bradfield, 12 App. D. C. 453; Davenport *v.* Buffington, 97 Fed. Rep. 234, 237; Inge *v.* Mobile Board of Public Works, 135 Ala. 187, 195, citing text; Bates *v.* Nome, 1 Alaska, 208, 211; Russell *v.* Tate, 52 Ark. 541, 545, citing text; Douglass *v.* Placerville, 18 Cal. 643;

§ 1582 (917). **Same Subject. State Court Decisions; Connecticut.** — The Supreme Court of Connecticut, in holding that a *citizen and taxpayer* of an incorporated city *is entitled to an injunction to restrain an illegal or wrongful appropriation of the money of the city,* says in substance that this is so because the city corporation holds its moneys for the corporators, the inhabitants of the city, to be expended for legitimate corporate purposes; and a misappropria-

Winn *v.* Shaw, 87 Cal. 631, 636, citing text; Bradford *v.* San Francisco, 112 Cal. 537, 543, approving text; Nelson *v.* Garfield County, 6 Colo. App. 279; Webster *v.* Harwinton, 32 Conn. 131; Terrett *v.* Sharon, 34 Conn. 105; Drake *v.* Phillips, 40 Ill. 388; Stevens *v.* St. Mary's Training School, 144 Ill. 336, 348; Oliver *v.* Keightley, 24 Ind. 514; Valparaiso *v.* Gardner, 97 Ind. 1; Owen County *v.* Spangler, 159 Ind. 575; Handy *v.* New Orleans, 39 La. An. 107; Telle *v.* St. Tammany Parish School Board, 44 La. An. 365, 368; City Item Co-Op. Ptg. Co. *v.* New Orleans, 51 La. An. 713, 717; Reynolds *v.* Waterville, 92 Me. 292; Baltimore *v.* Gill, 31 Md. 375; Flynn *v.* Little Falls Electric & Water Co., 74 Minn. 180, citing text; Hooper *v.* Ely, 46 Mo. 505; Davenport *v.* Kleinschmidt, 6 Mont. 502, 522; Normand *v.* Otoe County, 8 Neb. 18; Tukey *v.* Omaha, 54 Neb. 370, 378; State *v.* White Pine County, 22 Nev. 80, 87; Merrill *v.* Plainfield, 45 N. H. 126; Sherburne *v.* Portsmouth, 72 N. H. 539, 540; Gifford *v.* New Jersey R. & T. Co., 10 N. J. Eq. 171; Laughlin *v.* Santa Fe County, 3 N. Mex. 420, 423; Catron *v.* Santa Fe County, 5 N. Mex. 203, 234; Stratford *v.* Greensboro, 124 N. Car. 127, 134; Wadsworth *v.* Concord, 133 N. Car. 587, 593; Pierce *v.* Hagans, 79 Ohio St. 9, 18; Kellogg *v.* Comanche County School Dist. No. 10, 13 Okla. 285, 297; Page *v.* Allen, 58 Pa. St. 338; Graves *v.* Jasper School Township, 2 S. Dak. 414, 418; Austin *v.* McCall, 95 Tex. 565, 577; Brummitt *v.* Ogden Water Works Co., 33 Utah, 289; Lynchburg & R. St. R. Co. *v.* Dameron, 95 Va. 545, 554; Johnson *v.* Black, 103 Va. 477, 484; Wade *v.* Richmond, 18 Gratt. (Va.) 583; Stevens *v.* Rutland & B. R. Co., 29 Vt. 546; Times Publishing Co. *v.* Everett, 9 Wash. 518, 522; Krieschel *v.* Snohomish County, 12 Wash. 428, 438; Christie *v.* Malden, 23 W. Va. 667, 671; Nevil *v.* Clifford, 55 Wis. 161, 172. See also Patterson *v.* Bowes, 4 Grant (Can.), 170; West Gwillimbury *v.* Hamilton & N. W. R. Co., 23 Grant (Can.), 383.

Injunction in favor of individuals to prevent the municipal authorities from encroaching upon private property. See Leverich *v.* Mobile, 110 Fed. Rep. 170. A taxpayer has right to restrain a city from holding an election in a new ward, unlawfully created, and from expending the public revenues in defraying the expenses thereof. Cascaden *v.* Waterloo, 106 Iowa, 673. In *Iowa* a mere taxpayer cannot question the power of a city to grant an exclusive right to construct and operate water-works. Dodge *v.* Council Bluffs, 57 Iowa, 560; Grant *v.* Davenport, 36 Iowa, 396. See also Reid *v.* Trowbridge, 78 Miss. 542, 549; Patton *v.* Chattanooga, 108 Tenn. 197; Brummitt *v.* Ogden Water Works Co., 33 Utah, 285. See *ante,* § 1308, chapter on Public Utilities; *ante,* chaps. xxv. and xxvi.

The proper remedy against applying part of a city tax to payment of an indebtedness in excess of the constitutional limit is by an action to restrain, not its collection, but its misapplication. Strohm *v.* Iowa City, 47 Iowa, 42. A citizen and taxpayer held not to be entitled to enjoin a city council from entering into a contract to light the streets without showing that he would sustain injury by the proposed action. Searle *v.* Abraham, 73 Iowa, 507; Morris *v.* Municipal Gas Co., 121 La. 1016; Brennan *v.* Sewerage & Water Board, 108 La. 569.

If county bonds are issued and placed in the hands of individuals for a railway company, before performance of the conditions upon which they were voted, they being improperly in such persons' hands, any disposition of them, except delivering them back to the county authorities, may be enjoined. Jackson County *v.* Brush, 77 Ill. 59.

ion of these funds is an injury to the taxpayer, for which no other emedy is so effectual or appropriate. If the money is taken out f the treasury, one person cannot well sue either the city or the erson who receives the money for his proportion, and it is impracicable for all to unite in such a suit.[1] And when the amount thus iisappropriated is subsequently needed for legitimate purposes, a itizen cannot resist the necessary tax to raise the same because ie corporation had at a prior time misappropriated money.[2]

§ 1583 (918). **Same Subject. Maryland Decision.** — The same octrine has been expressly sanctioned by the Court of Appeals in Iaryland, in a case in which it was held that *residents and taxayers* of a city might file a bill in equity to restrain the corporation nd its officers from taking steps to carry out a city ordinance reating a debt in violation of the Constitution.[3] Mr. Chief Justice

[1] Washington *v.* Harvard, 8 Cush. Mass.) 66; *post*, chap. xxxii. § 1616.

[2] New London *v.* Brainard, 22 Conn. 52 (appropriating money to celebrate ie Fourth of July). Approved, Harey *v.* Indianapolis, 32 Ind. 244; *ante*, 309. Scofield *v.* Eighth School Dist. llegal use of school-room), 27 Conn. 99, 504, applying the same principle the misappropriation of corporate roperty; Webster *v.* Harwinton, 32 onn. 131; Terrett *v.* Sharon, 34 Conn. 05; Jacksonport *v.* Watson, 33 Ark. 04; Liberty Bell Case, 23 Fed. Rep. 43; noted, *supra*, § 1579, note; aproving text; Sherburne *v.* Portsmouth, 2 N. H. 539, 540, citing text.

Though money has been illegally oted by a city or town, and though the etitioners are entitled to resort to quity to restrain illegal appropriations, et if they have been guilty of *gross ches*, and have knowingly permitted *ird persons* to incur liabilities in good ith, relying upon such appropriation r reimbursement, an *injunction* will e denied. Tash *v.* Adams, 10 Cush. Mass.) 252; s. p. Stewart *v.* Kalamaoo, 30 Mich. 65, 69; People *v.* Mayard, 15 Mich. 463. But parties in hose favor the illegal vote was made, ough they incurred expenditures on ie faith of it, are not third persons in e meaning of the principle. Claflin Hopkinton, 4 Gray (Mass.), 502. mpare New London *v.* Brainard, 22 nn. 552, *supra;* Hodges *v.* Buffalo, Denio (N. Y.), 110. See Index, tit. *tra Vires.*

If an appropriation of money be made for *two objects, one lawful* and *the other not*, and it cannot be distinguished and separated, the whole will be held void; otherwise the court will enjoin or relieve against the expenditure which is unlawful. Roberts *v.* New York, 5 Abb. (N. Y.) Pr. R. 41; Howes *v.* Racine, 21 Wis. 514; Jacksonport *v.* Watson, 33 Ark. 704, approving text.

County supervisors cannot, without the aid of legislative authority, pay a debt, though meritorious if it had been legally contracted, which is not legally obligatory upon the county. People *v.* Stout, 23 Barb. (N. Y.) 338, 349. See *ante*, §§ 121, 787; *infra*, § 1584.

[3] Baltimore *v.* Gill, 31 Md. 375, 395 (*ante*, § 294); approving New London *v.* Brainard, 22 Conn. 552, *supra*, and Merrill *v.* Plainfield, 45 N. H. 126; and disapproving Roosevelt *v.* Draper, 23 N. Y. 318, and Doolittle *v.* Broome County, 18 N. Y. 155, mentioned below, § 1585. See also in *Maryland*, Frederick *v.* Groshen, 30 Md. 436; Baltimore *v.* Porter, 18 Md. 284; Baltimore *v.* Grand Lodge, 44 Md. 436, 445; St. Mary's Industrial School *v.* Brown, 45 Md. 310, 326; Kelly *v.* Baltimore, 53 Md. 134; Baltimore *v.* Johnson, 62 Md. 225; Baltimore *v.* Keyser, 72 Md. 106, 108; Packard *v.* Hayes, 94 Md. 233, 252; Bennett *v.* Baltimore, 106 Md. 484, 496, cited *infra*, § 1587, note. See Coulson *v.* Portland, Deady, 481.

Bartol, in giving the judgment of that tribunal, observed that, "in this State the courts have always maintained with jealous vigilance the restraints and limitations imposed by law upon the exercise of power by municipal and other corporations. If the right to maintain such a bill as this be denied, citizens or property-holders would be without adequate remedy to prevent the injury which might result to them from the unauthorized or illegal acts of the municipal government or its officers and agents."

§ 1584 (919). **Same Subject. Decisions elsewhere.** — So elsewhere, and because that the remedy in equity is more direct, speedy, and effectual than by *certiorari*, it is held that equity will entertain jurisdiction of a bill on behalf of taxpayers *to enjoin the misapplication of the moneys* of the corporation. Based upon such considerations,[1] it has been well decided that one or more taxpayers,

[1] Bates *v.* Nome, 1 Alaska, 208; Russell *v.* Tate, 52 Ark. 541, 545, citing text; Americus *v.* Perry, 114 Ga. 871; Colton *v.* Hanchett, 13 Ill. 615; Mt. Carbon C. & R. Co. *v.* Blanchard, 54 Ill. 240; Sherlock *v.* Winnetka, 59 Ill. 389; Stevens *v.* St. Mary's Training School, 144 Ill. 336, 348, citing text; Harney *v.* Indianapolis, 32 Ind. 244; Madison *v.* Smith, 83 Ind. 502; Richmond *v.* Davis, 103 Ind. 449; Pleasants *v.* Shreveport, 110 La. 1046; Nerlien *v.* Brooten, 94 Minn. 361; Newmeyer *v.* Missouri & M. R. Co., 52 Mo. 81 (holding that a bill by taxpayers of a county in the name of themselves and all the other taxpayers of the county to annul an illegal railroad subscription by the county court was well brought, and that the State was not a necessary party); Follmer *v.* Nuckolls County, 6 Neb. 204; Sherman *v.* Carr, 8 R. I. 431; Place *v.* Providence, 12 R. I. 1, approving text; Wade *v.* Richmond, 18 Gratt. (Va.) 583; *infra*, § 1589.

Any citizen and taxpayer may prevent the issue and sale of void bonds by a municipal corporation. Dunbar *v.* Canyon County, 5 Idaho, 407; Cole *v.* Hanchett, 13 Ill. 615; Drake *v.* Phillips, 40 Ill. 388, 392; Perry *v.* Kinnear, 42 Ill. 160; Beauchamp *v.* Kankakee County, 45 Ill. 274; Sherlock *v.* Winnetka, 59 Ill. 389; Marshall *v.* Silliman, 61 Ill. 218; Livingston County *v.* Weider, 64 Ill. 427; Chestnutwood *v.* Hood, 68 Ill. 132; Springfield *v.* Edwards, 84 Ill. 626; Wright *v.* Bishop, 88 Ill. 302; Delaware County *v.* McClintock, 51 Ind. 325; Allison *v.* Louisville, H. C. & W. R. Co., 9 Bush (Ky.), 247; Frantz *v.* Jacob, 88 Ky. 525; Hamilton *v.* Detroit, 85 Minn. 83; State *v.* Ottawa County, 5 Ohio N. P. 260; Lynchburg & R. St. R. Co. *v.* Dameron, 95 Va. 545; Bound *v.* Wisconsin Cent. R. Co., 45 Wis. 543.

A taxpayer's bill to cancel void bonds of a municipality need not allege a restoration of the consideration, or even offer to restore the consideration. Miller *v.* Perris Irrigation District, 92 Fed. Rep. 263, 267. An act of the legislature authorizing a municipal corporation *to subscribe for stock in railroads*, and to issue bonds to pay for the same, does not authorize it to contribute to a railroad by indorsing its bonds; and upon the complaint of a taxpayer, or citizen of the corporation, a court of equity will enjoin such indorsement. Blake *v.* Macon, 53 Ga. 172. In a suit by taxpayers to enjoin collection of a tax in aid of a subscription to a railroad, it is error to admit the directors of the company as parties defendant. The company has no interest until the tax is collected. Jager *v.* Doherty, 61 Ind. 528.

The decisions in *Missouri* on the subject under consideration are reviewed and the result stated in an opinion of the Supreme Court of that State in the case of Ranney *v.* Bader, 67 Mo. 476, in substance as follows: It was held, says the court, in the case of North Missouri R. Co. *v.* Maguire, 49 Mo. 482, 483, that when the property is liable to be taxed in any form,

without showing any other injury than that which they will suffer in common with other property-holders of the municipality, may file a bill to restrain the allowance and payment of an illegal claim, or the collection of a tax for unauthorized objects, such as, for example, to pay a fraudulent or collusive judgment;[1] or to pay the

though irregularly assessed, the collector would not be liable to the taxpayer for the amount collected. In the case of Rubey *v.* Shain, 54 Mo. 207, it was held that when the assessment is illegal, or when it is based on the illegal act of the county court, the remedy of the taxpayer must be by a proceeding to arrest the execution of the illegal assessment and collection of the tax. This may be done by *certiorari*, under the authority of the cases of State *v.* St. Louis County Ct., 52 Mo. 244, and State *v.* Dowling, 50 Mo. 134. It may also be done under authority of Newmeyer *v.* Missouri & Miss. R. Co., 52 Mo. 81, by any taxpayer who may for himself, and on behalf of all other taxpayers similarly situated, bring a bill in equity to annul the illegal acts of county courts in respect to assessing and levying taxes. Wood *v.* Draper, 24 Barb. (N. Y.) 187. In the State *v.* Saline County Court, 51 Mo. 350, it was held that *the State, through its Attorney-General*, or other proper law officer, might maintain a proceeding by injunction to restrain the imposition and collection of an illegal tax. It is said the above cases are not in strict accord with Deane *v.* Todd, 22 Mo. 90; Sayre *v.* Tompkins, 23 Mo. 443; Barrow *v.* Davis, 46 Mo. 394; Leslie *v.* St. Louis, 47 Mo. 474, 478; Steines *v.* Franklin County, 48 Mo. 167, 176; Mowrer *v.* Helferstine, 80 Mo. 23, which assert the doctrine that courts of equity will not interfere by injunction to restrain the collection of an illegal and void tax. The distinct ground upon which the court based its conclusion was that in such cases courts of equity will not interfere, because there was a complete remedy afforded to the injured party by an action at law against the officer. There is, however, another ground of equitable jurisdiction which reconciles the conclusion reached in the cases of Newmeyer *v.* Missouri & Miss. R. Co., 52 Mo. 81; and Rubey *v.* Shain, 54 Mo. 207, *supra*, with the cases above cited, *i.e.*, that equity will maintain jurisdiction to prevent multiplicity of suits; and no stronger case could be put for entertaining jurisdiction under this rule than is presented when one taxpayer, for himself and all other taxpayers of a township or county similarly interested, brings his bill, asking the chancellor to put forth restraining process to prevent the imposition and collection of an unauthorized tax, and thus settle in one suit what it would take hundreds, and perhaps thousands, to do if such relief were denied, and the parties subject to the payment of such tax were driven, each one, to his action at law for redress. Ranney *v.* Bader, 67 Mo. 476. See *infra*, §§ 1586, 1590, note.

Action properly brought to avoid multiplicity of suits. Michael *v.* St. Louis, 112 Mo. 610. Injunction lies on suit of taxpayer to restrain illegal diversion of public funds by officers in charge of the funds. Black *v.* Ross, 37 Mo. App. 250. See also Black *v.* Cornell, 30 Mo. App. 641. Adjoining property holder may maintain a bill in equity to cancel a tax bill for illegal and void tax against his property, or to enjoin its issuance and delivery on the theory that the tax bill is, or will be, a cloud on the title. Verdin *v.* St. Louis, 131 Mo. 26.

[1] Barr *v.* Deniston, 19 N. H. 170, 180. See also in the same State, Merrill *v.* Plainfield, 45 N. H. 126; *supra*, §§ 1582 and notes, 1583. See also Hart *v.* Buckner, 54 Fed. Rep. 925; Mt. Carbon Coal & R. Co. *v.* Blanchard, 54 Ill. 240; Gill *v.* Lake Charles, 119 La. 17; Pettibone *v.* Hamilton, 40 Wis. 402; Nevil *v.* Clifford, 55 Wis. 161, 172, quoting text; Balch *v.* Beach, 119 Wis. 77.

The motive of the taxpayer in bringing suit is immaterial. Mock *v.* Santa Rosa, 126 Cal. 330; Moore *v.* Hupp, 17 Idaho, 232, 105 Pac. Rep. 209; Packard *v.* Hayes, 94 Md. 233, 252; Mazet *v.* Pittsburgh, 137 Pa. 548. Contrary view in Johnson *v.* New Orleans, 105 La. 149; Baker *v.* Grand Rapids, 142 Mich. 687; Vadakin *v.* Crilly, 28 Ohio Cir. Ct. R. 634, aff'd 73 Ohio St. 380. See also Gallagher *v.* Johnson, 1 Ohio

expenses of a railroad survey which there was no power to make;[1] or to refund to individuals money voluntarily contributed by them for the purpose of avoiding a draft in the town.[2]

§ 1585 (920). **Same Subject. New York Decisions.** — But on the other hand, it has been several times decided in New York that *resident citizens or taxpayers* of a municipal corporation cannot, as such merely, either on their own behalf or on behalf of themselves and all others having a like interest, maintain a suit to restrain or to avoid corporate acts alleged to be wrongful. The principle applicable to public nuisances is there adopted. Such wrongful acts are considered to affect the whole public; and the public, by its authorized public officers, must institute the proceeding to prevent or redress the wrongful act, unless a private person is threatened with or suffers some *peculiar* or *special* damage to his individual interest, — that is, some damage distinct from that of every other

Dec. 264; Fergus *v.* Columbus, 8 Ohio Dec. 290; 6 Ohio N. P. 82; Johnson *v.* Farley, 11 Ohio Dec. 639; 8 Ohio N. P. 498; Ampt *v.* Cincinnati, 15 Ohio Dec. 237, 241, 243; Brown *v.* Toledo, 5 Ohio Cir. Dec. 115. As to the rule in *New York*, see *post*, § 1585.

[1] Douglass *v.* Placerville, 18 Cal. 643.

[2] Drake *v.* Phillips, 40 Ill. 388; *ante*, § 152; *supra*, §§ 1579 and notes, 1582, 1583, and notes; *infra*, § 1586. In *Tennessee* a bill in equity *by municipal taxpayers* without the Attorney-General lies to enjoin the *unauthorized issue of scrip to circulate as money*, or unauthorized promises to pay money at a future day. Colburn *v.* Chattanooga, 17 Am. L. Rep. N. S. 191. See *In re* Bloomsburg Election, 18 Pa. Co. Ct. R. 449. Where certain bonds were *void*, it was held that an injunction in an action by one or more taxpayers to be affected, for themselves and others, is a proper remedy, and will issue to restrain the levy of taxes with which to pay principal and interest of the bonds. Morton *v.* Carlin, 51 Neb. 202.

In *Iowa* citizens and taxpayers may enjoin the expenditure of county moneys by the county officers in *the erection of a court-house at a place not the county-seat* of the county, the duty of interfering in such cases not being devolved on any public officer. Rice *v.* Smith, 9 Iowa, 570. See Grant *v.* Davenport, 36 Iowa, 396; Fleming *v.* Mershon, 37 Iowa, 413. Similar principles, Smith *v.* Magourich, 44 Ga. 163. A corporation will not be allowed to purchase property, in order by controlling it to compel a taxpayer to abandon or compromise his litigation with the municipality. Place *v.* Providence, 12 R. I. 1, citing text; S. P. State *v.* Marion County, 21 Kan. 419.

Where the indebtedness of a city *exceeds the constitutional limitations* of the percentum of the valuation of taxable property, the city will be enjoined from the levy and collection of a tax for the purpose of paying additional indebtedness incurred, before such levy, in violation of the Constitution. Howell *v.* Peoria, 90 Ill. 104, affirming Springfield *v.* Edwards, 84 Ill. 626, and Law *v.* People, 87 Ill. 385, 395; *supra*, § 1579, note; Valparaiso *v.* Gardner (unauthorized contract), 97 Ind. 1. Further on this point, see *ante*, chap. vi. § 215. Index, tit. *Limitation of Indebtedness*.

As to the jurisdiction of the Federal courts of a taxpayer's action to restrain the issue of municipal bonds in so far as the same is affected by the amount in controversy, see Brown *v.* Trousdale, 138 U. S. 389; El Paso Water Co. *v.* El Paso, 152 U. S. 157; Colvin *v.* Jacksonville, 158 U. S. 456, Ottumwa *v.* City Water Supply Co., 119 Fed. Rep. 315; Helena *v.* Helena Water Works, 173 Fed. Rep. 18.

inhabitant, in which case he may maintain his bill for an injunction or for relief in his own name. Private persons may thus protect their own interests, but they cannot "assume to be the champions of the community, and in its behalf challenge the public officers to meet them in the courts of justice to defend their official acts." Therefore an illegal or wrongful alienation of property by a corporation, or an illegal or wrongful act which may or will result in increased taxation, cannot be questioned by a private person or taxpayer or property-owner, unless it be *specially* injurious to him.[1]

[1] This doctrine, left open in Ketchum *v.* Buffalo, 14 N. Y. 356, and Guilford *v.* Chenango County, 13 N. Y. 143, was first definitely adjudged in *New York* in the Court of Appeals, in Doolittle *v.* Broome County, 18 N. Y. 155; disapproving, on this point, the cases of Adriance *v.* New York, 1 Barb. (N. Y.) 19; Brower *v.* New York, 3 Barb. (N. Y.) 254; Christopher *v.* New York, 13 Barb. (N. Y.) 567; Milhau *v.* Sharp, 15 Barb. (N. Y.) 193; *Ib.* 244; and De Baum *v.* New York, 16 Barb. (N. Y.) 392; Texarkana *v.* Leach, 66 Ark. 40; Strickland *v.* Knight, 47 Fla. 327; Johnson *v.* New Orleans, 105 La. 149; Melody *v.* Goodrich, 67 N. Y. App. Div. 368; Queens County Water Co. *v.* Monroe, 83 N. Y. App. Div. 105; Schwede *v.* Hemrich Bros. Brewing Co., 29 Wash. 21. See also Gerlach *v.* Brandreth, 34 N. Y. App. Div. 197; Tifft *v.* Buffalo, 65 Barb. (N. Y.) 460; Korff *v.* Green, 16 How. Prac. 140; Guest *v.* Brooklyn, 69 N. Y. 506; Wood *v.* Victoria, 18 Tex. Civ. App. 573.

So far as the above and other prior *New York* cases hold "that a *person owning property fronting on a public street* is entitled to maintain an action to restrain the commission of an act of nuisance in the street, which, from the location of the plaintiff's premises, would render it specially injurious to him, I am of opinion that the law is correctly laid down, as in Davis *v.* New York, 14 N. Y. 506." *Per Denio*, J., 18 N. Y. 163, *supra*, and observe street cases reviewed on page 160. (See *ante*, § 1132.) Doctrine of this case was adhered to and extended to *cities*, in Roosevelt *v.* Draper, 23 N. Y. 318, which also considers the question when relief may be had by a *creditor*. Demarest *v.* Wickham, 63 N. Y. 320, 324. On same principle taxpayers cannot as such maintain a bill in equity against the custodian of an illegal tax to restrain its application to the purposes for which the tax was raised. Kilbourne *v.* St. John, 59 N. Y. 21. The successful bidder for the lease of the franchise of a ferry owned by the city was a railroad corporation. A taxpayer under the Act of 1881, chap. 531, "for the protection of the taxpayer," filed a bill to set aside the lease as illegal. It was held that the plaintiff as a private citizen, having no interest except that of any other citizen, could not raise the question that the railroad company had no power to take the lease. Such a question may be raised by the Attorney-General or by a stockholder, but a taxpayer is not authorized to do so by the Act of 1881. Starin *v.* Edson, 112 N. Y. 206. Where, by statute, relief against an assessment for a local improvement can be granted only to the extent to which the assessment has been increased by fraud or irregularity, the petitioner must set forth and prove by competent evidence that such excess actually exists. Mead, *In re*, 74 N. Y. 216.

A similar rule to that in *New York* prevails in *California*, Merriam *v.* Yuba County, 72 Cal. 517, holding that a taxpayer cannot restrain supervisors of county from auditing and ordering paid a claim, on the ground that it is not a valid demand and against the county, following Linden *v.* Case, 46 Cal. 171; McCoy *v.* Briant, 53 Cal. 247; McBride *v.* Newlin, 129 Cal. 36. See also Barto *v.* San Francisco, 135 Cal. 494, but *quære*, and in *Louisiana*, Droz *v.* Baton Rouge, 36 La. An. 307.

Massachusetts decisions and statute. Views similar to those held by the Court of Appeals in *New York* have received judicial sanction in *Massachusetts;* and in view of the decisions there made, it seems to be unsettled or somewhat difficult to ascertain, except in the cases for which the statute (Gen. Sts.

But by statute,[1] the right is now conferred upon taxpayers to maintain an action against the officers and agents of a municipality

chap. xviii. § 79) has made provision, in what manner municipal corporations can be made to observe their duties or prevented from violating them to the injury of the inhabitants. In Hale *v.* Cushman, 6 Met. (Mass.) 425, which was a bill in equity by sixty-seven legal voters and taxpayers to restrain the officers of a town from paying money under a vote for an alleged unauthorized purpose, the court dismissed the bill on the ground that its equity jurisdiction as conferred by statute did not extend to the case, since "the bill set forth no *trust* in which the complainants have an interest." The statute above cited (Gen. Sts. chap. xviii. § 79) provides that "when a town votes to raise by taxation or pledge of its credit, or to pay from its treasury any money, for a purpose other than those for which it has *the legal* right and power, the Supreme Judicial Court may, upon the suit or petition of not less than ten taxable inhabitants thereof, hear and determine the same in equity." Frost *v.* Belmont, 6 Allen (Mass.), 152.

In cases not covered by this statute it is considered that the *equity jurisdiction* of the Supreme Judicial Court does not extend to compelling the performance of a duty by a municipal corporation or its officers upon the relation or suit of individual taxpayers. Carlton *v.* Salem, 103 Mass. 141; Attorney-General *v.* Salem, *Ib.* 138. In these cases the court held that neither by information in the nature of a *quo warranto*, nor on a bill in equity by the Attorney-General, or by a bill in equity by taxable inhabitants, under the statute, could the city of Salem be made to observe the duties enjoined upon it by statute in relation to supplying the city with water. The court seems to treat the wrong as a *private* wrong; but is it such? It denies that there is a *trust* over which a court of equity has jurisdiction; but see Attorney-General *v.* Dublin, 1 Bligh N. R. 312 (*supra*, §§ 1574, 1575, note), which seems in principle analogous, in which the House of Lords declared there was such a trust as fell within the cognizance of a court of equity. The result in *Massachusetts* may be influenced by the somewhat peculiar nature of the equity jurisdiction of the Supreme Judicial Court, though such does not appear to be the case. For the construction of the Massachusetts statute conferring jurisdiction upon the courts at the instance of taxpayers, see Mead *v.* Acton, 139 Mass. 341; Baldwin *v.* Wilbraham, 140 Mass. 459; Parsons *v.* Northampton, 154 Mass. 410; Prince *v.* Crocker, 166 Mass. 347, 358; Waters *v.* Bonvouloir, 172 Mass. 286; Draper *v.* Fall River, 185 Mass. 142; Hodgdon *v.* Haverhill, 193 Mass. 406.

In the case of the Attorney-General *v.* Boston, 123 Mass. 460, it was held that the Attorney-General might, where *mandamus* was the appropriate remedy, file an information for a *mandamus* to enforce the performance, by a city corporation, of a public duty; and the justness of the above criticism on the previous cases seems to be recognized by the following observations of the Chief Justice, explaining and qualifying the Attorney-General *v.* Salem, 103 Mass. 138, *supra:*

"The learned counsel for the city," says *Gray*, C. J., "rely on Attorney-General *v.* Salem, 103 Mass. 138, as conclusive against the application of the Attorney-General. But nothing was adjudged in that case which supports the position. The decision there was that the failure of the city of Salem to establish, as required by statute, such rates, for the use by its citizens of the water supplied by the waterworks constructed by the city, as to pay the interest upon the cost of constructing and the expenses of operating those works, was neither such a usurpation of a franchise as would support an information in the nature of a *quo warranto*, nor such a public wrong as entitled the Attorney-General to maintain an information in equity. The question whether he could apply for a *writ of mandamus* was not before the court. The remark in the opinion, that the grievance complained of was *not a public wrong* in which every subject of the State was interested, and therefore could not be redressed by a public prosecution or proceeding, went beyond what the decision of the case required, and *is not quite accurate.* If

[1] Laws of New York, 1892, chap. 301; Laws, 1909, chap. 29, art. 4.

or the purpose of restraining illegal and wasteful acts. Any person or persons whose assessment shall amount to a designated sum and

he water-rates had been collected and misapplied by the city, there would have been such a misappropriation of trust funds held by the city for a public charitable purpose as would have supported an information in equity in the name of the Attorney-General. Attorney-General *v.* Dublin, 1 Bligh N. R. 312; Attorney-General *v.* Liverpool, 1 Mylne & Cr. 171, 201; Jones *v.* Williams, Ambl. 651; Vidal *v.* Girard, 2 How. (U. S.) 127, 189, 190; Drury *v.* Natick, 10 Allen (Mass.), 169, 178. The point decided, as already observed, was only that the case did not show such a public wrong as could be redressed by information in equity; and the true ground upon which that decision rests is that, when no misapplication of funds held upon a public trust and no nuisance to the public are shown, *the appropriate remedy to compel performance of a duty imposed upon a corporation by statute is not by decree in equity, but by writ of mandamus at common law.* Attorney-General *v.* Reynolds, 1 Eq. Cas. Ab. 131; Attorney-General *v.* Birmingham & O. J. R. Co., 4 De G. & Sm. 490, 498, and 3 Macn. & Gord. 453, 462; Adams *v.* London R. Co., 2 Macn. & Gord. 118, 133; Leominster Canal Nav. *v.* Shrewsbury & H. R. Co., 3 Kay & Johns. 654, 673; Attorney-General *v.* Tudor Ice Co., 104 Mass. 239." See *supra*, §§ 1482, 1507, 1513. The occupant of a tenement in a city entitled under the statute and ordinances of the city corporation to the use of water therein on payment or tender of the rate, may *restrain the city* and its officers *from illegally cutting off the supply of water.* Young *v.* Boston, 104 Mass. 95.

A statute similar to that in *Massachusetts* exists in *Maine.* Johnson *v.* Thorndike, 56 Me. 32. The municipal corporation must be a *party.* Allen *v.* Turner, 11 Gray (Mass.), 426. City collector is a *proper defendant.* Anderson *v.* State, 23 Miss. 459; New London *v.* Brainard, 22 Conn. 552.

The *New York* view was adopted in *Kansas*, where it is held that a suit having for its object the restraining of a county board from allowing a claim alleged to be illegal, and the clerk from drawing a warrant therefor, cannot be maintained by a person having no other interest than one common to all the resident taxpayers of the county. Such a suit, it is further held, cannot be maintained by a private person, unless the act complained of produces some peculiar damage to his individual interests, or affects his rights in a different manner from other members of the community. Craft *v.* Jackson County, 5 Kan. 518. See also, as to restraining void tax, Burnes *v.* Atchison, 2 Kan. 454. Compare Leavenworth *v.* Norton, 1 Kan. 432; Spencer *v.* Nemaha School Dist., 15 Kan. 259; Water Light & Gas Co. *v.* Hutchinson Interurban R. Co., 74 Kan. 661.

The *New York* view, although at first adopted in *Minnesota* (Conklin *v.* Fillmore County, 13 Minn. 454; Dawson *v.* St. Paul F. & M. Ins. Co., 15 Minn. 136), was afterwards rejected, and a taxpayer held to have the right, in the absence of an adequate remedy at law, to enjoin the illegal creation of a debt which will increase his share of taxation. Hodgman *v.* Chicago & St. P. R. Co., 20 Minn. 48; Harrington *v.* Plainview, 27 Minn. 224. See Merritt *v.* Duluth, 103 Minn. 236. The subject is discussed by Mr. Justice *Campbell*, in Bagg *v.* Detroit, 5 Mich. 336, 346, and in Chaffee *v.* Granger, 6 Mich. 51; see also Williams *v.* Detroit, 2 Mich. 560; Miller *v.* Grundy, 13 Mich. 540; Butler *v.* Detroit, 43 Mich. 552; Valparaiso *v.* Gardner, 97 Ind. 1; Kelly *v.* Chicago, 62 Ill. 279; *ante*, § 1579, and cases in note; *infra*, § 1586. See and compare Brown *v.* Manning, 6 Ohio, 298; *Ib.* 102; Denton *v.* Jackson, 2 Johns. (N. Y.) Ch. 320; State *v.* Perry County, 5 Ohio St. 497, 502; Culbertson *v.* Cincinnati, 16 Ohio, 579. A taxable inhabitant has no legal right to *intervene* in a pending suit and defend the action prosecuted against the corporation. Cornell College *v.* Iowa County, 32 Iowa, 520.

In *Wisconsin*, it is held that general taxpayers, as such, have no interest in the validity of special assessments and are not entitled to enjoin the collection of special assessments. Cawker *v.* Central Bithulithic Pav. Co., 133 Wis. 29.

In *Michigan*, a taxpayer, merely as such, without any allegation that

who shall have certain qualifications is entitled to bring the action upon furnishing a bond.[1] The wrongs for which redress is provided by the statute are of a threefold character, viz., first, to prevent any illegal official act; second, to prevent waste or injury to the property of the municipality; and third, to restore and make good property, funds, or estate of the municipality. The first class of wrongs provided for by the statute is simply defined as "an illegal official act," and the statute contains no express provision that the illegal official act against which redress is sought be one which has resulted or will result in loss or injury to the municipality. So far as the literal language of the statute is concerned any illegal official act may be prevented at the suit of a taxpayer having the requisite status as such. This liberal interpretation of the statute has been supported by the courts.[2] The second class of wrongs, that concern-

he will sustain pecuniary loss by the action of the municipal authorities, cannot maintain an action to restrain the municipality from entering into an unauthorized contract. Kimmerle *v.* Cassopolis, 160 Mich. 90; 125 N. W. Rep. 65.

In *Louisiana*, a taxpayer's suit must be *bona fide* on the part of the plaintiff, and have the object to assert and protect the individual rights of the plaintiff, or those common to all taxpayers; or to vindicate the charter of the corporation against ordinances or attempts to enact ordinances unauthorized thereby, or in conflict therewith; or which the council may seek to pass in a manner not in compliance with the charter. Taxpayers cannot, as such, lend themselves in a suit of this character to others who have an interest to subserve but who prefer to keep in the background. Johnson *v.* New Orleans, 105 La. 149.

[1] *Jurisdiction of Federal Courts* not defeated by this statute. Seccomb *v.* Wurster, 83 Fed. Rep. 856. Action cannot be maintained for wrongful act of city officers when another statute furnishes mode of relief. Lutes *v.* Briggs, 64 N. Y. 404; rev'g 5 Hun (N. Y.), 67. Right to maintain an action under the statute does not turn upon the exercise of the general jurisdiction of a court of equity. Metzger *v.* Attica & A. R. Co., 79 N. Y. 171.

Statute includes cases where a remedy might have been obtained by the town by an action at law. Osterhoudt *v.* Rigney, 98 N. Y. 222, 231. A taxpayer may have relief although a court of equity would not have taken cognizance of such action. Hurlburt *v.* Banks, 52 How. Pr. (N. Y.) 196; 1 Abb. N. C. 157. The remedy applies as much to wrongs which are threatened as to those which have been wholly or partly consummated by some illegal or wasteful or injurious act. Williams *v.* Boynton, 147 N. Y. 426, aff'g 71 Hun (N. Y.), 309. Action of the common council in the nature of a threat to waste the funds of the city. West *v.* Utica, 71 Hun (N. Y.), 540. Consolidation of town with city held to terminate life of town board and also to terminate illegal agreement and to render injunction unnecessary. Parfitt *v.* Furguson, 159 N. Y. 111, aff'g 3 N. Y. App. Div. 176. Action to restrain board of improvements from voting to approve contract. Press Publishing Co. *v.* Holahan, 29 N. Y. Misc. 684.

[2] The statute is to be liberally construed. Queens County Water Co. *v.* Monroe, 83 N. Y. App. Div. 105. Employment of inspector of lighting not qualified for the office under civil service law held to be an illegal act. Peck *v.* Belknap, 130 N. Y. 394, 399. City seeking to recover possession of real estate belonging to it is not exercising any function of general public interest, and its action for that purpose is not an illegal act within the statute. Rogers *v.* O'Brien, 153 N. Y. 357, aff'g 7 N. Y. App. Div. 612; Sheehy *v.* Clausen, 26 N. Y. Misc. 269; Wilkins *v.* New York, 9 N. Y. Misc. 610; Olp *v.* Leddick, 59 Hun (N. Y.), 627.

The term "illegal official act" used in the taxpayer's statute is scarcely

ng waste of or injury to the property, funds, and estate of the municipality, has been the subject of judicial consideration and

usceptible of definition in such a nanner as to throw any light upon he remedy conferred by the act. An llegal official act which may be the ubject of a taxpayer's action may be ny action of a municipal officer hich is not authorized by law or hich is in excess of the authority onferred by law. In actions brought y taxpayers the court has taken urisdiction and *has restrained or nnulled official acts of great diversity f character. Lease of market lands* by nunicipal authorities for use as a laughter-house enjoined as an illeal official act. Bird *v.* Grout, 106 App. Div. 159. Common council *creting an office without express authorty* in the charter an illegal official act. O'Connor *v.* Walsh, 83 N. Y. App. Div. 179. *Failure to give notice of earing prior* to purchase of land, as equired by statute, an illegal official ct and enjoined. Queens County Water Co. *v.* Monroe, 83 N. Y. App. Div. 105. An offer of judgment by he corporation counsel in an action gainst the city of New York made ithout statutory authority held to e an illegal official act. Bush *v.* O'Brien, 164 N. Y. 205. The *collecion of rent* by the comptroller of the ity under leases which are alleged to e invalid and illegal for collusion of ormer officers of defunct town and hich are sought to be annulled in he action, held to be an illegal official ct. Wenk *v.* New York, 171 N. Y. 07. The fact that a village tax is nvalid for want of notice of hearing efore it was imposed does not entitle taxpayer to bring action under the tatute. Trumbull *v.* Palmer, 104 N. Y. App. Div. 51.

Contracting of debts and liabilities by municipality in excess of the amount uthorized by law restrained. Gerach *v.* Brandreth, 34 N. Y. App. Div. 97. Making of a *contract for the urchase* of real estate before the noney or tax for the object has been oted as required by statute restrained. atham *v.* Richards, 12 Hun (N. Y.), 60, appeal dismissed 72 N. Y. 607. urchase of public works enjoined on he ground that the statutory *authority* o make the purchase had *expired by imitation of time.* Ziegler *v.* Chapin, 126 N. Y. 342. Injunction issued against the unauthorized publication of the daily proceedings of the board of supervisors. Kingsley *v.* Bowman, 33 N. Y. App. Div. 1. Injunction granted against the *employment* by a board *of one of its own members* as an attorney. Beebe *v.* Sullivan County, 64 Hun (N. Y.), 377. See also West *v.* Utica, 71 Hun (N. Y.), 540. Injunction granted against the performance of a contract with a corporation in which one of the city officers had an interest. Terry *v.* Gleason, 21 N. Y. Misc. 368. The court will *restrain the audit of a claim* which is plainly not a municipal charge, also the reconsideration of an audit and rejection of a claim. Osterhoudt *v.* Rigney, 98 N. Y. 222. The court will restrain the payment of the fees of a county treasurer without the audit of his claim therefor; Warrin *v.* Baldwin, 105 N. Y. 534; also the payment of money pursuant to the authority of an unconstitutional statute; Bush *v.* Orange County, 10 N. Y. App. Div. 542; also the payment of a salary to a person appointed to office in violation of the requirements of the law; Stearns *v.* Tew, 6 N. Y. Misc. 404; Beresford *v.* Donaldson, 54 N. Y. Misc. 138; also the appointment of officials by virtue of an unconstitutional statute; Rathbone *v.* Wirth, 150 N. Y. 459; Meyers *v.* New York, 58 N. Y. App. Div. 534; also the appointment or employment of a person in the municipal service without a compliance with the civil service law; Peck *v.* Belknap, 130 N. Y. 394; Rogers *v.* Buffalo, 123 N. Y. 173; also the issuance or negotiation or payment of municipal bonds in violation of the law; Ayres *v.* Lawrence, 59 N. Y. 192, 199; Metzger *v.* Attica & A. R. Co., 79 N. Y. 171; Hills *v.* Peekskill Sav. Bank, 26 Hun (N. Y.), 161; Strang *v.* Cook, 47 Hun (N. Y.), 46; also the granting of a franchise for a street railroad in perpetuity when the power of the municipality is limited to a grant for a term of years; Norris *v.* Wurster, 23 N. Y. App. Div. 124; Gusthal *v.* Strong, 23 N. Y. App. Div. 315; Blaschko *v.* Wurster, 156 N. Y. 437; Seccomb *v.* Wurster, 83 Fed. Rep. 856.

interpretation in many cases. The earlier cases held that the terms "waste" and "injury" were to be given a more liberal interpretation;[1] but subsequently the courts so construed these terms as to remove from the operation of the statute any discretionary act of the municipal officers which is not tainted with fraud or corruption, so that according to the controlling rule for the interpretation of the statute a taxpayer's action can only be maintained upon an allegation of waste and injury where fraud, or collusion, or bad faith amounting to fraud can be shown.[2] The third provision of

Plaintiff need not show peculiar injury. Gerlach *v.* Brandreth, 34 N. Y. App. Div. 197.

The motives of the plaintiff. More recent decisions support the view that if a taxpayer have the qualifications called for by the statute, he is entitled to maintain the action although it may in fact be brought for the purpose of effecting some private and personal end. Starin *v.* Edson, 42 Hun (N. Y.), 549; rev'd without considering this question, 112 N. Y. 206; Kingsley *v.* Bowman, 33 N. Y. App. Div. 1; Gage *v.* New York, 110 N. Y. App. Div. 403; Grace *v.* Forbes, 64 N. Y. Misc. 130. Contrary view in Hull *v.* Ely, 2 Abb. N. C. 440; Kimball *v.* Hewitt, 15 Daly (N. Y.), 124; Nathan *v.* O'Brien, 117 N. Y. App. Div. 664. As to other jurisdictions, see *ante*, § 919.

Statute of limitations applies. Calhoun *v.* Millard, 16 N. Y. State Rep. 46, aff'd 121 N. Y. 69; contrary view in Strang *v.* Cook, 47 Hun (N.Y.), 46. *Doctrine of laches applies.* Alvord *v.* Syracuse Sav. Bank, 98 N. Y. 599. Application of doctrine of laches limited. Calhoun *v.* Millard, 121 N. Y. 69, 83.

A taxpayer's action will not lie against an officer of the *State* acting by virtue of his authority as such officer. Hutchinson *v.* Skinner, 21 N Y. Misc. 729.

[1] Ayres *v.* Lawrence, 59 N. Y. 192; Metzger *v.* Attica & A. R. Co., 79 N. Y. 171, 174; Gorden *v.* Strong, 158 N. Y. 407; Armstrong *v.* Grant, 56 Hun (N. Y.), 226; Adamson *v.* Union R. Co., 74 Hun (N. Y.), 3. "Waste" and "injury" are identical in meaning and include only illegal, wrongful, or dishonest acts. Hearst *v.* McClellan, 102 N. Y. App. Div. 336; Basselin *v.* Pate, 30 N. Y. Misc. 368.

[2] Potter *v.* Collis, 19 N. Y. App. Div. 392, aff'd 156 N. Y. 16; Standart *v.* Burtis, 46 Hun (N. Y.), 82; Sweet *v.* Syracuse, 60 Hun (N. Y.), 28; rev'd 129 N. Y. 316; New York Central & H. R. R. Co. *v.* Maine, 71 Hun (N. Y.), 417; Robinson *v.* Gilroy, 10 N. Y. Misc. 205; Holts *v.* Diehl, 26 N. Y. Misc. 224; Sheehy *v.* Clausen, 26 N. Y. Misc. 269. To constitute bad faith, some improper motive is essential to justify a taxpayer's action. Hearst *v.* McClellan, 102 N. Y. App. Div. 336; Basselin *v.* Pate, 30 N. Y. Misc. 368.

Discretionary acts. Held, that the action could not be maintained, inasmuch as the acts complained of were not beyond the discretion of the board of supervisors and were not illegal and void. Talcott *v.* Buffalo, 125 N. Y. 280; Ziegler *v.* Chapin, 126 N. Y. 342, 348; Hearst *v.* McClellan, 102 N. Y. App. Div. 336; New York Central & H. R. R. Co. *v.* Maine, 71 Hun (N. Y.), 417; Wilkins *v.* New York, 9 N. Y. Misc. 610; Holts *v.* Diehl, 26 N. Y. Misc. 224. The determination of city officials, on whom rests the duty of inspection and acceptance, that materials furnished pursuant to contract with the city are of the prescribed quality will not be interfered with by the courts in the absence of evidence to show that their determination was influenced by fraud or corruption. Paul *v.* New York City, 46 N. Y. App. Div. 69.

Where no fraud, bad faith, or collusion is alleged, the sole question is one of legal authority of the officer. Schinzel *v.* Best, 45 N. Y. Misc. 455, aff'd 109 N. Y. App. Div. 917. Where trustees of a village have authority to do certain acts, taxpayer's action will not lie. New York & Rosendale Cement Co. *v.* Davis, 173 N. Y. 235, aff'g 62 N. Y. App. Div. 577. Taxpayer's action cannot be maintained

the statute for redress authorizes an action against the officers and agents of any county, town, village, or municipal corporation to

without proof of fraud, collusion, corruption, bad faith, or illegality. Hearst v. McClellan, 102 N. Y. App. Div. 336.

The determination of a city officer that there cannot be *competitive bidding* for work and supplies is subject to review in a taxpayer's action, if the facts disclose that competition is possible. Gleason v. Dalton, 23 N. Y. Misc. 18. A contract so prepared that all possibility of bidding is confined to one corporation, held to be illegal and void. Grace v. Forbes, 64 N. Y. Misc. 130.

Legislative acts. The motives inducing legislative action cannot be inquired into by the court and the legislation set aside because in the judgment of the courts it was induced by dishonest and corrupt motives. Kittinger v. Buffalo Traction Co., 160 N. Y. 377; Barhite v. Rochester Home Telephone Co., 50 N. Y. App. Div. 25; Adamson v. Nassau Elect. R. Co., 89 Hun (N. Y.), 261; Farley v. Lockport, 61 N. Y. Misc. 417. That the courts will not generally interfere with legislative action because of the motives of the legislative body, see *ante*, §§ 580, 581.

There are many duties devolving on the city council or board of supervisors which are administrative in their character and not impressed with the character of sovereignty, and in the performance of such duties their action may be attacked for fraud and corruption, and if the charge be proved may be declared of no effect by the courts. Roosevelt v. Draper, 23 N. Y. 318; Talcott v. Buffalo, 125 N. Y. 280; Kittinger v. Buffalo Traction Co., 160 N. Y. 377, 390. As to what action on the part of a municipal body is legislative in its character, see People v. Queens County, 131 N. Y. 468; People v. Queens County, 153 N. Y. 370; People v. McIntyre, 154 N. Y. 628; Ghee v. Northern Union Gas Co., 158 N. Y. 510; Kittinger v. Buffalo Traction Co., 160 N. Y. 377; Barhite v. Rochester Home Telephone Co., 50 N. Y. App. Div. 25.

A taxpayer may maintain an action to restrain or annul a legislative act by a municipal body when such act is unauthorized and is not within the power of the legislative body. Seccomb v. Wurster, 83 Fed. Rep. 856; People v. Queens County, 131 N. Y. 468; Blaschko v. Wurster, 156 N. Y. 437; Norris v. Wurster, 23 N. Y. App. Div. 124; Gusthal v. Strong, 23 N. Y. App. Div. 315.

Inadvertence and mistake. It has been held that an action by a taxpayer cannot be maintained to restrain the payment to a public officer of moneys expended by him in good faith without complying with the requirements of the statute as to the manner in which the same shall be expended, by reason of inadvertence or mistake, arising from ignorance of the requirements of the law. Cobb v. Ramsdell, 37 N. Y. State Rep. 457; 14 N. Y. Supp. 93; Walter v. McClellan, 48 N. Y. Misc. 215. The taxpayers' acts were not designed to protect the public from mistakes, errors of judgment, or lack of intelligent appreciation of official duties on the part of their chosen officials. Hearst v. McClellan, 102 N. Y. App. Div. 336.

Unconstitutional statutes. Taxpayers' actions have been brought in which the relief asked was a judgment declaring provisions of various enactments to be unconstitutional, and restraining action thereunder. Sweet v. Syracuse, 129 N. Y. 316; Rathbone v. Wirth, 150 N. Y. 459; Bush v. Orange County, 10 N. Y. App. Div. 542; Mercer v. Floyd, 24 N. Y. Misc. 164; Hurlburt v. Banks, 52 How. Prac. (N. Y.) 196. Taxpayer may enjoin execution of contract containing provisions required by a law which is unconstitutional. Meyers v. New York, 58 N. Y. App. Div. 534.

Levy of taxes for illegal and unauthorized purposes. See Ayres v. Lawrence, 59 N. Y. 192, 199; Osterhoudt v. Rigney, 98 N. Y. 222; Squire v. Cartwright, 67 Hun (N .Y.), 218; Squire v. Preston, 82 Hun (N. Y.), 88.

Limitations of power to contract municipal indebtedness. Gerlach v. Brandreth, 34 N. Y. App. Div. 197; Latham v. Richards, 12 Hun (N. Y.), 360; appeal dismissed, 72 N. Y. 607.

Contracts by municipalities. A contract by a municipality cannot be attacked upon the ground that it is a waste of or injury to the property, funds, and estate of the municipality

restore or make good any property, funds, or estate of such county, town, village, or municipal corporation, and also provides that the

unless corruption, fraud, or bad faith amounting to fraud is charged and proved. The ground of the decisions is that in those matters which are within the discretion of the municipality or its officers the courts will not interfere unless the exercise of the discretion be fraudulent or corrupt. Talcott *v.* Buffalo, 125 N. Y. 280; Ziegler *v.* Chapin, 126 N. Y. 342; Kingsley *v.* Bowman, 33 N. Y. App. Div. 1; Paul *v.* New York, 46 N. Y. App. Div. 69; Hearst *v.* McClellan, 102 N. Y. App. Div. 336; Armstrong *v.* Grant, 56 Hun (N. Y.), 226; Beebe *v.* Sullivan County, 64 Hun (N. Y.), 377, aff'd 142 N. Y. 631; West *v.* Utica, 71 Hun (N. Y.), 540; Terrell *v.* Strong, 14 N. Y. Misc. 258; Gleason *v.* Dalton, 23 N. Y. Misc. 18; Winkler *v.* Summers, 22 Abb. N. C. 80.

The power of a corporation to take a lease from the municipality cannot be attacked by a taxpayer. Starin *v.* Edson, 112 N. Y. 206.

Audit of claims. An action may be maintained under the statute by a taxpayer of a town to vacate the audit of bills in favor of an individual by the board of audit of the town, on the ground that such audit was illegal and without authority. Osterhoudt *v.* Rigney, 98 N. Y. 222. Payment of claims illegally audited by town board may be enjoined. Rockefeller *v.* Taylor, 69 N. Y. App. Div. 176.

Payment of claims. An action may be maintained by a taxpayer, under the statutes, to restrain the threatened payment of illegal claims against the municipality. Warrin *v.* Baldwin, 105 N. Y. 534; Calhoun *v.* Millard, 121 N. Y. 69, 86; Bush *v.* Orange County, 10 N. Y. App. Div. 542; Scott *v.* Twombley, 20 N. Y. App. Div. 535; Webb *v.* Bell, 22 N. Y. App. Div. 314; Gerlach *v.* Brandreth, 34 N. Y. App. Div. 197; Latham *v.* Richards, 12 Hun (N. Y.), 360; McCrea *v.* Chahoon, 54 Hun (N. Y.), 577; West *v.* Utica, 71 Hun (N. Y.), 540; Squire *v.* Preston, 82 Hun (N. Y.), 88; Warren *v.* Van Nostrand, 21 N. Y. State Rep. 960.

Compromise of disputed claims restrained. Standart *v.* Burtis, 46 Hun (N. Y.), 82.

Qualifications of officers for appointment to office. Taxpayer's action to restrain payment of salaries to public officers holding regular and presumptively valid appointments cannot be maintained. Greene *v.* Knox, 175 N. Y. 432, aff'g 76 N. Y. App. Div. 405. See also Rathbone *v.* Wirth, 150 N. Y. 459; Fahy *v.* Johnstone, 21 N. Y. App. Div. 154; Stearns *v.* Tew, 6 N. Y. Misc. 404; Beresford *v.* Donaldson, 54 N. Y. Misc. 138. Acts of board of health which is illegally constituted are void. Whitney *v.* Patrick, 64 N. Y. Misc. 191.

Payment of railroad aid bonds. Ayres *v.* Lawrence, 59 N. Y. 192, 199; Metzger *v.* Attica & A. R. Co., 79 N. Y. 171; Newton *v.* Keech, 9 Hun (N. Y.), 355; Hills *v.* Peekskill Savings Bank, 26 Hun (N. Y.), 161; Strang *v.* Cook, 47 Hun (N. Y.), 46.

Grants of franchises in streets and highways. By the Constitution and by statute the rule has been adopted that street railroads can only be constructed and operated in streets and highways upon the consent of the local authorities having control of the street or highway in which they are to be laid. Constitution of New York, art. iii. § 18; Railroad law, Laws of 1892, chap. 676, §§ 91 and 123. Local authorities are beyond the direction and control of the courts in determining whether they shall give any consent which is within their statutory authority, and the court cannot inquire into the motive inducing the consent, although such motive may be dishonest and corrupt and may consist in a bribe to the common council or other local legislative body. Kittinger *v.* Buffalo Traction Co., 160 N. Y. 377; Bohmer *v.* Haffen, 161 N. Y. 390, 399; Adamson *v.* Nassau Elect. R. Co., 89 Hun (N. Y.), 261. But a taxpayer may maintain an action to restrain the board of aldermen from granting a franchise for the construction and operation of a street railroad for an unlimited term when by statute the board is only authorized to grant its consent to the construction of a street railroad for a term of twenty-five years. Seccomb *v.* Wurster, 83 Fed. Rep. 856; Blaschko *v.* Wurster, 156 N. Y. 437; Norris *v.* Wurster, 23 N. Y. App. Div. 124; Gusthal *v.*

court may, in its discretion, enforce the restitution and recovery of any claims, demands, expenses, or judgments wrongfully recovered against or paid by a municipal corporation, if already paid by the person or party receiving and retaining the same; and it may also, in its discretion, adjudge and declare the colluding or defaulting officers personally responsible therefor.[1]

§ 1586 (921). **Same Subject. General Doctrine; Author's Comment.** — The author may observe that there appears to be little difference of judicial opinion as to the *right of the taxable inhabitants*, wherever the threatened illegal corporate act *will increase the burden of taxation*, to the aid of equity, in proper cases, to prevent it.[2] The chief difference is as to the *proper party plaintiff* in a bill of this character.

Strong, 23 N. Y. App. Div. 315. Park board can be restrained from granting a franchise where a statutory preliminary step has not been taken. Smith *v.* Buffalo Traction Co., 51 N. Y. Misc. 216. A taxpayer may maintain an action to obtain relief against a provision inserted in a contract. Parfitt *v.* Furguson, 159 N. Y. 111. When a railway is already constructed pursuant to municipal consent, a taxpayer cannot enjoin its operation on the ground that it is otherwise illegal and a public nuisance. Gallagher *v.* Keating, 40 N. Y. App. Div. 81. See also Sheehy *v.* McMillan, 26 N. Y. App. Div. 140. Granting a permit to a railroad to open streets to change its motive power is not a waste of or injury to city property. Potter *v.* Collis, 19 N. Y. App. Div. 392, aff'd 156 N. Y. 16. As to the use of city property in the completion of public work without compensation to the city, see Ottendorfer *v.* Agnew, 13 Daly, 16. A mere revocable license permitting a street railroad corporation to lay down a railway track on dock property of a city is not a waste of the city property. Hart *v.* New York, 16 N. Y. App. Div. 227.

[1] Latham *v.* Richards, 15 Hun (N. Y.), 129. Taxpayer cannot compel restitution unless he can show waste of or injury to the funds or property of the city. Bush *v.* Coler, 60 N. Y. App. Div. 56, aff'd 170 N. Y. 587.

Summary investigation of towns and villages. In the general municipal law of New York, statutory provisions are incorporated conferring upon any justice of the Supreme Court jurisdiction to make summary investigations of towns and villages upon the presentation of a petition of twenty-five freeholders. Laws of 1892, chap. 68, § 3. This statute is constitutional. See Clark *v.* Sheldon, 106 N. Y. 104; Vinton *v.* Cattaraugus County, 18 N. Y. St. Rep. 435. As to construction of statute and the scope of its provisions, see also Crowninshield *v.* Cayuga County, 124 N. Y. 583.

[2] Inge *v.* Mobile Board of Public Works, 135 Ala. 187, 195, citing text; Chicago *v.* Nichols, 177 Ill. 97; State *v.* New Orleans, 50 La. An. 880; Tukey *v.* Omaha, 54 Neb. 370. See State *v.* Kohnke, 109 La. 838; Alpena *v.* Alpena Cir. Judge, 97 Mich. 550; Clark *v.* Interstate Independent Tel. Co., 72 Neb. 883.

In *Tennessee*, taxpayers may maintain an injunction against public officials where the public revenues are involved and the result of the proposed action will be to increase the burden of taxation. In such cases, the taxpayer sustains an injury not common to those citizens who are not taxpayers and is regarded as suffering special injury. Kennedy *v.* Montgomery County, 98 Tenn. 165; Patton *v.* Chattanooga, 108 Tenn. 197; Lynn *v.* Polk, 8 Lea (Tenn.), 121; Colburn *v.* Chattanooga, 2 Shannon's Cases (Tenn.), 22. But if the action of municipal authorities will not result in any increase in taxation, the taxpayer has no standing in court to enjoin it. Patton *v.* Chattanooga, 108 Tenn. 197.

If the ordinary principle which obtains as to public nuisances is applied, it must be admitted where the duty about to be violated by the corporation or its officers is public in its nature, and affects all of the inhabitants alike, that one, not suffering any special injury, cannot, in his *own name*, or by uniting with others, maintain a bill to enjoin it. And a reason urged against such a course is that if one citizen may maintain such a bill, an indefinite number of others may each also bring separate suits; and an adjudication in one case concludes nothing as to the others or as to the inhabitants at large. But it is substantially agreed that any taxable inhabitant, or perhaps any citizen of the municipality, has such an interest to prevent or to avoid illegal or unauthorized corporate acts that he may be a relator, on whose application the proper public officer of the Commonwealth may, on behalf of the public, file the requisite bill in cases which fall within the jurisdiction of equity, to enjoin the menaced illegal or wrongful act, or if it has been consummated, to have relief against it.[1] To allow the taxable inhabitant to maintain a bill for an injunction, to prevent illegal expenditures or appropriations of money, has the advantage of directness and simplicity, and notwithstanding its departure, or apparent departure, from technical principles, has, as above shown, received the general, but not quite uniform, approval of the courts in this country; and practically this course has not had the effect to engender a multiplicity of similar suits by separate parties, but a few persons usually unite in one suit, which, when judicially determined, in effect settles the question in controversy.[2] There is no doubt but that the corporation may in its *own name* bring suits, in proper cases, to be relieved against illegal, unauthorized, or fraudulent acts on the part of its officers. Since, however, experience has shown how liable these corporations are to be betrayed by those who have the temporary management of their concerns, it would never do, we think, for the courts to hold that relief against illegal or wrongful acts can be had *only* by an authorized suit brought by and in the name of the corporation.

[1] Text quoted; Chicago *v.* Union Building Assoc., 102 Ill. 379; *supra*, § 1584, note.

A trading corporation which is a resident and taxpayer in a city has a right to maintain a taxpayer's bill to restrain an illegal appropriation of public funds, and it is immaterial that the corporation is not an elector and that the fund in question was raised by a loan authorized by the electors of the city and not by taxpayers. Wolff Chemical Co. *v.* Philadelphia, 217 Pa. 215.

[2] Text approved; Williams *v.* Grant County Court, 26 W. Va. 488; Ranney *v.* Bader, 67 Mo. 476; noticed *supra*, § 1584, note. Text approved in Brownfield *v.* Houser, 30 Oreg. 534.

§ 1587 (922). **General Conclusions stated.** — While a survey of decisions in Great Britain and the United States exhibit some diversity of opinion, it seems to us, in view of the nature of municipal powers, the danger of abuse, the necessity for prompt remedy on the part of those most interested in the proper administration of municipal affairs, — to wit, the taxable inhabitants, — that *the following conclusions rest upon sound reason*, and have also the support of *the decided preponderance* of judicial authority.[1]

1. The proper parties may resort to equity, and equity will, in the absence of restrictive legislation, entertain jurisdiction of their suit against municipal corporations and their officers when these are acting *ultra vires*, and assuming or exercising a power over the property of the citizen, or over corporate property or funds, which the law does not confer upon them, and where such acts affect injuriously the property owner or the taxable inhabitant.[2]

[1] Winn *v.* Shaw, 87 Cal. 631, 636, citing text; Bradford *v.* San Francisco, 112 Cal. 537, 543, approving text; Keen *v.* Waycross, 101 Ga. 588, approving text; Zuelly *v.* Casper, 160 Ind. 455, citing text; Kellogg *v.* School Dist. No. 10, 13 Okla. 285, 299, quoting text; El Reno *v.* Cleveland Trinidad Pav. Co. (Okla.), 107 Pac. Rep. 163; Christie *v.* Malden, 23 W. Va. 667, 670, approving text; Times Publishing Co. *v.* Everett, 9 Wash. 518, 522, approving text. See Shaw *v.* Jones, 4 Ohio N. P. 372.

[2] Valparaiso *v.* Gardner, 97 Ind. 1, citing text; Holland's Case, 11 Md. 186; Baltimore *v.* Porter, 18 Md. 284; Baltimore *v.* Horn, 26 Md. 194; Baltimore *v.* Gill, 31 Md. 375, 395; Dunkin *v.* Blust, 83 Neb. 80, citing text; Place *v.* Providence, 12 R. I. 1, citing text; Christie *v.* Malden, 23 W. Va. 667, 670, quoting text; *supra*, § 1583. The *State* has no such interest in taxes voluntarily paid under an illegal assessment as will warrant an injunction, at its suit, against the disbursement by a city of the money so paid. Atchison *v.* State, 34 Kan. 379.

The doctrines of the text in §§ 1579–1583, 1586, 1587, are not, in the opinion of the Supreme Court of the United States, "at this day, open to serious question." Crampton *v.* Zabriskie, 101 U. S. 601, 609, *per Field*, J. Mr. Pomeroy, 1 Eq. Juris. §§ 259–270, examines at large and with ability the question of the jurisdiction of equity to relieve against illegal taxes and assessments, and reaches conclusions (*Ib.* §§ 267–269) substantially the same as those in the text. Injunction, 3 Pom. Eq. Juris. § 1345.

The views of the text, so far as *corporate property or funds* are concerned, accord with those of Lord *Cottenham* in Frewin *v.* Lewis, 18 Eng. Ch. (4 Mylne & Cr. 249, 255) 249. Speaking of the principles on which chancery will enjoin public officers and bodies, this eminent equity judge wisely says: "So long as those [public] functionaries strictly confine themselves within the exercise of those duties which are confided to them by law this [chancery] court will not interfere . . . to see whether any regulation they make is good or bad; but if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer treats them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority. While the court avoids interfering with what they do while keeping within the limits of their jurisdiction, it takes care to confine them within those limits; if they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this court by injunction." Similar principles are asserted and applied by *Mc-*

But if in these cases the property owners or the taxable inhabitants can have full and adequate remedy at law, equity will not interfere, but leave them to their legal remedy.[1]

2. That, in the absence of special controlling legislative provision, the proper public officer of the Commonwealth, which created the corporation and prescribed and limited its powers, may, in his own name, or in the name of the State, on behalf of residents and voters of the municipality, exercise the authority, in proper cases, of filing an information, or bill in equity to prevent the misuse of corporate powers, or to set aside or correct illegal corporate acts. But such suits, in the author's experience, are rarely brought.

3. That the existence of such a power in the State, or its proper public law officer, is not inconsistent with the right of *any taxable inhabitant* to bring a bill to prevent the corporate authorities from transcending their lawful powers where the effect will be to impose upon *him* an unlawful tax, or to increase *his* burden of taxation.[2] Much more clearly may this be done when the right of the public officer of the State to interfere is not admitted, or does not exist; and in such case it would seem that a bill might properly be brought in the name of one or more of the taxable inhabitants for themselves and all others similarly situated, and that the court should then regard it in the nature of a public proceeding to test

Allister, J., in Sherlock *v.* Winnetka, 59 Ill. 389, when it was held that equity, at the instance of taxable inhabitants, would restrain and relieve against fraudulent and unauthorized acts of municipal corporations in purchasing property for private purposes, such as the establishment of a private school. The case of Frewin *v.* Lewis, 4 Mylne & Cr. 249, *supra*, and the above observations of Lord *Cottenham* approved. Carter *v.* Chicago, 57 Ill. 283, 288; *supra*, § 1586.

In Blanton *v.* Merry, 116 Ga. 288, certain taxpayers sought to enjoin the local authorities of a town from operating a liquor dispensary therein. It was admitted that the dispensary was being operated without any cost to the town and without any possibility of the town becoming indebted in any way for its operation. The court held that the plaintiffs, as citizens and taxpayers, were not entitled to an injunction for the reason that it was not shown that they would sustain any damage in consequence of the operation of the dispensary, and distinguished Barnesville *v.* Murphey, 113 Ga. 779, on the ground that in the latter case it appeared that the city owed bills in connection with the dispensary and the taxpayers asked an injunction against the payment thereof. The latter case was regarded as one to prevent an increase in the tax rate, — a matter in which the plaintiffs had a direct interest.

In Jones *v.* North Wilkesboro, 150 N. Car. 646, taxpayers sought to enjoin the appropriation for water purposes of a stream, on the ground that the population adjoining the stream was so dense that it was unfit for a water supply. The court held that the action would lie and that the taxpayers were entitled to enjoin the municipal authorities from creating a public nuisance, *i.e.* a condition which seriously endangered the health and lives of the people.

[1] *Ante*, § 1570, and cases there cited. Text approved; Christie *v.* Malden, 23 W. Va. 667.

[2] Elyria Gas & Water Co. *v.* Elyria, 57 Ohio St. 374.

the validity of the corporate acts sought to be impeached, and deal with and control it accordingly.[1]

§ 1588. **Right of Taxpayer to enforce Affirmative Cause of Action of City.** — Since previous editions of this Treatise, the views expressed in the preceding paragraphs have not only been steadily adhered to by the courts, but in some jurisdictions at least, the rights of taxpayers have been extended to give more effectual protection against the illegal acts of municipal officers. It has been held by the courts of several States that when a municipal or other public corporation has a cause of action which should be prosecuted for its use, whether that cause of action be legal or equitable, and its governing body or other proper officer wrongfully neglects or wrongfully refuses to commence an action thereon, a taxpayer may, on behalf of himself and all others similarly situated, commence an action in equity to redress the wrong to the corporation, making the corporation a defendant as trustee for all its members.[2] Accordingly, it has been held that a taxpayer may sue to recover back, on behalf of the municipality, moneys of the municipality unlawfully paid to officers, contractors, and others.[3]

[1] The conclusions in this section approved in Kelly *v.* Baltimore, 53 Md. 134; *supra*, § 1583. See Fergus v. Columbus, 6 Ohio N. P. 82; Elyria Gas and Water Co. *v.* Elyria, 57 Ohio St. 374. Conclusions in this section approved and quoted in Poppleton *v.* Moores, 67 Neb. 388.

[2] Russell *v.* Tate, 52 Ark. 541; Independent School Dist. No. 5 *v.* Collins, 15 Idaho, 535; Knight *v.* Thompsonville, 74 Ill. App. 550; Guelly *v.* Casper, 160 Ind. 455; State v. Holt, 163 Ind. 198, 200; Eder *v.* Kreiter, 40 Ind. App. 542; Cone *v.* Wold, 85 Minn. 302; Stone *v.* Bevans, 38 Minn. 127; Shepard *v.* Easterling, 31 Neb. 882, 887; Land, Log, & Lumber Co. *v.* McIntyre, 100 Wis. 245; Webster *v.* Douglas County, 102 Wis. 181, 189; St. Croix County *v.* Webster, 111 Wis. 270, 273.

[3] Drennen *v.* Griffin, 145 Ala. 128; s. c. 150 Ala. 241; Russell *v.* Tate, 52 Ark. 541; Independent School Dist. No. 5 *v.* Collins, 15 Idaho, 535; Eder v. Kreiter, 40 Ind. App. 542; Cathers v. Moores, 78 Neb. 17. But it has been held that a taxpayer suing to recover misappropriated funds must allege and prove a demand that the proper officer sue, or facts showing that such a demand would be unavailing. Reed *v.* Cunningham, 126 Iowa, 302; Merrimon *v.* Southern Pav. & Const. Co., 142 N. Car. 539; Lodor *v.* McGovern, 48 N. J. Eq. 275.

But in *Oregon* it has been held that where the moneys of a municipality have been misapplied, the proper party to complain is the injured municipality, either in its own name, or on the relation of some proper person; and an individual taxpayer cannot maintain a suit to recover the money. Brownfield *v.* Houser, 30 Oreg. 534; Sears *v.* James, 47 Oreg. 50, 55.

In *Iowa*, it has been held that repayment to the city of consideration for work performed under a void contract which was not let to the lowest bidder as required by statute, will not be decreed at the suit of a taxpayer, when it appears that the work was performed in good faith, accepted by the city, done at reasonable rates, and payment was made in good faith. Miller *v.* Des Moines, 143 Iowa, 409; 122 N. W. Rep. 226.

In *Ohio*, in the absence of a statute

§ 1589 (923). **Injunction in Municipal Tax Cases; When granted; Plaintiffs.** — Respecting the right to *restrain a municipal corporation from collecting taxes*, the courts, in cases where this relief is proper to be granted, have generally held that *one or more taxpayers* may bring a bill for this purpose. There is, however, some want of harmony in the decisions as to what will in such cases justify equitable interference, but the correct view doubtless is that equity ought not, except for the clearest reasons, to interfere with the speedy and ordinary collection of municipal or other public revenues.[1] If there is no lawful power to levy the tax in

providing other means for recovering back money unlawfully paid to councilmen for salaries or compensation, a taxpayer may prosecute a suit for that purpose on behalf of the municipality, and may join all the councilmen so illegally receiving money. Walker *v.* Dillondale, 30 Ohio Cir. Ct. R. 623, 625. Where a taxpayer sued to enjoin a county from unlawfully issuing bonds, the court rendered a money judgment against a defendant to whom the bonds were delivered before suit, and by whom they were transferred to a *bona fide* holder for value. It appeared that the fact of the delivery and transfer was not known to the plaintiff at the time when he brought the suit. Muskingum County *v.* State, 78 Ohio St. 287.

Where a suit is brought by a municipal corporation to recover money alleged to be due under an executed contract, a taxpayer cannot be permitted to intervene for the purpose of defeating a recovery upon the ground that the contract was unauthorized. Morgan City *v.* Dalton, 112 La. 9.

[1] The right of taxpayers to unite in a bill and ask for an injunction to restrain the collection of an unauthorized tax was expressly ruled in Vanover *v.* Terrell County, 27 Ga. 354, *Lumpkin*, J., observing: "We approve the remedy resorted to in this case. It is not only more complete than any other, but the only one, in our judgment, which meets the exigency of the case." See also *ante*, § 1584; Seligman *v.* Santa Rosa, 81 Fed Rep. 524; Davis *v.* Petrinovitch, 112 Ala. 654; Mason *v.* Caffrey, 9 Kulp (Pa.), 414; Bull *v.* Read, 13 Gratt. (Va.) 78; Nill *v.* Jenkinson, 15 Ind. 425; Lewis *v.* Henley, 2 Ind. 332; Harward *v.* St. Clair, &c. Levee Co., 51 Ill. 130; Mount Carbon C. & R. Co. *v.* Blanchard, 54 Ill. 240; Fleming *v.* Mershon, 37 Iowa, 413; Barr *v.* Deniston, 19 N. H. 170, 180; Frederick *v.* Augusta, 5 Ga. 561; Baltimore *v.* Porter, 18 Md. 284; King *v.* Wilson, 1 Dillon C. C. 555; Coulson *v.* Portland, Deady, 481, where the general subject is well considered; Mechanics' Bank *v.* Kansas City, 73 Mo. 555; Teegarden *v.* Davis, 36 Ohio St. 601; Richmond *v.* Crenshaw, 76 Va. 936; Corrothers *v.* Clinton Dist. Bd. of Education, 16 W. Va. 527; see also Savannah *v.* Crawford, 75 Ga. 35. Amount of tax necessary to give *Federal court jurisdiction*. King *v.* Wilson, 1 Dillon C. C. 555, *supra*.

One who *joined in a petition* for a public improvement held not to be entitled to maintain a bill to restrain the collection of the assessment made for it. Byram *v.* Detroit, 50 Mich. 56; *infra*, § 1590, note. Index — *Estoppel*. Courts will not interfere with legislative action concerning *what property* may be taxed by a municipal corporation, this being a *political* question. Norris *v.* Waco, 57 Tex. 635. See *ante*, § 1579, note.

In Worth *v.* Fayetteville, 1 Winst. (N. Car.) Pt. 2, 70, *Pearson*, C. J., with doubts as to jurisdiction, expressed the opinion that equity might entertain a bill to test the legality of a tax imposed by a municipal corporation, but doubted whether such a bill will lie to enjoin the collection of State and county taxes. The case does not show that the illegal tax was sought to be made by the sale of real estate, or in what manner the tax was about to be enforced. A taxpayer, on behalf of himself and all other taxpayers of the State, may file a bill against the proper State officers and parties to enjoin the issue of State bonds under an uncon-

question under any circumstances, or if it be assessed upon property not subject to taxation, and the remedy at law is not adequate, a plain case for equitable interposition is made out.[1] But if the power to levy the tax exists, and the property be subject to taxation, mere errors and irregularities should, according to the better view, be corrected on *certiorari* or other appropriate proceedings, or their effect left to be tested at law; for *equity* ought not to interfere with the collection of taxes, unless the complainant makes a case coming within some acknowledged head of equity jurisdiction, such as the prevention of a multiplicity of suits, inadequacy of legal remedy, irreparable injury, or where a cloud will be thrown upon his title to real estate. Unless he can make such a case, he must bring a legal action or pursue a legal remedy.[2]

stitutional statute. Galloway *v.* Chatham R. Co., 63 N. Car. 147. After the doubt intimated in Worth *v.* Fayetteville, *supra*, the legislature enacted "that a writ of injunction is allowable in all cases against the collection of taxes illegally imposed." Brodnax *v.* Groom, 64 N. Car. 244. See London *v.* Wilmington, 78 N. Car. 109.

In *Indiana* it is considered that "the assessment of taxes for State purposes is a matter of public concern in which all the citizens of the State are interested, and hence any citizen of the State may be the relator" in proceedings to compel officers of the revenue law to see that its provisions are carried out. State *v.* Hamilton, 5 Ind. 310, *per Perkins*, J.; Hamilton *v.* State, 3 Ind. 452; Douglass *v.* Harrisonville, 9 W. Va. 162; Delphi *v.* Bowen, 61 Ind. 29, 31, approving text.

Replevin will not lie against tax collector to recover personal property seized to satisfy tax levied by proper officer. Mowrer *v.* Helferstine, 80 Mo. 23. See Valle *v.* Ziegler, 84 Mo. 214.

[1] See Dollahan *v.* Whittaker, 187 Ill. 84; Blessing *v.* Galveston, 42 Tex. 341.

[2] State Railroad Tax Cases, 92 U. S. 575, 613; Dows *v.* Chicago, 11 Wall. (U. S.) 108 (approving Heywood *v.* Buffalo, 14 N. Y. 534); Hannewinkle *v.* Georgetown, 15 Wall. (U. S.) 548; Cook County *v.* Chicago, B. & Q. R. Co., 35 Ill. 460; White *v.* Raymond, 188 Ill. 298; Ryan *v.* Leavenworth County, 30 Kan. 185; Clee *v.* Trenton, 108 Mich. 293; Susquehanna Bank *v.* Broome County, 25 N. Y. 312; Hatch *v.* Buffalo, 38 N. Y. 276; Marsh *v.* Brooklyn (cloud on title), 59 N. Y. 280; Douglass *v.* Harrisonville, 9 W. Va. 162. These cases fully support the doctrine of the text, which is, indeed, extracted from them. See also McLott *v.* Davenport, 17 Iowa, 379, in which the remedies of the taxpayer are fully pointed out by *Cole*, J. Dodd *v.* Hartford, 25 Conn. 232; Deane *v.* Todd, 22 Mo. 90, 91; Lockwood *v.* St. Louis, 24 Mo. 20; Hughes *v.* Kline, 30 Pa. St. 227; Lovingston *v.* Wider, 53 Ill. 302; Green *v.* Mumford, 5 R. I. 472, where the rule is strictly held, that to warrant a resort to equity the remedy at law must be inadequate. See *ante*, §§ 1047 and note, 1132, 1570–1573, 1585. In *Michigan*, see Merrill *v.* Humphrey, 24 Mich. 170.

When equity will interfere with the collection of taxes is fully considered in the State Railroad Tax Cases, 92 U. S. 575, which will doubtless be hereafter regarded as a leading authority on the subject; distinguished in Allen *v.* Baltimore & O. R. Co. (Virginia Coupon Case), 114 U. S. 311, noted *infra*, where an injunction to restrain distress and sale of rolling stock was sustained, and the subject of equitable interference with the collection of taxes is considered. *Infra*, § 924, and note. *Mode of collecting taxes and assessments.* *Ante*, § 1414 *et seq.* Where an assessment has been made upon land in bulk, the depth of which exceeds the usual depth of lots, to pay for the improvement of a street upon which it abuts, the collection of such assessment will be enjoined at the suit of the owner of the land, without prejudice to the right of the corporation to collect the

§ 1590 (924). **Same Subject; When Injunction granted; When not.** — Accordingly, equity will not, according to the rule generally adopted, restrain even an illegal and void tax assessment where it is sought to be enforced against *personal property only*, since here the party has in general, or is considered to have, an adequate remedy at law; nor in such a case will equity interfere because several join in the bill asking it.[1] But under special circumstances equity will enjoin the sale of personal property where the right of the complainant is clear and the remedy at law is inadequate. Thus, equity will restrain the collection of taxes by distress of the *rolling stock of a railroad, after a tender of payment in tax-receivable coupons*, which the State, in violation of its contract, refused to accept. The ground of the jurisdiction in such cases is, that there is no adequate remedy at law.[2] Where, however, the effect of the sale will be to *cast a cloud upon the title to real estate*, equity, in many of the States, will for this reason alone, interfere to prevent it.[3] The Court of Appeals in Maryland, in holding that where a city corporation was seeking to enforce a void tax or assessment by a sale of private property the owner might enjoin it, speaking through

amount properly chargeable against the frontage of the land. Griswold *v.* Pelton, 34 Ohio St. 482. See on this point chapter on Taxation, *ante*.

[1] Dodd *v.* Hartford (decided by two judges), 25 Conn. 232; Sheldon *v.* Centre School Dist., *Ib.* 224. Same point, as to personal property, Lockwood *v.* St. Louis, 24 Mo. 20; Leslie *v.* St. Louis, 47 Mo. 474; Milwaukee Iron Co. *v.* Hubbard, 29 Wis. 51; Chicago & N. W. R. Co. *v.* Fort Howard Bor., 21 Wis. 44; Peck *v.* Fox Lake, 28 Wis. 583; Coulson *v.* Portland, Deady, 481, commenting on Ewing *v.* St. Louis, 5 Wall. (U. S.) 413; Dows *v.* Chicago (tax on bank stock), 11 Wall. (U. S.) 108; *ante*, §§ 1415, 1570, and notes; Altantic & Pac. R. Co. *v.* Cleino, 2 Dillon C. C. 175; Youngblood *v.* Sexton, 32 Mich. 406; where *Cooley*, J., refers to numerous cases to the same point. Equity will not restrain the collection of a personal tax, or a tax levied upon personal property by a municipal corporation, upon the *sole* ground of the illegality of the tax. Milwaukee *v.* Koeffler, 116 U. S. 219, reaffirming Dows *v.* Chicago, 11 Wall. (U. S.) 108; Hannewinkle *v.* Georgetown, 15 Wall. (U. S.) 548; Union Pac. R. Co. *v.* Cheyenne, 113 U. S. 516, 525, where, says the court, the rule against the interference of a court of equity in the collection of taxes, and the exceptions to the rule, are restated with care and accuracy; approving Quinney *v.* Stockbridge, 33 Wis. 505; Youngblood *v.* Sexton, 32 Mich. 406, where it is shown that the same principle is asserted in the courts of *Massachusetts, New Hampshire, Connecticut, California, North Carolina, Rhode Island, Ohio, Missouri, New York*, and *Maryland*. Text approved, Delphi *v.* Bowen, 61 Ind. 29, 31. Courts will, indeed, in all cases, cautiously interfere with the exercise of an admitted power. Manifest abuse must be shown. Sheldon *v.* Centre School Dist., 25 Conn. 224; *ante*, §§ 242 and notes, 581, 624.

[2] Allen *v.* Baltimore & O. R. Co. (Virginia Coupon Cases), 114 U. S. 311; distinguished from State Railroad Tax Cases, 92 U. S. 575; *ante*, chapter on Mandamus. So a bill in equity will lie which seeks to have a wharfage ordinance declared void, and for an injunction to restrain further collection under it, and any interference with the right of the complainant to the free navigation of the river. Transportation Co. *v.* Parkersburg, 107 U. S. 691.

[3] Powell *v.* Parkersburg, 28 W. Va. 698; Verdin *v.* St. Louis, 131 Mo. 26. See Pickett *v.* Russell, 42 Fla. 116.

: Grand, C. J., said: "We entertain no doubt on this question. ıe idea that a party ought to stand by and see his property illelly exposed to public sale, and then force the purchaser to bring :ctment to gain possession or to try his title, seems sustained by good authority. Such a doctrine would not only encourage cirity of action and multiplicity of suits, but render the title of the ıl owner comparatively valueless while the suits at law should pending. Equity will not allow a title, otherwise clear, to be ıuded by a claim which cannot be enforced in law or equity." [1] in Wisconsin the law is settled that equity will interfere to prent a cloud upon the plaintiff's title, where his lands are threatened be sold on a *void tax or assessment.* But where the defect comıined of is merely formal, not impeaching the justice of the tax assessment, and the plaintiff ought to pay the amount, equity ll not interfere, but leave him to his legal remedies.[2] The same

[1] Holland *v.* Baltimore, 11 Md. 186; ltimore *v.* Porter, 18 Md. 284; *ante,* 27. In *Indiana,* if "the tax is illegal l void the remedy by injunction to train its collection may be sought once." Delphi *v.* Bowen, 61 Ind. 29, In *New York* the somewhat stricter w is adopted, that to justify equity interfering to prevent a cloud being ıt upon the title, it must be a proding whose invalidity does not appear its face, but requires extraneous dence to show it. Heywood *v.* ffalo, 14 N. Y. 534, cited with apıval, Ewing *v.* St. Louis, 5 Wall. . S.) 413, 419; *ante,* §§ 1407, 1571; gh on Injunctions, §§ 367, 368; 1 meroy Eq. Juris. §§ 259–270.

[2] Mitchell *v.* Milwaukee, 18 Wis. 92, and prior cases in that State there ed. See also Foote *v.* Milwaukee, Wis. 270; Myrick *v.* La Crosse, 17 s. 442; Bond *v.* Kenosha, 17 Wis. l, 287, where *Cole,* J., clearly states : effect of the decisions; Howes *v.* cine, 21 Wis. 514; Dean *v.* Gleason, Wis. 1, 18; Barnes *v.* Beloit (who may . join in bill), 19 Wis. 93, *quære;* lls *v.* Charleton, 29 Wis. 400; *Ib. ante,* § 1444, note; Gilmore *v.* Fox :y necessary party to bill to enjoin nicipal taxes), 10 Kan. 509; Stone Mobile, 57 Ala. 61, approving text. So in *Iowa* a bill for an injunction restrain sale of real estate may be tained if the proceedings to tax it clearly illegal. Litchfield *v.* Polk ınty, 18 Iowa, 70; Burlington & R. R. Co. *v.* Spearman, 12 Iowa, 112. And in the same State the collection of a tax in aid of a railroad has been enjoined at the suit of a taxpayer, suing on behalf of himself and others interested, for the reason that the vote authorizing the tax was passed upon the assurance of the president of the railroad that the road would be built upon a certain line when in fact it was built upon another and inaccessible line. Curry *v.* Decatur County, 61 Iowa, 71.

In *Indiana* it is held that where the *owner of real estate in a city stands by and sees a street improved* adjoining his property, on a contract made under an order of the common council, without attempting by injunction to prevent such improvement, he cannot, after the work is completed, or nearly completed, refuse to pay for it. Lafayette *v.* Fowler, 34 Ind. 140. Same principle, Sleeper *v.* Bullen, 6 Kan. 300. *Ante,* §§ 1455, 1456. Extension by the city to the contractor of the time to complete the improvement is no ground for an injunction to stay the collection of the assessment. Lafayette *v.* Fowler, *supra.* Injunction to restrain the collection of an assessment for constructing a sidewalk, on the ground of irregularities in the passage of the ordinance authorizing it, *refused because plaintiff had stood by and allowed the improvement* to be made to the great benefit of his property without taking steps to prevent the outlay. Ritchie *v.* South Topeka, 38 Kan. 368. So where an owner of property sees a contractor go on and make a street im-

view, substantially, is also taken by the Supreme Court of Missouri.[1] It may now be regarded as settled in this State, however

provement adjoining his property, and makes no objection while the work is being done, he cannot, after the work is completed, and accepted by the city as having been done according to the contract, enjoin the collection of the entire assessments made for such improvement, on the ground that the materials used and the work done were not strictly in accordance with the contract; in such case, a complaint for an injunction must show a tender by the property-owner to the contractor of the value of the improvement. Evansville *v.* Pfisterer, 34 Ind. 36. When the inaction of the property-owners is a ground of estoppel, and the principles on which the estoppel rests. See Schumm *v.* Seymour, 24 N. J. Eq. 143; Liebstein *v.* Newark, *Ib.* 200; Dusenbury *v.* Newark, 25 N. J. Eq. 295; Hyde Park *v.* Borden, 94 Ill. 26; New Haven *v.* Fair Haven & W. R. Co., 38 Conn. 422, 871. Index — *Estoppel.*

The writ will be refused to one who has intentionally delayed his application until he has secured an inequitable advantage thereby. Traphagen *v.* Jersey City, 29 N. J. Eq. 206. See also as to *effect of delay* in equity, until the improvement is completed. Weber *v.* San Francisco, 1 Cal. 455. Injunction to prevent debt beyond charter limit dissolved on ground of *laches*, the rights of third persons having attached. Collings *v.* Camden, 27 N. J. Eq. 293; *infra*, § 1595, note. In *Michigan* this view of the estoppel of the property-owner is taken. In Motz *v.* Detroit, 18 Mich. 495, it was held that petitioners to a city council for public improvements for which the charter makes provision must be taken to ask that it may be done under the charter, and if it turned out to be invalid, the petitioners were estopped to set up such invalidity as a basis for equitable relief against the action which they had requested. But in Steckert *v.* East Saginaw, 22 Mich. 104, the above case was distinguished, and such petitioners were held not to be estopped to object that the proceedings upon their petition have been conducted contrary to law, and unless it may be in the case where they had actual knowledge of the illegality of the proceeding before the expenditure was made, they will be in time to object when proceedings are commenced to deprive them of their rights. See also Byram *v.* Detroit, 50 Mich. 56; Putnam *v.* Grand Rapids, 58 Mich. 416; Zeigler *v.* Hopkins (estoppel), 117 U. S. 683.

In *Kansas* it is decided that courts of equity will not interfere to restrain by injunction the collection of taxes, when the property is subject to taxation, the tax is legal, and the valuation not excessive, simply because of irregularities in the assessment. Amrine *v.* Kansas Pac. R. Co., 7 Kan. 178. *Must tender what is equitably due.* Morrison *v.* Hershire, 32 Iowa, 271; State Railroad Tax Cases, 92 U. S. 575. See also

[1] Leslie *v.* St. Louis, 47 Mo. 474, 479. In this case a bill was filed for an injunction to restrain the city from selling the complainant's real estate for an assessment for benefits. The assessment was held void because no effort had been made by the city to agree with the owner. *Ante*, § 1041. Treating of the question whether there is a remedy in equity, *Wagner*, J., says: "Courts of equity never allow relief by injunction to prevent the sale of personal property, but where real property is about to be *sold* by a municipal corporation for the payment of [illegal] taxes or assessments, equity will interpose. The distinction lies in the fact that in the one case a full and complete remedy is furnished at law, while in the other a cloud is about to be cast over a land title and the court interferes to prevent it. Lockwood *v.* St. Louis, 24 Mo. 20; Fowler *v.* St. Joseph, 37 Mo. 228." But the same court in Anderson *v.* St. Louis, 47 Mo. 479, held that equity would not enjoin the city from taking possession of the plaintiff's real estate under a void condemnation, it not appearing that by trespass, ejectment, or *certiorari* there was not a complete remedy at law; the case of Ewing *v.* St. Louis, 5 Wall. (U. S.) 413 (*ante*, § 1047), was approved. Text approved; St. Louis *v.* Schnuckelburg, 7 Mo. App. 536. Missouri decisions. See further, *supra*, § 1584, note.

conflicting the decisions here and elsewhere have been, that to prevent illegal action on the part of municipalities, tending to an increased taxation on their constituents, the State, through its appropriate officer, the Attorney-General or Circuit-Attorney, or any taxpayer of the municipality, may institute a proceeding for an injunction.[1]

§ 1591 (925). **Remedy by Certiorari; At Common Law; In this Country.** — It is well settled *in England* that courts of superior and general jurisdiction will examine on *certiorari* the proceedings of inferior or special jurisdictions or officers. Thus, *certiorari* lies to the censors of the college of physicians,[2] to commissioners of sewers,[3] and to justices of the peace.[4] Such a superintending

Sleeper *v.* Bullen, 6 Kan. 300; Missouri L. Ft. S. & G. R. Co. *v.* Morris, 7 Kan. 210; Merrill *v.* Humphrey, 24 Mich. 70. In State *v.* McLaughlin, 15 Kan. 228, it was held that an injunction bill in *the name of the State, on the relation of the Attorney-General*, would not lie to restrain *the collection* of taxes levied by a school district to pay void bonds heretofore issued; and the decision was upon the ground that the State, *as such*, had no interest in the subject-matter, and that each taxpayer could protect himself, or all could unite to prevent a multiplicity of suits in a single bill to restrain the collection of the illegal tax. The reasoning of the court seems to distinguish such a case from one to restrain public corporations from committing threatened acts in violation of their duty and the law.

The Supreme Court of the United States has laid down this important and just rule, too often overlooked or disregarded; viz., that in a bill to enjoin the collection of taxes it is not sufficient to aver readiness to pay, *but the taxes which are conceded to be due, or which the court can see ought to be paid*, must be paid, or tendered without demanding a receipt in full, before an injunction will be awarded. State Railroad Tax Cases, 92 U. S. 575.

In *Massachusetts*, both with respect to general taxes and local assessments legally levied upon land, it is held that equity will not restrain a city corporation from selling the land therefor, and the ground upon which the court bases the doctrine is that if the land-owner would pay the tax or assessment to save his land from a sale under the form of legal process, he would be entitled to recover it back as money wrongfully received by the corporation, and hence he has, in the view of the court, a complete and adequate remedy at law. Loud *v.* Charlestown, 99 Mass. 208; Arnold *v.* Cambridge, 106 Mass. 352; Whiting *v.* Boston, 106 Mass. 89; Hunnewell *v.* Boston, *Ib.* 350, and cases there cited.

The act of the *Illinois* legislature of April 16, 1869, by which taxes to pay *railroad aid bonds*, registered in the office of the auditor of public accounts, are to be levied and collected by certain State officers instead of local or municipal officers, does not infringe the Constitution of the State; but if bonds are unlawfully registered the courts will enjoin proceedings to collect taxes to pay them. Dunnovan *v.* Green, 57 Ill. 63; *ante*, chapter on Municipal Bonds.

For a collection of cases upon the subject of *injunctions against taxes*, see High on Injunctions, chap. vii.

[1] State *v.* Saline County Court, 51 Mo. 350; Newmeyer *v.* Missouri & Miss. R. Co., 52 Mo. 81. *Napton*, J., in Matthis *v.* Cameron, 62 Mo. 504. See also Dennison *v.* Kansas, 95 Mo. 416.

The courts will not interfere with the honest exercise of the discretion vested in municipal authorities in levying a tax to meet expenses of collection, and deficiencies likely to occur over and above the sum actually required to pay debts, &c. Hyde Park *v.* Ingalls, 87 Ill. 11.

[2] Groenvelt *v.* Burwell, 1 Ld. Raym. 454, 469, and cases there cited; 1 Salk. 144.

[3] *Ib.*

[4] Rex *v.* Glamorganshire (Caerdiffe

power to restrain and correct the irregularities and mistakes of inferior officers and jurisdictions is both necessary and salutary. If the proceedings are in a common-law court of record, a writ of error is the proper remedy to correct or vacate them if erroneous; otherwise the remedy is by *certiorari*.[1] So *in this country* the rule has been very generally adopted by the courts, where a new jurisdiction is created by statute, and the inferior court, board, tribunal, or officer exercising it proceeds in a summary manner, or in a course different from the common law, that the Circuit or District Court of the State, or other tribunal exercising general, original common-law jurisdiction, has, in the absence of a specific remedy being given, an inherent authority to revise the proceedings of such inferior jurisdiction by *certiorari;* and in such cases a writ of error is not, without the aid of statute, the proper remedy to effect the removal of the proceedings to the revisory tribunal.[2]

§ 1592 (926). **Scope of Certiorari in this Country.** — The unquestionable weight of authority in this country is, if an appeal be not given or some specific mode of review provided, that the superior common-law courts will, on *certiorari, examine the proceedings of municipal corporations,* even although there be no statute giving this remedy; and if it be found that they have exceeded their chartered powers, or have not pursued those powers, or have not substantially conformed to the requirements of the charter or law under which they have undertaken to act, such proceedings will be reversed or annulled. An aggrieved party is, in such case, entitled to a *certiorari ex debito justitiæ.*[3] Thus, if no appeal or other mode

Bridge Case), 1 Ld. Raym. 580; Nordyke & Marmon Co. *v.* McConkey, 7 Idaho, 562.

[1] Parks *v.* Boston, 8 Pick. (Mass.) 218, 226; Lawton *v.* Cambridge, 2 Caines (N. Y.), 179, 182; Wood *v.* Peake, 8 Johns. (N. Y.) 54; Wildy *v.* Washburn, 16 Johns. (N. Y.) 49.

[2] *Ante*, §§ 752, 1047; Marion *v.* Chandler, 6 Ala. 899; Tarlton, *In re*, 2 Ala. 35; Negus, *In re*, 10 Wend. (N. Y.) 34, 39; Ruhlman *v.* Commonwealth, 5 Binn. (Pa.) 26; Savage *v.* Gulliver, 4 Mass. 178; Commonwealth *v.* Ellis, 11 Mass. 465; Edgar *v.* Dodge, *Ib.* 670; Ball *v.* Brigham, 5 Mass. 406; Bob, *In re* (a slave), *v.* State, 2 Yerg. (Tenn.) 173; Lawson *v.* Scott, 1 Yerg. (Tenn.) 92; Wildy *v.* Washburn, 16 Johns. (N. Y.) 49; Street *v.* Francis, 3 Ohio, 277; State *v.* Bill, 13 Ired. L. 373; Home Savings & Trust Co. *v.* Polk County, 121 Iowa, 1; Gilbert *v.* Salt Lake City, 11 Utah, 378, quoting text; Redfield on Railways, chap. xxvi. When remedy is by *certiorari*, and when by *bill in equity*, and when not, in *Massachusetts*, see Whiting *v.* Boston, 106 Mass. 89; Jones *v.* Boston, 104 Mass. 461; *ante*, § 1590, note; Miller *v.* School Trustees, 88 Ill. 26, citing and approving text; *ante*, §§ 1570–1572, and note.

[3] State *v.* Bill, 13 Ired. (N. Car.) Law, 373; Marion *v.* Chandler, 6 Ala. 899; Carroll *v.* Tuskaloosa, 12 Ala. 173; Miller *v.* Jones, 80 Ala. 89; *Ib.* 287; Jackson *v.* People, 9 Mich. 111, cited *ante*, § 752, note; McKenzie *v.* San Francisco Board of Education, 1 Cal. App. 406; DeKalb County Court *v.* Pogue, 115 Ill. App. 391. There

of review be given, and if there be no statute to the contrary, the legality of convictions in *municipal courts* will be revised on *certiorari*.[1] So, under the same circumstances and in the same way, the proceedings of municipal corporations in *opening streets*,[2] in making

ought to be substantial grounds to justify disturbing the action of public bodies by this writ. Gager *v.* Chippewa County, 47 Mich. 167. See further on the subject of the text: State *v.* Stewart, 5 Strob. L. (S. Car.) 29; State *v.* Swift, 1 Hill (S. Car.), 360; *Re* Schmidt, 24 S. Car. 363; State *v.* Fort, 24 S. Car. 510; Dwight *v.* Springfield, 4 Gray (Mass.), 107; Parks *v.* Boston, 8 Pick. (Mass.) 218; Fay, Petitioner, 15 Pick. (Mass.) 243; Cunningham *v.* Squires, 2 W. Va. 422; Taylor *v.* Americus, 39 Ga. 59; Macon *v.* Shaw, 16 Ga. 280; Shaw *v.* Macon, 19 Ga. 468; Burns *v.* LaGrange, 17 Tex. 415; Buckner, *In re*, 9 Ark. 73, 148; Camden *v.* Mulford, 26 N. J. L. 49; Carron *v.* Martin, *Ib.* 594; Morris Canal & B. Co. *v.* Jersey City, 12 N. J. Eq. 252; Holmes *v.* Jersey City, *Ib.* 299; State *v.* Newark, 25 N. J. L. 399; State *v.* Hudson, 32 N. J. L. 365; Swann *v.* Cumberland, 8 Gill (Md.), 150; Dorchester *v.* Wentworth, 31 N. H. 451; Chicago & R. I. R. Co. *v.* Whipple, 22 Ill. 105; Ewing *v.* St. Louis, 5 Wall. (U. S.) 413; Kip *v.* Paterson, 26 N. J. L. 298; State *v.* Zeigler, 32 N. J. L. 262; Holberg *v.* Macon, 55 Miss. 112, citing and approving text; Miller *v.* School Trustees, 88 Ill. 26; Doolittle *v.* Galena & C. U. R. Co., 14 Ill. 381; Sonova H. Comm'rs *v.* Carthage, 27 Ill. 140; Geneseo *v.* Harper, 38 Ill. 103; *ante*, §§ 752, 1047, 1457, 1571; Tierney *v.* Dodge, 9 Minn. 166; State *v.* Dowling, 50 Mo. 134; St. Paul *v.* Marvin, 16 Minn. 102; Corbett *v.* Duncan, 63 Miss. 84; Loeb *v.* Duncan, 63 Miss. 89; McCreary *v.* Rhodes, 63 Miss. 308; Collins *v.* Davis, 57 Iowa, 256; Stubenrauch *v.* Neyenesch, 54 Iowa, 567; Oshkosh *v.* State, 59 Wis. 425; Denver *v.* Darrow, 13 Colo. 460, citing text, and explaining Darrow *v.* People, 8 Colo. 417; *ante*, § 953, note.

A *certiorari* will not be granted where the object thereof can be attained in an appeal pending, — as here, from the decision of county commissioners locating or discontinuing a way, to quash the record. Hodgdon *v.* Lincoln County, 68 Me. 226; *infra*, § 1595.

[1] Taylor *v.* Americus, 39 Ga. 59; Marion *v.* Chandler, 6 Ala. 899; Jackson *v.* People, 9 Mich. 111, and remarks of Mr. Justice *Campbell; ante*, § 752, and notes; State *v.* Davey (writ refused), 39 La. An. 992. See Watson *v.* Plainfield, 60 N. J. L. 260.

[2] Tarlton, *In re*, 2 Ala. 35; Dwight *v.* Springfield, 4 Gray (Mass.), 107; Carron *v.* Martin, 26 N. J. L. 594; Dorchester *v.* Wentworth, 31 N. H. 451; Parks *v.* Boston, 8 Pick. (Mass.) 218, 225; Ewing *v.* St. Louis, 5 Wall. (U. S.) 413, cited *ante*, § 1047, note; St. Charles *v.* Rogers, 49 Mo. 530.

It seems to be the settled view in *New York* that without a statutory enlargement of the functions of the writ of *certiorari*, it will be denied, or if granted it will be quashed, when it is sought for the purpose of reviewing the official or *corporate* proceedings of a common council when they are of a *legislative, executive, or ministerial character;* as, for example, the regularity of proceedings by ordinances or resolutions under the right of eminent domain to *open streets, squares, &c., and for constructing sewers in streets, and the like improvements, including assessments therefor;* and the regularity of proceedings voting taxes, appointing officers, making by-laws, &c. People *v.* New York, 2 Hill (N. Y.), 9. In Matter of Mount Morris Square, 2 Hill (N. Y.), 14, questioning Parks *v.* Boston, 8 Pick. (Mass.) 218, *supra*, which holds that proceedings to open streets may be reviewed on *certiorari*, and also doubting Le Roy *v.* New York, 20 Johns. (N. Y.) 430, and Baldwin *v.* Calkins, 10 Wend. (N. Y.) 166, so far as the latter asserts that the *principle of assessment* may be reviewed by *certiorari*. It is admitted, however, Mount Morris Sq., *In re* (2 Hill (N. Y.), 14), that the writ will lie to the local courts or corporate officers *exercising judicial functions*. See further, as to remedy by *certiorari*, People *v.* Allegany County, 15 Wend. (N. Y.) 198; People *v.* Queens County, 1 Hill (N. Y.), 195; Albany, *Ex parte*, 23 Wend. (N. Y.) 277; Stone *v.* New York, 25 Wend. (N. Y.) 157, 167, *per Paige*,

local assessments, in *levying taxes*,[1] in contested *election cases*,[2] and the like, will be examined and reviewed, to ascertain

Senator; *Ib.* 693. The doctrine of the *New York* cases denying that the proceedings of municipal corporations in opening streets, making assessments, &c., can be reviewed on *certiorari*, followed in Dixon *v.* Cincinnati, 14 Ohio, 240; but the weight of authority is otherwise. See chapter on Eminent Domain, *ante*, § 611.

Later *New York* cases are to the effect that upon a common-law *certiorari* "the duty of the court is not limited to the inquiry whether the lower tribunal had jurisdiction over the parties and the subject-matter; but it is the duty of the court, in addition thereto, to examine the evidence, and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated." *Per Grover*, J., People *v.* Smith, 45 N. Y. 772. See previous cases cited and reviewed by *Woodruff*, J., People *v.* Metropolitan Pol. Board, 39 N. Y. 506. Where assessors for a local improvement adopt the correct legal rule, — *i. e.*, that all property benefited must be assessed, — an error in determining what property is in fact benefited must be reviewed and corrected by *certiorari*, not by suit. Kennedy *v.* Troy, 77 N. Y. 493; Le Roy *v.* New York, 20 Johns. (N. Y.) 430; People *v.* Brooklyn Board of Ass., 39 N. Y. 81; People *v.* Metropolitan Pol. Board, 39 N. Y. 506; People *v.* Hillhouse, 1 Lans. (N. Y.) 87; Western R. Co. *v.* Nolan, 48 N. Y. 513; Heywood *v.* Buffalo, 14 N. Y. 534, 541; see *infra*, § 1594, note; Laws of New York, 1896, ch. 908, §§ 250, 251; Laws of N. Y., 1909, ch. 62, §§ 290, 291; People *v.* Stilwell, 190 N. Y. 284; People *v.* Wells, 182 N. Y. 314; People *v.* Kaufman, 121 N. Y. App. Div. 599; Matter of Long Beach Land Co., 106 N. Y. App. Div. 253; People *v.* Wells, 91 N. Y. App. Div. 172; City of New York *v.* Tucker, 91 N. Y. App. Div. 214; *In re* Cathedral of Long Island, 91 N. Y. App. Div. 543.

Defects in notices preceding orders of the city council for the improvement of streets can only be availed of by *certiorari* in *Massachusetts;* such orders cannot be impeached for this reason, in an action to recover money paid for betterments under protest. Foley *v.* Haverhill, 144 Mass. 352; Lowell *v.* Hadley, 8 Met. (Mass.) 180, 192; Taber *v.* New Bedford, 135 Mass. 162; Sisson *v.* New Bedford, 137 Mass. 255; Gilkey *v.* Watertown, 141 Mass. 317. Whether an assessment for a sewer is made in accordance with a statute, and whether the statute is constitutional, can only be raised on *certiorari*, and not upon trial of a petition for a revision of the assessment. Snow *v.* Fitchburg, 136 Mass. 179.

[1] State *v.* Newark, 25 N. J. L. 399; Swann *v.* Cumberland, 8 Gill (Md.), 150; Buckner, *In re*, 9 Ark. 73; Carroll *v.* Tuskaloosa, 12 Ala. 173; State *v.* Lawler, 103 Wis. 460; Milwaukee Iron Co. *v.* Schubel, 29 Wis. 444, where the authorities are very fully considered by *Cole*, J. See also People *v.* Ogdensburg, 48 N. Y. 390, holding that the action of the assessors in putting upon and refusing to strike from the roll non-taxable property can be reviewed on *certiorari*. *Ante*, § 804, and note.

Certiorari lies at common law *to remove a tax assessment*, but as the allowance of the writ is discretionary, it is generally refused on grounds of

[2] Cunningham *v.* Squires, 2 W. Va. 422. Further, as to power to review on *certiorari* the regularity of the proceedings of inferior tribunals in cases of *contested elections*. Gibbons *v.* Sheppard, 65 Pa. St. 20; s. c. Brightly's Election Cases, 538; State *v.* Lamberton (review on *certiorari* refused), 37 Minn. 362; *ante*, chap. ix., on Municipal Elections, also §§ 752, 1553. Certain constitutional provisions and concurrent charter remedies held not to take away the jurisdiction of the superior courts on *quo warranto* to determine the legal right to the office of mayor. People *v.* Londoner, 13 Colo. 303. In *Michigan*, *certiorari* is held to be the proper mode of reviewing the *proceedings of a special statutory board* in apportioning property and moneys between a county and a new county which is created out of its territory. Alcona *v.* White, 54 Mich. 503.

whether they are legal and regular, and, if not so, they will be quashed.[1]

§ 1593 (927). **Same Subject.** — At common law *certiorari* only lies to inferior *courts* and officers exercising *judicial* powers; not only so, but the act to be reviewed must be *judicial* in its nature, and not merely ministerial.[2] But the doctrine that *certiorari* lies

ublic policy and convenience. *Per Beardsley*, J., Weaver *v.* Devendorf, 3 Denio (N. Y.), 117–119; People *v.* Allehany County, 15 Wend. (N. Y.) 198; People *v.* Queens County, 1 Hill (N. Y.), 95; People *v.* New York, 2 Hill (N. Y.), , 11; Mount Morris Square, *In re*, Hill (N. Y.), 14. But it ought, we hink, to be freely allowed whenever necessary to protect the citizen in his egal rights. Effect of not resorting to *certiorari*, on the right to an injunction against assessments for local improvements. Ottawa *v.* Chicago & R. I. R. Co., 25 Ill. 43; Ewing *v.* St. Louis, 5 Wall. (N. Y.) 413; *ante*, § 953, note.

[1] In the case of Wilson, *In re*, 32 Minn. 145, this section (§ 1592) was cited "as authority that courts will on certiorari examine the proceedings of municipal corporations, whether *legislative* or *judicial*," and *Mitchell*, J., in his opinion, says the author "did not intend to convey the idea that mere legislative or ministerial acts could thus be reviewed," because an examination of the cases cited shows that none support such a proposition, and because the illustrations in the last half of the section are all of *judicial acts*. The learned judge seems to have entirely overlooked the following section. Lorpeer *v.* Hutchinson, 111 Cal. 272; State *v.* Osburn, 24 Nev. 187.

The doctrines of the text were approved and applied by the Supreme Court of Colorado in the case of Denver *v.* Darrow, 13 Colo. 460. The statute of that State provided that the writ of *certiorari* should be granted in all cases where inferior tribunals, boards, or officers exercising judicial functions exceed their jurisdiction, and there is no appeal, or, in the judgment of the court, other plain, speedy, and adequate remedy. Darrow was elected an alderman of the city of Denver, qualified, took his seat, and was chosen and had for some time acted as president of the board. The board, on the ground that he was ineligible to that place by reason of not having been for at least one year a taxpayer of the city, without charge, notice, or opportunity to be heard (although he was present), passed a resolution, against his protest, summarily removing him from his position as alderman, and he was forcibly compelled to vacate his seat. The charter of the city provided that the board of aldermen "shall be the sole judge of the qualifications, election, and returns of its own members." Darrow brought a proceeding by a *certiorari* to review the action of the board of aldermen in thus removing him. It was held, in a very able opinion, by *Richmond*, C.: 1st. That the writ of *certiorari* was applicable to the case, and not *quo warranto*. 2d. That the provision of the charter making the board the judge of the qualifications, election, and return of its members did not divest the superior courts of the power to review by *certiorari* the regularity of the proceedings of the board in removing Darrow, explaining on this point Darrow *v.* People, 8 Colo. 417. 3d. That one who has been elected and inducted into office cannot be summarily removed by resolution, upon a charge of disqualification, without notice and an opportunity to be heard. 4th. That the controversy between Darrow and the board of aldermen was judicial in its nature, and that the board in its action was to be regarded as exercising judicial functions within the meaning of the statute in relation to the writ of *certiorari*.

[2] Bacon's Abr. *Certiorari*, B; People *v.* New York, 2 Hill (N. Y.), 9, 11; Mount Morris Square, *In re*, 2 Hill (N. Y.), 14; People *v.* Park, 97 N. Y. 37; Pine Bluff Water & L. Co. *v.* Pine Bluff, 62 Ark. 196, citing text; Frasher *v.* Rader, 124 Cal. 132; Borchard *v.* Ventura County, 144 Cal. 10; Adleman *v.* Pierce, 6 Idaho, 294; Harvey *v.* Dean, 62 Ill. App. 41; Moore *v.* Perry, 119 Iowa, 423; Morse *v.* Norfolk

only to examine the validity of such ordinances and acts of a municipal corporation as are of a *judicial* character, and not such as are legislative or ministerial in their nature, is not adopted in New Jersey, and in that State this writ has long been used to test the validity of the acts and ordinances of such corporations, whatever their nature, whether legislative, ministerial, or judicial, and it is considered ordinarily to be the appropriate remedy; but equity will also, in proper cases, entertain jurisdiction.[1] And in other States the powers with which the municipal authorities are clothed, to be exercised whenever in their opinion the convenience or welfare of the inhabitants requires it, are considered to be *judicial*, and hence *certiorari* lies to remove proceedings thereunder to the proper court for examination; but if the local authorities have decided

County, 170 Mass. 555; Devlin *v.* Dalton, 171 Mass. 338; Minnesota Sugar Co. *v.* Iverson, 90 Minn. 6; State *v.* Iverson, 92 Minn. 355; People *v.* New York Board of R. Comm'rs, 158 N. Y. 711, aff'g 32 N. Y. App. Div. 179; People *v.* Brady, 166 N. Y. 44; People *v.* New Rochelle, 17 N. Y. App. Div. 603; People *v.* Gilroy, 72 Hun (N. Y.), 637; People *v.* Bush, 22 N. Y. App. Div. 363; People *v.* Shaw, 34 N. Y. App. Div. 61; People *v.* Feeney, 43 N. Y. App. Div. 376; People *v.* Van Alstyne, 53 N. Y. App. Div. 1; People *v.* Woodruff, 54 N. Y. App. Div. 1; People *v.* Conway, 59 N. Y. App. Div. 329; People *v.* Flood, 64 N. Y. App. Div. 209; People *v.* Board of R. Comm'rs, 52 N. Y. Supp. 908; Southern Development Co. of Nevada *v.* Douglass, 26 Nev. 50; Greenough *v.* Pawtucket School Committee, 27 R. I. 427; Gilbert *v.* Salt Lake City, 11 Utah, 378; Wheeling & E. G. R. Co. *v.* Triadelphia, 58 W. Va. 487. See People *v.* Martin, 142 N. Y. 228. Street and assessment cases. People *v.* Covert, 1 Hill (N. Y.), 674; *Re* Wilson, 32 Minn. 145; State *v.* St. Paul, 34 Minn. 250; Attorney-General *v.* Northampton, 143 Mass. 589, holding that this writ does not lie to quash proceedings of a city council in appointing a police officer in violation of a statute for the improvement of the civil service.

Thus a taxpayer may apply for *certiorari* to annul an order or resolution made in excess of the jurisdiction of the board when exercising judicial functions. In *California*, the county board has no power to contract for any county printing without ten days' public notice that such contract will be let to the lowest bidder. Maxwell *v.* Stanislaus County, 53 Cal. 389. In Fonda *v.* Canal Appraisers, 1 Wend. (N. Y.) 288, a *certiorari* was granted where the damages of a party were appraised without notice, and without giving him an opportunity to be heard or to produce testimony.

[1] Camden *v.* Mulford, 26 N. J. L. 49; Carron *v.* Martin, *Ib.* 594; Morris Canal & B. Co. *v.* Jersey City, 12 N. J. Eq. 252; Holmes *v.* Jersey City, *Ib.* 299. Further, as to office of the writ. State *v.* Hudson, 32 N. J. L. 365; State *v.* Donahay, 30 N. J. L. 404; Jersey City *v.* State, *Ib.* 521; State *v.* Jersey City, *Ib.* 247; *supra*, § 1570, and note; Mowery *v.* Camden, 49 N. J. L. 106; Shields *v.* Paterson, 55 N. J. L. 495; Daily *v.* Essex County Freeholders, 58 N. J. L. 319; Roberts *v.* Camden, 63 N. J. L. 186; Christie *v.* Bayonne, 64 N. J. L. 191; Bill Posting Sign Co. *v.* Atlantic City, 71 N. J. L. 72; Jackson *v.* Newark, 53 N. J. Eq. 322. The Supreme Court will not weigh the evidence. State *v.* Newark, 49 N. J. L. 170. What acts are judicial, and what ministerial, in their nature. Camden *v.* Mulford, *supra;* Iske *v.* Newton, 54 Iowa, 586; Denver *v.* Darrow, 13 Colo. 460, *supra*. The writ is properly *directed* to the municipal corporation by name, since the possession of the record by its officer or agent is, in legal contemplation, its own possession. Davis *v.* Harrison, 46 N. J. L. 79; *ante*, §§ 1532-1536; *infra*, § 1595, note.

that the public convenience or welfare requires the exercise of the power, as, for example, the establishment or improvement of a street, the decision of such a question cannot, without statutory provision to that effect, be judicially revised on *certiorari*.[1] This is so for the reason that, aside from such a statute, questions of this character are not judicially reviewable,[2] and for the further reason that *certiorari*, unless otherwise provided by statute, only lies to correct *errors of law* in inferior jurisdictions. Where an appeal is allowed, it, in general, takes up the cause or proceeding for determination *de novo*, unless otherwise ordered by statute; but *certiorari* is not a substitute for an appeal, and is not designed to correct errors of fact, unless so provided by statute.[3]

§ 1594 (928). **What may be examined and reviewed.** — Although there is some contrariety of opinion as to just what the writ removes, and as to whether the evidence, if certified, can be considered at all, the more liberal and better view is that the revisory court may not only *inquire into the jurisdiction of the inferior tribunal, but into errors of law* occurring in the course of the proceedings and affecting the merits of the case, and may also examine the *evidence* embodied in the return, "not to determine whether the probabilities preponderate one way or the other, but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not have been drawn by the superior tribunal." [4]

[1] Dwight *v.* Springfield, 4 Gray (Mass.), 107; Parks *v.* Boston, 8 Pick. (Mass.) 218; Stone *v.* Boston, 2 Met. (Mass.) 220; Fay, Petitioner, 15 Pick. (Mass.) 243; Monterey *v.* Berkshire County, 7 Cush. (Mass.) 394; *ante*, § 242; Brown *v.* San Francisco, 124 Cal. 274; Hartman *v.* Wilmington, 1 Marv. (Del.) 215; People *v.* Queens County, 14 N. Y. App. Div. 608; People *v.* McClellan, 107 N. Y. App. Div. 272; See Whittaker *v.* Venice, 150 Ill. 195; People *v.* Yonkers Board of Health, 140 N. Y. 1; *In re* Fitch, 147 N. Y. 334; People *v.* New York Comm'rs, 160 N. Y. 202; People *v.* Guilfoyle, 65 N. Y. App. Div. 498; People *v.* Simonson, 66 N. Y. App. Div. 18; Walker *v.* Maxwell, 68 N. Y. App. Div. 196.

In *Georgia*, *certiorari* was held to lie to a city council that accused, tried, and dismissed a city officer for alleged official neglect, the Constitution providing that the superior courts "shall have power to correct errors in inferior judicatories by a writ of *certiorari*," the council, in trying and dismissing their officer, being regarded as a judicatory. Macon *v.* Shaw, 16 Ga. 280. See Shaw *v.* Macon, 19 Ga. 468; Denver *v.* Darrow, 13 Colo. 460, *supra*.

[2] *Ante*, §§ 242, 1573.

[3] State *v.* Bill, 13 Ired. L. 373; State *v.* Stewart, 5 Strob. (S. Car.) 29; State *v.* Swift, 1 Hill (S. Car.), 360; State *v.* Cockrell, 2 Rich. (S. Car.) 6; Bradshaw *v.* Earnshaw, 11 App. D. C. 495; Berkey *v.* Thompson, 126 Iowa, 394; Somers *v.* Wescoat, 66 N. J. L. 551; Coles *v.* Blythe, 69 N. J. L. 666; Nobles *v.* Piollet, 16 Pa. Super. Ct. 386. See State *v.* Reynolds, 190 Mo. 578; *post*, § 1594.

[4] Jackson *v.* People, 9 Mich. 111, where the subject is fully and ably examined by Mr. Justice *Campbell*,

§ 1595 (929). **When Certiorari does not lie.** — From inferior jurisdictions an appeal or writ of error exists only as it is provided by law, but where a remedy by writ of error or by appeal is given, a *common-law certiorari will not, without legislative aid,* be sustained.[1]

and the propositions of the text fortified by the authorities cited. In *Massachusetts* it is held that the Superior Court, on *certiorari*, can only examine into the regularity and legality of the proceedings; that is, whether the inferior jurisdiction has pursued the powers granted, and conformed to the requirements of the law under which it professes to act. *Ante*, § 758, note; Parks *v.* Boston, 8 Pick. (Mass.) 218; Dwight *v.* Springfield, 4 Gray (Mass.), 107; Fay, Petitioner, 15 Pick. (Mass.) 243; Weathersby *v.* Jordan, 124 Ga. 68; Heaney *v.* Chicago, 117 Ill. App. 405; State *v.* Hennepin County Dist. Co., 83 Minn. 464; State *v.* Baker, 170 Mo. 383; People *v.* Monroe, 106 N. Y. App. Div. 607; People *v.* Lawrence, 94 N. Y. Supp. 820; Appeal of Plains, 206 Pa. 556. See Harvey *v.* Dean, 62 Ill. App. 41; School Dist. No. 2 *v.* Pace, 113 Mo. App. 134; McAdam *v.* Block, 63 N. J. L. 508.

On a petition to quash the proceedings of the selectmen of a town, claiming to act under Statutes of 1873, chap. ccxiv., in making certain public improvements, and in assessing the expenses thereof on the estates benefited, it was held in Locke *v.* Lexington, 122 Mass. 290: 1. That a writ of *certiorari* lies only to correct the errors and restrain the excesses of jurisdiction of inferior courts, or officers acting judicially. Rex *v.* Lediard, Sayer, 6; Rex *v.* Lloyd, Cald. 309; Constables of Hipperholm, *In re*, 5 D. & L. 79, 81; Regina *v.* Hatfield Peverel, 14 Q. B. 298; Regina *v.* Salford Tp. Ov., 18 Q. B. 687; Parks *v.* Boston, 8 Pick. (Mass.) 218; Farmington River W. P. Co. *v.* Berkshire County, 112 Mass. 206. 2. The selectmen of a town are not a court, and, independently of the Statutes of 1873, chap. ccxiv., exercise no judicial functions which could be reviewed by writ of *certiorari*. Young *v.* Yarmouth, 9 Gray (Mass.), 386, 390; Robbins *v.* Lexington, 8 Cush. (Mass.) 292; Hooper *v.* Bridgewater, 102 Mass. 512. 3. Sec. 9 of said act, providing that "this act shall take effect at a legal meeting called for the purpose," the meeting at which said statute was accepted by the town, having been held on the second day after its passage, under a warrant served on the inhabitants some days before its passage, was not legally called; the statute never took effect, the selectmen never acquired any judicial powers, and the petitioners have an appropriate remedy by action. Ewing *v.* St. Louis, 5 Wall. (U. S.) 413, 418; People *v.* Court, 1 Hill (N. Y.), 674; Daws, *In re*, 8 A. & E. 936; s. c. 1 P. & D. 146.

In *Missouri*, *certiorari* brings up for review only the facts appearing on the face of the record. State *v.* Kansas City, 89 Mo. 34.

In *New York* it was held that the supervisory court is confined, if its powers are not enlarged by the statute, to an examination "to see whether the limited (or subordinate) jurisdictions have exceeded their bounds," kept within the limits of the jurisdiction. The case cannot be retried upon the evidence or its merits. The record alone, or that which stands for it, is regarded. People *v.* New York, 2 Hill (N. Y.), 9; Mount Morris Square, *In re*, 2 Hill (N. Y.), 14; 1 Hill (N. Y.), 674; Stone *v.* New York, 25 Wend. (N. Y.) 157, 167, and authorities cited by *Paige*, Senator; People *v.* Rochester, 21 Barb. (N. Y.) 656; s. p. Mount Morris Square, *In re*, 2 Hill (N. Y.), 14, 27, and cases there cited; Rex *v.* Morely, 2 Burr. 1040, 1042, and authorities there cited; Albany, *In re*, 23 Wend. (N. Y.) 277, and cases cited and commented on by *Cowen*, J. Starr *v.* Rochester, 6 Wend. (N. Y.) 565. Construing code as to what may be determined upon the return to a writ of *certiorari*. People *v.* Com'rs Dept. Fire & Buildings, 106 N. Y. 64; People *v.* Fire Com'rs, 106 N. Y. 257; People *v.* Fire Com'rs, 100 N. Y. 82. In *Wisconsin*. Milwaukee Iron Co. *v.* Schubel, 29 Wis. 444; Driscoll *v.* Smith, 59 Wis. 38; Oshkosh *v.* State, 59 Wis. 425.

[1] Duggen *v.* McGruder, Walk. (Miss.) 112; Rundle *v.* Baltimore, 28 Md. 356;

But if an appeal where it exists is improperly denied, or if the party is deprived of it by fraud or accident, he may have his whole case reviewed by *certiorari*, both as to matters of law and of fact; and where the right of appeal is not allowed or does not exist, the aggrieved party is still entitled to have his case revised by a superior tribunal.[1]

§ 1596 (930). **Remedy by Prohibition; When Proper Remedy.** — In some of the States the *writ of prohibition* is resorted to to prevent municipal corporations from transcending the bounds of their jurisdiction or exercising powers not conferred.[2] A manifest

Beasley *v.* Beckley, 28 W. Va. 81; [Wilson *v.* Burks, 71 Ga. 862; *Re* Pearce, 44 Ark. 509; Galloway *v.* Corbitt, 52 Mich. 460; Storm *v.* Odell, 2 Wend. (N. Y.) 287; State *v.* Wakely, 2 Nott & McC. (S. Car.) 410; *Ex parte* Howard-Harison Iron Co., 130 Ala. 185; People *v.* Pueblo County Dist. Ct., 33 Colo. 257; Harvey *v.* Dean, 62 Ill. App. 41; State *v.* King, 52 La. Ann. 1548; State *v.* Miller, 109 La. 704; State *v.* Leche, 113 La. 1; State *v.* Justice Court, 31 Mont. 258; State *v.* Moore, 54 S. Car. 556; State *v.* Spokane County Superior Court, 38 Wash. 23; State *v.* Oshkosh A. & B. W. R. Co., 100 Wis. 538; Mount Morris Square, *In re*, 2 Hill (N. Y.), 14, 27, and the many authorities cited by *Cowen*, J.; and it was there held that the right of opposing in the Supreme Court the report of the commissioners of estimate and assessment in proceedings to open and widen streets was in the nature of a remedy by appeal, and therefore *certiorari* would not lie to review their proceedings. See also People *v.* Covert, 1 Hill (N. Y.), 674; *ante*, §§ 377, 758, 1047. So *delay* may defeat right to a *certiorari*. Elmendorf *v.* New York, 25 Wend. (N. Y.) 693, adopting analogy of statute relative to writs of error. Reynolds *v.* Los Angeles County, 64 Cal. 372; Williams *v.* Sacramento County, 65 Cal. 160; *supra*, §§ 1457, note, 1590, note. *Writ, how directed.* Bogart *v.* New York, 7 Cow. (N. Y.) 158; Davis *v.* Harrison, 46 N. J. L. 79; *supra*, § 1593, note. *Practice under writ.* Macon *v.* Shaw, 14 Ga. 162.

[1] State *v.* Bill, 13 Ired. L. 373; Blount County Com'rs Ct. *v.* Johnson, 145 Ala. 553; Lyons *v.* Green, 68 Ark. 205. As to right and manner of Appeals by municipal corporations, see, generally, chapter on Municipal Courts, *ante*, §§ 749, 756, 757; also Pottsville Bor. *v.* Curry, 32 Pa. St. 443;] Robinson *v.* Jefferson County, 6 Watts & S. 16; Monaghan *v.* Philadelphia, 28 Pa. St. 207. *Supersedeas* necessary to stay proceedings to open street. Dusseau *v.* Municipality, 6 La. An. 575.

[2] Mayo *v.* James, 12 Gratt. (Va.) 17; Warwick *v.* Mayo, 15 Gratt. (Va.) 528; Clayton *v.* Heidelberg, 17 Miss. 623; People *v.* Denver District Court, 33 Colo. 293; Stein *v.* Morrison, 9 Idaho, 426; Speed *v.* Detroit Common Council, 98 Mich. 360; State *v.* Cline, 85 Mo. App. 628; People *v.* Sherman, 171 N. Y. 684, aff'g 66 N. Y. App. Div. 231; Taylor *v.* Bliss, 26 R. I. 16; Brown *v.* Randolph County Election Canvassers, 45 W. Va. 826; Judy *v.* Lashley, 50 W. Va. 628; Black Fork Board of Education *v.* Holt, 51 W. Va. 435. Only *matters of jurisdiction* can be considered on an application for a writ of prohibition. State *v.* Evans, 184 Mo. 632. In *West Virginia* it has been held that ministerial acts cannot be interfered with by writ of prohibition. Williamson *v.* Mingo County Ct., 56 W. Va. 38. In *Arkansas* the writ does not lie where the inferior court has jurisdiction of the subject-matter, on a suggestion of erroneous proceedings. Blackburn, *In re*, 5 Ark. 21. So in *Georgia*. Turner *v.* Forsyth, 78 Ga. 683. So in *Minnesota*. State *v.* Cory, 35 Minn. 178.

The reports of judicial decisions in *South Carolina* show that it is the constant practice in that State to restrain by *prohibition*, not only inferior *judicial* tribunals, but also municipal corporations and corporations *sub modo*, from the exercise of unwarranted

difference between the writ of prohibition and the writ of injunction is this: the former operates upon the *court*, and the judge or officer who disregards it may be punished; the latter operates upon the *party* alone, but does not interfere with the court itself.[1] Where prohibition is a proper remedy, the writ will not be granted unless the party is in danger of being injured by a suit *actually depending*; it will not be granted because such a suit is threatened.[2]

§ 1597 (931). **Remedy by Indictment; In England.** — It is a clear principle of the *English law* that *all corporations, municipal as well as private*, which owe duties to the public, are liable to indict-

powers, or the imposition of penalties beyond their jurisdiction. State *v.* Christ Church Par. R. Com'rs, 1 Mill Const. (S. Car.) 55, where the subject is fully examined; McKee *v.* Anderson, Rice L. (S. Car.) 24; Charleston *v.* Pinckney, 1 Tr. Const. (S. Car.) 42; s. c. 3 Brev. 217; Zylstra *v.* Charleston, 1 Bay (S. Car.), 382. If an appeal is given, that course is the proper one for the aggrieved party to pursue if he wishes a trial *de novo*, and, in general, he is entitled to a *certiorari*, if he has no other remedy, in order to review errors of law committed by the inferior jurisdiction. State *v.* Wakely, 2 Nott & McC. (S. Car.) 410; State *v.* Cockrell, 2 Rich. L. 6, *per Evans*, J.; McDonald *v.* Elfe, 1 Nott & McC. (S. Car.) 410, 501.

A *writ of prohibition* will not lie to prevent the execution of a contract for a sidewalk. The remedy is by injunction; a writ of prohibition only lies to prevent making the contract. Bluffton *v.* Silver, 63 Ind. 262.

[1] Mealing *v.* Augusta, Dud. (Ga.) 221; Moore *v.* Holt, 55 W. Va. 507; Hawk's Nest *v.* Fayette County Court, 55 W. Va. 689. Where a city council is not a *court*, but is exercising the powers given to it as the governing body of the corporation, it is not such a tribunal as can, in the opinion of the Superior Court of *Georgia*, be reached by prohibition. Mealing *v.* Augusta, Dud. (Ga.) 221.

[2] Mealing *v.* Augusta, Dud. (Ga.) 221. Text approved: Bluffton *v.* Silver, 63 Ind. 262; Kinard *v.* Oakland Police Court, 2 Cal. App. 179. See Town *v.* County Court, 55 W. Va. 689.

In Smith *v.* Whitney, 116 U. S. 167, the nature of the writ of prohibition was very fully considered. Mr. Justice *Gray*, referring to the authorities, says: "Where the inferior court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error. This is the clear result of the modern English decisions, in which the law concerning writs of prohibition has been more fully discussed and explained than in the older authorities." But in that case it was held that the writ of prohibition did not lie to the action of the Secretary of the Navy convening a court-martial, nor to a court-martial to correct mistakes in the decision of questions of law and fact within its jurisdiction.

Respecting the *writ of prohibition and the practice under it*. Mayo *v.* James, 12 Gratt. (Va.) 17; Ellyson, *In re*, 20 Gratt. (Va.) 10, where a writ of prohibition is distinguished from a writ of error; Culpeper County *v.* Gorrell, 20 Gratt. (Va.) 484; 3 Black. Com. 112; 8 Bac. Abr. 206, title, *Prohibition*; 7 Com. Dig. 135, same title; Home *v.* Earl Camden, 2 H. Bl. 533; Gould *v.* Gapper, 5 East, 345; 1 Saund. 136, and notes; Williams, *In re*, 4 Ark. 537, and note, giving *forms* used in the proceeding; Arnold *v.* Shields, 5 Dana (Ky.), 18; Clayton *v.* Heidelberg, 17 Miss. 623, where the office of the writ is discussed. Under the Constitution of *South Carolina* the Supreme Court of that State has no jurisdiction of an original application for a writ of prohibition to prevent a municipal corporation from issuing licenses. State *v.* Columbia, 16 S. Car. 412.

ɔr malfeasance as well as nonfeasance in respect to such The duty, however, must be one which is devolved on the tion by prescription or by statute; it must be a duty or on of a public nature, and one, it is supposed by the author, ory in its nature, and not discretionary. This method of on the part of the public against municipal corporations is equently resorted to for their failure to maintain and repair or highways, in compliance with a prescriptive duty or ɔy requirement; but the principle is general in its character the limits above stated.[1]

)8 (932). **Same Subject; In this Country.** — In *this country* ne principles have been recognized, and corporations are ly regarded as indictable for misfeasance, as well as non-e, respecting duties of a public nature plainly enjoined by slature for the benefit of the public. The modern view is to ıte corporations, as to their duties and responsibilities, so ɔssible, to individuals. It is admitted that they cannot be l for felonies, but it is clear that they may be indicted for ne to the injury and annoyance of the public, and which to a nuisance.[2] In practice, however, the remedy by in-

ıe Regis *v.* Henley, 3 B. & Ad. . 2 Clark & Fin. 331; Cal. 116, 117; Regina *v.* Great No. Co., 9 Q. B. 315; Rex *v.* Strat-n-Avon Bor., 14 East, 348; orp. 283; Reg. *v.* Birmingham . Co., 9 Car. & P. 469; Rex *v.* ıire, 16 East, 223; 1 Kyd, 225, Maule & S. 365, note; *ante*, ıotes. See Regina *v.* Nott, 4 '3; Add. on Torts (Am. ed.), , 889. Other mode of enforc- duties, see chapter on Man- *ınte.*

ırance is enforced by distress. ɔ. Birmingham & Gl. R. Co., 23. And, upon conviction, the ion may be fined. *Ib.* Upon tment against a town for not or repairing a highway, the ınot object that the record of ıg out of the road shows that *the land-owners*, over whose road was laid, *was not notified.* ı objection should be made ıe road was finally established. Raymond, 27 N. H. 388. *nte*, § 1042.

ımonwealth *v.* New Bedford ɔ., 2 Gray (Mass.), 339, and cases cited; Commonwealth *v.* Vermont & Mass. R. Corp. 4 Gray (Mass.), 22; Sussex County *v.* Strader, 18 N. J. L. 108. Approved: Cooley *v.* Essex County, 27 N. J. L. 415; State *v.* Morris & E. R. Co., 23 N. J. L. 360; State *v.* Hudson County, 30 N. J. L. 137, cited *infra;* State *v.* Vermont Cent. R. Co., 27 Vt. 103; Phillips *v.* Commonwealth, 44 Pa. St. 197; Commonwealth *v.* Bredin, 165 Pa. St. 224; Saukville *v.* State, 69 Wis. 178; McCrowell *v.* Bristol, 5 Lea (Tenn.), 685; State *v.* Portland, 74 Me. 268 (an indictment for so constructing a sewer that the outfall created a public nuisance sustained); Redfield on Railways, chap. xxix.; Morawetz Corp. (2d ed.) §§ 732, 733. It is held in *Massachusetts* that a railroad constructed over a public highway in such a manner as to obstruct the public travel is liable to indictment, this being a proper mode of redress for the public. Commonwealth *v.* Nashua & L. R. Co., 2 Gray (Mass.), 54; Cambridge *v.* Charlestown R. Co., 7 Met. (Mass.) 70. See Louisville & N. R. Co. *v.* State, 3 Head (Tenn.), 523.

Twenty years' acquiescence, on the

dictment in such cases is rarely resorted to, other remedies usually being preferred.

§ 1599 (933). **Neglect of Duty in Respect of Repair of Streets, &c.** — In Tennessee a municipal corporation is considered liable, upon the general principles of the common law, to indictment for *neglecting its duty to keep its streets in reasonable repair*, and it is no defence that the street is little used and is in a remote part of the town.[1] And the mayor and aldermen may also be personally indicted for like neglect of duty.[2] So in the same State it is held, upon the general principles of the law, that if a municipal corporation has power by its charter to pass such ordinances as may be necessary "*to preserve the health* of the town, and to prevent and remove nuisances," it is its positive duty to exercise this power, and that for a *neglect of this public duty* it or its officers are liable to an indictment. An indictment against the mayor and aldermen was accordingly sustained for *permitting a slaughter-house* to be kept upon the private property of a citizen of the town, to the annoyance of the inhabitants and the endangering of the public health, the court remarking that "an indictment against the corporation is the

part of a town, in the doings of their selectmen in the laying out of a highway and the making of repairs during that period, estops the town when indicted from denying that the road was legally laid out. State *v.* Boscawen, 32 N. H. 331. See *ante*, chapter on Dedication, §§ 1080, 1087.

[1] Chattanooga *v.* State, 5 Sneed (Tenn.), 578; State *v.* Barksdale, 5 Humph. (Tenn.) 154; State *v.* Murfreesboro, 11 Humph. (Tenn.) 217, where form of indictment is given; Louisville & N. R. Co. *v.* State, 3 Head (Tenn.), 523; *post*, chap. xxxii., as to repairs of streets.

[2] Hill *v.* State, 4 Sneed (Tenn.), 443.

And in *Pennsylvania* an indictment lies as at common law against public officers for neglect of public duties; and the principle was extended to a contractor for the repair of roads. Phillips *v.* Commonwealth, 44 Pa. St. 197.

Authorities relating to indictments against *public officers*, see chapter on Corporate Officers, *ante*, chap. xi. § 440, note. The Supreme Court of *Illinois* has decided that an alderman was indictable as at common law for a proposal made by himself to receive a bribe to influence his official action. Walsh *v.* People, 65 Ill. 58.

Requisites of indictment against official or corporate body for non-repair of streets. State *v.* Halifax, 4 Dev. L. (N. Car.) 345; *ante*, chap. ix. § 237, note. Facts which will sustain an indictment. Davis *v.* Bangor, 42 Me. 522; Howard *v.* North Bridgewater, 16 Pick. (Mass.) 189.

An indictment under statute of *Alabama* which charges that defendants, "aldermen and corporate officers of the town of G., failed and refused, as officers and supervisors of the public streets and highways in said town, to perform their duties as said corporate officers of all the public streets," is fatally defective on demurrer: 1st, because it does not state that the said town of G. is incorporated under the laws of the State; 2d, because it does not state that the inhabitants of said town are exempted from working on public roads; 3d, because it does not state that any of the streets of said town were out of repair, and so remained for more than ten days at any one time, without reasonable excuse. Nowlin *v.* State, 49 Ala. 41.

proper mode of redress by the public for a grievance of this nature."[1] So, also, in Kentucky a municipal corporation is indictable as at common law for *suffering its streets* to become and remain out of repair.[2] In Vermont a town is liable to an indictment as at common law for not *erecting a bridge* pursuant to an order from a competent tribunal.[3] In Maine, towns charged with the maintenance of *public highways* are by *statute* indictable for failing to discharge their duty in this respect; and the general principle is asserted in such cases, that where the town is civilly liable in damages it may be indicted.[4]

§ 1600 (934). **Repair of Bridges; Omission of Duty.** — On the ground that the legislation, both colonial and State, had imposed the duty of *repairing bridges* on the township, and had never recognized the common-law principle of holding the inhabitants of counties responsible for repairs, the Supreme Court of New Jersey

[1] State *v.* Shelbyville, 4 Sneed (Tenn.), 176; Hill *v.* State, *Ib.* 443; McCrowell *v.* Bristol, 5 Lea (Tenn.), 685; Georgeown *v.* Commonwealth, 115 Ky. 383. But in *Vermont* it has been held that a town is not indictable for not removing nuisances; as, for example, a stagnant and noxious pool of water beside a street, not created by it or its agents. State *v.* Burlington, 36 Vt. 521. Whether a municipal corporation is liable to indictment for keeping and maintaining a "*calaboose*," if it is so situated or managed as to become a nuisance, *quære*. Paris *v.* People, 27 Ill. 74.

[2] Commonwealth *v.* Hopkinsville, 7 B. Mon. (Ky.) 38; Hammar *v.* Covington, 3 Met. (Ky.) 494, *per Peters*, J. Similarly in *Pennsylvania*, Commonwealth *v.* Lansford Bor., 14 Pa. Co. Ct. R. 376.

[3] State *v.* Whittingham, 7 Vt. 390.

[4] *Per Weston*, C. J., State *v.* Great Works Milling & M. Co., 20 Me. 41; Davis *v.* Bangor, 42 Me. 522; State *v.* Gorham, 37 Me. 451, where a town was held indictable for neglecting to keep in repair a bridge and abutments erected by a *railroad company* over a railroad where it crosses the public highway. The *primary* liability under the statute, as respects the public, was considered as resting upon the town rather than upon the railroad company; the latter, however, would be liable to the town, which could enforce such liability by *mandamus*, to compel the railroad companies to keep such bridges as the law requires them to maintain in repair; and see State *v.* Portland, 74 Me. 268, noted *ante*, § 1598, note. See Cambridge *v.* Charlestown R. Co., 7 Met. (Mass.) 70; Reg. *v.* Birmingham & Gl. R. Co., 9 Car. & P. 469. *Mandamus* lies to compel a railroad company to restore the highway. People *v.* Dutchess & C. R. Co., 58 N. Y. 152; Indianapolis & C. R. Co. *v.* State, 37 Ind. 489. *Remedy by indictment.* Rex *v.* Oxfordshire, 16 East, 223; Pittsburg, V. & C. R. Co. *v.* Commonwealth, 101 Pa. St. 192; Louisville & N. R. Co. *v.* State, 3 Head (Tenn.), 523. Or, if money be expended by the town in necessary repairs, by *an action on the case*. Further, as to liability of towns for defects in railroad bridges erected on a public highway, see Sawyer *v.* Northfield, 7 Cush. (Mass.) 490, where, under the statute of *Massachusetts*, a different conclusion was reached. Under the statute of the latter State, the liability of the town is qualified, and does not exist where the turnpike or bridge or railroad company is bound by law or charter to keep the roads and bridges built by them in repair, in which case they, and not the towns, are liable for neglect of this duty. See further, *ante*, § 1233, and note; *post*, chap. xxxii. § 1730; 2 Thomps. Neg. 805.

holds that the *inhabitants of counties* in that State are not indictable for not repairing bridges over rivers; nor at common law were they so indictable for not repairing bridges over canals. The court enters a *caveat* against "acquiescing in the *dicta* in the books," asserting a doctrine which would make the inhabitants of townships or the board of freeholders indictable for the non-repair of bridges.[1] Under a statute investing the county commissioners "with a general superintendence over the public roads," prescribing their duties and the manner of raising means, and also providing for the indictment of the commissioners for "palpable omission of duty," no prosecution can, in the opinion of the Supreme Court of Illinois, be sustained, unless there was a palpable omission of a duty imperatively required by law in a matter involving no discretion, or a wilful and corrupt as well as palpable neglect of a discretionary duty; mere error of judgment or departure from sound policy not being sufficient where the defendants are vested with a discretionary power.[2]

§ 1601 (934 *a*). **Concluding Observations.** — Except the subject of ordinary common-law actions to enforce by way of damages the liabilities of municipal corporations on contracts and for torts, which will be treated in our next chapter, we have in this, and in the two preceding chapters relating to *mandamus* and *quo warranto*, completed our survey of the circle of remedies in our jurisprudence applicable to such corporations. While taken as a whole it cannot be said that either the public or individuals aggrieved are left without substantial means to keep municipalities and their officers within their chartered limits and powers, and to compel obedience to law, the result of the examination strongly impresses our minds with the conviction that the remedies to effectuate these ends are in some respects unnecessarily artificial, intricate, and uncertain. It is Utopian to suppose that in our advanced and complex civilization legal rights are always simple,[3] or that by legislative provision they can all be clearly defined, catalogued, and formulated

[1] State *v.* Hudson County, 30 N. J. L. 137. The opinion in this case, by *Vredenburgh*, J., was evidently prepared with much care, and is highly interesting. *Ante*, § 1244.

[2] Eyman *v.* People, 6 Ill. 8 (neglecting to repair bridge), and see State *v.* Portland, 74 Me. 268. Further, as to *Bridges*, see chap. xxiv., on Streets, *ante*, § 1157; chap. on Mandamus, § 1493; *post*, chap. xxxii.

[3] "The rights of men are incapable of [exhaustive] definition, but are not impossible to be discerned." — *Burke*, *French Revolution*. While this profound political thinker had especial reference to the natural or civil rights of men, his observation equally applies to their legal rights.

n advance; but there is no inherent reason why remedies for the enforcement of rights and the redress of wrongs should not in all cases be simple and easily understood. Owing to the accidental and irregular mode in which our law has been developed,[1] we have n almost every case to consider: (1) Whether any of the usual common-law actions is adapted to the case in hand, and adequate to the ends of justice. (2) Whether there is any special statutory remedy; and if so, whether it is exclusive or cumulative. (3) Whether any of the extraordinary remedies, as distinguished from the ordinary remedies of the common law, and also as distinguished from equitable remedies, is applicable to the case, and adequate. The boundary between these extraordinary remedies *inter sese*, and between them and the ordinary remedies at law, is at many places confused or obscure. And when we reach the grave question whether there is in the particular instance a remedy in equity, we are driven to ascertain the general boundary lines of the province of remedial equity, as distinguished, not only from the ordinary, but also as distinguished from the extraordinary remedies of the common law, — an inquiry which, while always important in our jurisprudence as it stands, is oftentimes one of exceeding difficulty and nicety. It is obvious that by judicious legislation remedial procedure could be greatly liberalized, simplified, and improved. It is satisfactory to observe the marked tendency within the last fifty years both of legislatures and courts to disembarrass legal proceedings from needless refinements and technicalities; but there are obstacles in the way of a harmonious and complete system of remedial procedure which can only be removed and wants which can only be supplied by legislative action.

Where a substantive legal or equitable *right* exists this should be the paramount consideration, and the *remedies* to protect and enforce that right should be subordinated to the substantive right itself, and by liberal provisions for amendments or otherwise, be given the fullest flexibility consistent with the Constitution of State. Remedies which for historical, accidental, or technical

[1] "Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls are magnificent and venerable, but useless, and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult." 3 Black. Com. 268. This is a true picture; it is as exact as it is elegant, and none but a master could have produced it. May we be permitted to add that in making the reparations we would not destroy, plow under and build anew, but would make the approaches in the existing structure few and plain, instead of leaving them numerous, winding, and difficult.

reasons are held to be *exclusive*, might by legislative authority well be made concurrent, cumulative, or interchangeable. Such, happily, in the interests of the administration of justice, is the spirit and tendency of the age, as manifested in modern legislative enactments and exemplified in the contemporary decisions of the judicial tribunals. The legal world moves slowly, *but it moves*.

CHAPTER XXXII

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0 (935). **General Liability ex Contractu; Ultra Vires.** — Mu-
corporations *are subject to be sued* upon contracts and in tort.
evious chapter we have considered at length the authority of
rporations to make contracts, the mode of exercising and the
f transcending the power.[1] This leaves but little to add in

e, chap. on Contracts, § 770 See also *ante*, § 1487, note; Municipal Bonds; People *v.* or, 53 N. Y. 128; Weismer *v.* 64 N. Y. 91; Winslow *v.* Per- County, 64 N. Car. 218.

ability of executory contracts icipality. Devlin *v.* New York, . 8; *ante*, § 771.

nicipal corporation, in protect- operty, in collecting its debts, erally in transacting business ate character, may, when not prohibited, or when not other- vided by statute, avail itself of ghts and remedies afforded to dual. Buffalo *v.* Bettinger, 76 93; Oliver *v.* Worcester, 102 9; Detroit *v.* Corey, 9 Mich. gusta *v.* Leadbetter, 16 Me. ans County *v.* Bowen, 4 Lans. 24; First Nat. Bank of Char- National Exch. Bank of Balti- U. S. 122.

unicipal corporation, like an l, under the limitations in- n its constitution and organization, may have recourse to the courts of the country to enforce rights and redress wrongs. Ottawa Dist. Council *v.* Low, 6 Can. Q. B. o. s. 546. Thus one municipal corporation may sue another. Huron Dist. Council *v.* London Dist. Ct., 4 Up. Can. Q. B. 302. So, also, a municipal corporation may be sued for a breach of contract, and in certain cases for wrongful acts not arising out of contract. Thus a municipal corporation may be sued for negligence in the construction of a sewer, malfeasance in illegally obstructing a drain or water course, so as to injure the owner or owners of land adjoining, or for wrongfully diverting a stream of water on plaintiff's land. [*Post*, §§ 1731–1745.] Farrell *v.* London, 12 Up. Can. Q. B. 343; Reeves *v.* Toronto, 21 Up. Can. Q. B. 157; Perdue *v.* Chinguacousy, 25 Up. Can. Q. B. 61; Rowe *v.* Rochester, 29 Up. Can. Q. B. 590; Stonehouse *v.* Enniskillen, 32 Up. Can. Q. B. 562; Darby *v.* Crowland, 38 Up. Can. Q. B. 338; Bathurst *v.* Macpherson, L. R. 4 App.

this place respecting their liability in actions *ex contractu.* Upon an authorized contract — that is, upon a contract within the scope of the chartered or legislative powers of the corporation and duly made by the proper officers or agents — they are liable in the same manner and to the same extent as private corporations or natural persons. But upon a contract which is *ultra vires* in the true sense of that expression, that is, upon a contract relating to matters *wholly* outside of the chartered or legislative powers of the corporation, there is no liability *upon the contract;* and the corporation is not estopped in an action on the contract to set up the defence.[1] Nor, as we

Cas. 256. To support an action against a municipal corporation of the nature suggested, although it is not necessary to show any authority under seal to the person or persons who, under the supposed instructions of the corporation, actually did the wrongful act, enough must be shown to connect the corporation as a body with the doing of the act. Farrell *v.* London, 12 Up. Can. Q. B. 343; Lewis *v.* Toronto, 39 Up. Can. Q. B. 343." Harris. Munic. Man. (5th ed.) p. 11. See also Biggar Munic. Man. (Canada) p. 595. A department of the city government of New York cannot be sued. Swift *v.* New York, 83 N. Y. 528. *Post,* § 1655, note.

A municipal corporation created by a State may, within the State which created it, be *sued in the Federal courts* by a citizen of another State. No State statute limiting the jurisdiction of suits against counties can defeat the jurisdiction given to the Federal courts by the Constitution. Cowles *v.* Mercer County, 7 Wall. 118; Louisville, C. & C. R. R. Co. *v.* Letson, 2 How. (U. S.) 497; Vincent *v.* Lincoln County, 30 Fed. Rep. 749. Federal courts have jurisdiction over a suit brought by an *assignee of a municipal bond* which is in form a simple acknowledgment of indebtedness and an unconditional promise to pay a certain sum at a certain time. Porter *v.* Janesville, 3 Fed. Rep. 617. No recovery can be had upon municipal bonds transferred by citizens of the State where the municipality is situated, to a citizen of another State, for the sole purpose of giving jurisdiction to the courts of the United States. New Providence *v.* Halsey, 117 U. S. 336. So also of coupons. Farmington *v.* Pillsbury, 114 U. S. 138. See Index, titles *Contracts, Municipal Bonds, Federal Courts.*

[1] *Ante,* § 791 and cases cited. Further, as to *ultra vires,* see *post,* §§ 1647, 1648, 1650, also Buffett *v.* Troy & B. R. R. Co., 40 N. Y. 168, and note; Griggs *v.* Foote, 4 Allen (Mass.), 195; Pearce *v.* Madison & I. R. R. Co., 21 How. 441; Cheeney *v.* Brookfield, 60 Mo. 53; Moore *v.* New York, 73 N. Y. 238, approving text. The subject is well examined and the different senses in which the term *ultra vires* is used is stated by *Sawyer,* C. J., in Miners' Ditch Company *v.* Zellerbach, 37 Cal. 543.

Where the corporation receives and retains the consideration of an *ultra vires* contract, it may be liable upon an *implied assumpsit* in respect of such consideration. See chapter on Contracts, *ante.* Louisiana *v.* Wood, 5 Dillon C. C. R. 122, aff'd 102 U. S. 294; s. p. Gause *v.* Clarksville, 5 Dillon C. C. R. 165; Union Depot Co. *v.* St. Louis, 76 Mo. 393; Montgomery *v.* Montgomery Water Works, 79 Ala. 233; Same *v.* Same, 77 Ala. 248, where a city was held liable for water received and used by it, under a contract which was *ultra vires* for being made for twenty-four years, when its charter gave it power to contract for one year only. *Ante,* chapter on Contracts; *infra,* §§ 1615, 1648.

In Allen *v.* La Fayette, 89 Ala. 641, the Supreme Court of *Alabama* held that where a municipality is authorized to purchase and hold property within a certain value and is also authorized to maintain public schools, the local authorities may purchase a school-house, so long as its value, with the property already owned, does not exceed the value of the property authorized to be held, and may make

have before stated, is it bound by contracts within the scope of its chartered or legislative powers, if made by officers or agents not thereunto authorized.[1]

the purchase on credit and give to the vendor warrants therefor. But if in the absence of express authority to borrow money, the municipal officers borrow the money of a third person and give warrants to the lender, and with the borrowed money pay the vendor of the school-house, the warrants issued to the lender are void, but, as the money has been received for the benefit of the municipality, and applied to an authorized public purpose the municipality is liable on an *implied contract* to repay the money which it has received; and in such a case, a resident owner and taxpayer cannot maintain a bill in equity to enjoin the payment of the warrants given to the lender of the money. The court reviews many of the cases relating to *ultra vires* contracts, and in an able opinion by *McClellan*, J., holds, as above stated, that a municipality is liable as upon an implied *assumpsit* for money received by it under an *ultra vires contract of borrowing* when the money is actually applied by the corporate authorities in good faith to authorized corporate purposes, citing and approving the text. *McClellan*, J., says: "In regard to municipal corporations, the opinion of Judge *Dillon* manifestly is in line with the position we have taken. We believe this to be a correct formulation of his view of the law on the point under consideration, as gathered from his inestimable work on Municipal Corporations: That municipal corporations are liable to action of implied *assumpsit* with respect to money or property received by them and applied beneficially to their authorized objects through contracts which are simply unauthorized, as distinguished from contracts which are prohibited by their charters, or some other law bearing upon them, or are *malum in se*, or violative of public policy. 1 Dill. Mun. Corp. [4th ed.] §§ 126, 132, 133, 459–465; 2 Dill. Mun. Corp. §§ 936–938. Thus in a note to § 126 it is said: 'If money is improperly borrowed in advance of liabilities actually created, and reaches the municipal treasury, and is expended by direction of the governing body for authorized municipal objects, the municipality may then . . . be liable in a proper action or suit; but the action should be, we think, for money had and received, or by suit in equity, and not upon the invalid bonds.' And under § 935 it is said that, 'where the corporation receives and retains the consideration of an *ultra vires* contract, it may be liable upon an implied *assumpsit* in respect to such consideration.'" See and compare Cleveland School Furn. Co. *v.* Greenville, 146 Ala. 559. See to the same effect, Butts County *v.* Jackson Banking Co., 129 Ga. 801; Thomson *v.* Elton, 109 Wis. 589. But there can be no implied liability if the transaction is contrary to a positive statutory prohibition; Bluthenthal *v.* Headland, 132 Ala. 249; McGillivray *v.* Joint School Dist., 112 Wis. 354; or is under any circumstances entirely outside the scope of the corporate authority. Cleveland School Furn. Co. *v.* Greenville, 146 Ala. 559. But *quære* as to the correctness of this decision (decided by a majority of one) under the legislation and special facts of the case.

A useful article on *ultra vires*, or how far corporations are liable for acts not authorized by their charters, will be found in 5 American Law Review (Jan., 1871), 272, in the form of a note to the opinion of *Jervis*, C. J., in the East Anglian Railways Co. *v.* Eastern Counties R. Co., 11 C. B. 775, 21 L. J. (N. S.) C. P. 23, 16 Jur. 249, selected because "one of the earliest and most constantly cited of the many cases on the subject, and, after being much criticised, has been followed in the latest English adjudications." *Post*, §§ 1648, 1654.

As to effect of having notice. Contract Corp., *In re* Claim of Ebbw Vale Co., L. R. 8 Eq. C. 14; 5 Am. L. Rev. 283, note; *Estoppel. Ib.* 275, and cases cited; Bradley *v.* Ballard, 55 Ill. 413, 420; East St. Louis *v.* East St. Louis Gas L. & C. Co., 98 Ill. 415; Broom Commentaries Com. Law, 568. Legislature within constitutional limits may ratify the *ultra vires* contracts of a municipal corporation. *Ante*, §§ 129, 948; Index, tit. *Curative Acts.*

[1] *Ante*, §§ 777, 791, 916, 958. State *v.* Michigan City, 138 Ind. 455,

§ 1611 (936). **Ultra Vires as a Defence.** — When a corporation is created by *public statute for definite and limited objects*, to which its funds are to be applied, a contract which is entirely unconnected with those purposes, or which on its face will cause an illegal or wrongful application of its funds or an application to other objects, is *ultra vires* and void. The question whether a particular contract is binding on a municipal or public corporation or not is to be tested by determining whether, on the true construction of the charter and the legislation applicable thereto, it relates to matters within the corporate powers and duties. When an act in its external aspect is within the general powers of the corporation, and is only unauthorized because it is done with a secret, unauthorized intent, the defence of *ultra vires* will not prevail against a stranger who, in good faith, dealt with it without notice of such intent.[1] A municipal corporation, as against persons who have acted in good faith and parted with value for its benefit, cannot, unless by virtue of some statutory provision, set up mere irregularities in the exercise of power conferred; as, for example, its failure to make publication in all of the required newspapers of a resolution involving the expenditure of moneys. Such failure might have the effect to invalidate a local assessment upon the abutter, if there were no grounds of estoppel, this being a matter *in invitum;* but as regards a *bona fide contractor with the city*, who had expended money for its benefit in respect of a matter within the scope of its general powers, the contract would not be *ultra vires* in the true sense of that term; and the city would be estopped to set up as a defence its own irregularities in the exercise of a power clearly granted to it.[2]

quoting text. The city council of a city, authorized to borrow money and issue its bonds therefor, ordered its officers *to insert on the face of certain bonds the consideration;* this the officers failed to do; and it was held that the city was *responsible for the acts and omissions* of its officers in this respect, and was bound to pay, the court regarding the directions to the officers not as a limitation on their powers, but in the nature of private instructions. De Voss *v.* Richmond, 18 Gratt. (Va.) 338. The opinion of *Joynes*, J., in this case, treats the power of the corporation to borrow money as one of its *private and not public* or governmental powers. In a case in the Supreme Court of the United States, where a town sought to have bonds adjudged to be invalid, it was held that a previous decree declaring them valid, entered upon the written consent of the mayor to that effect, the decree not being an adjudication of the question, did not estop the town from denying their validity. Kelley *v.* Milan, 127 U. S. 139, affirming s. c. 21 Fed. Rep. 842. Index — *Estoppel.*

[1] 5 Am. L. Rev. (Jan., 1871) 272, which sums up the result of the English cases to that date substantially in the language of the text.

[2] Moore *v.* New York, 73 N. Y. 238. *Allen*, J., clearly draws the distinction between a total want of power and mere irregularities in the exercise of powers conferred. *Ib.* Kennedy *v.* New York, 34 N. Y. App. Div. 311; Wade *v.* Brantford, 19 Up. Can. Q. B. 207. As to actions of *implied assump-*

A distinction which has often been overlooked, exists for some purposes and to some extent, between acts or contracts simply *ultra vires* and those which are *illegal* because made in violation of a positive provision of a penal statute. Where license moneys were collected by a city from the sale of liquors, which by statute were to be paid into the common-school fund of the county, and the county treasurer brought an action against the city to recover the amount thus collected by the city, it was held that the city, having collected the money, could not set up the defence of illegality.[1]

§ 1612 (937). **Statute may require Presentation or Demand before Suit.** — In furtherance of *a public policy to prevent needless litigation,* and to save unnecessary expenses and costs, by affording an opportunity amicably to adjust all claims against municipal corporations of every nature before suit is brought, it is often provided in the charters of such corporations that no action shall be maintained upon any claim or demand until the claimant *shall first have presented his claim or demand to the common council for allowance.*[2] In other charters it is provided that no action on a contract, obligation, or liability shall be commenced *except within one year or other short limitation period* after the cause of action shall have accrued.[3] These provisions have been held not applicable to actions for *personal torts;* a statutory requirement of notice of "claim or demand" without other words of explanation or expansion, includes only claims and demands arising upon contract and does not include a

sit where the contract is *ultra vires,* see *infra,* § 1615, and cases cited.

[1] Hastings *v.* Thorne, 8 Neb. 160; Herman *v.* Crete, 9 Neb. 350; Bullwinkle *v.* Guttenberg, 17 Wis. 585; White *v.* Lincoln, 5 Neb. 505; s. p. Oxford Bank *v.* Wheeler, 72 N. Y. 201; see *post,* §§ 1647–1650.

[2] Kelly *v.* Madison, 43 Wis. 688; Cerro Gordo County *v.* Wright, 50 Iowa, 439; State *v.* Stout, 7 Neb. 89; State *v.* Lancaster County Bank, 8 Neb. 218; s. p. Alden *v.* Alameda County, 43 Cal. 270; Adams *v.* Modesto, 131 Cal. 501; Denver *v.* Bradbury, 19 Colo. App. 441; McCartney *v.* Washington, 124 Iowa, 382; Huntington *v.* Calais, 105 Me. 144; Woodworth *v.* Kalamazoo, 135 Mich. 233; Kellogg *v.* New York, 15 N. Y. App. Div. 326; Stemmler *v.* New York, 34 N. Y. App. Div. 408; Jewell *v.* Ithaca, 72 N. Y. App. Div. 220; Seliger *v.* New York, 88 N. Y. Supp. 1003; O'Donnell *v.* Syracuse, 102 N. Y. App. Div. 80; Ruprecht *v.* New York, 102 N. Y. App. Div. 309; Luke *v.* El Paso (Tex. Civ. App.), 60 S. W. Rep. 363; Brown *v.* Salt Lake City, 33 Utah, 222; Small *v.* Prentice, 102 Wis. 256; O'Donnell *v.* New London, 113 Wis. 292; Howell *v.* Buffalo, 15 N. Y. 512; Taylor *v.* New York, 82 N. Y. 10 (wherein also the right of a city to set off a debt or demand in an action for services rendered and materials furnished was upheld by *Folger,* C. J.). The neglect of the council to act upon a claim within the time limited in the charter is equivalent to a refusal to allow it. Fleming *v.* Appleton, 55 Wis. 90.

[3] McGaffin *v.* Cohoes, 74 N. Y. 387; Jones *v.* Albany, 17 N. Y. Supp. 232; Walsh *v.* Buffalo, 36 N. Y. Supp. 997; Ray *v.* St. Paul, 44 Minn. 340.

cause of action arising from a tort;[1] but a similar charter or statutory provision with the addition of the word "whatsoever" has been held to include torts.[2] The failure to comply with such provision constitutes a good defence.[3]

§ 1613. **Notice of Claim and Demand before Suit.** — Statutes requiring the presentation of notice of claim to designated municipal or public authorities before any action shall be brought and within a specified period after the cause of action may have accrued have often been sustained as valid enactments in the case of *claims growing out of torts* on the ground that the liability of the municipality for tortious claims is only statutory in its origin, and the legislature may attach such conditions to the right to recover from the municipality for the tort as it deems proper or expedient.[4] The statutory

[1] Adams *v.* Modesto, 131 Cal. 501; Hillyer *v.* Winsted, 77 Conn. 304; Miller *v.* Mullan, 17 Idaho, 28; Lay *v.* Adrian, 75 Mich. 438; Snyder *v.* Albion, 113 Mich. 275; Pollard *v.* Cadillac, 133 Mich. 503; Hunter *v.* Ithaca, 141 Mich. 539; Dawes *v.* Great Falls, 31 Mont. 9; Nance *v.* Falls City, 16 Neb. 85; Chadron *v.* Glover, 43 Neb. 732; McGaffin *v.* Cohoes, 74 N. Y. 387; Harrigan *v.* Brooklyn, 119 N. Y. 156; Pomfrey *v.* Saratoga Springs, 104 N. Y. 459; Howell *v.* Buffalo, 15 N. Y. 512; McDonough *v.* New York City, 15 N. Y. Misc. 593; Shields *v.* Durham, 118 N. Car. 450; Sheridan *v.* Salem, 14 Oreg. 328; Sutton *v.* Snohomish, 11 Wash. 24; Gallamore *v.* Olympia, 34 Wash. 379; Kelly *v.* Madison, 43 Wis. 688; Bradley *v.* Eau Claire, 56 Wis. 168; Ruggles *v.* Fond du Lac, 53 Wis. 436; Jung *v.* Stevens Point, 74 Wis. 547; Vogel *v.* Antigo, 81 Wis. 642; Sommers *v.* Marshfield, 90 Wis. 59. See also Warren *v.* Davis, 43 Ohio St. 447. *Contra*, Barret *v.* Mobile, 129 Ala. 179.

At *common law* it is not necessary, as a condition precedent to an action against a municipal corporation arising in tort, that the claim shall first be presented to the corporation. Green *v.* Spencer, 67 Iowa, 410. A statute which required that "all claims for injuries to the person" alleged to have been caused by defective streets, etc., "and all claims for damages alleged to have occurred by reason of the wrongful act or neglect of the city or any of its officers," etc., was construed as being applicable only to torts, and to have no application to suits in equity for relief from wrongful acts in the nature of trespass which day by day caused damage to the complainant. although there was involved in the case a demand for damages in the past. Sammons *v.* Gloversville, 175 N. Y. 346. See also Gerow *v.* Liberty, 106 N. Y. App. Div. 357.

[2] Sheel *v.* Appleton, 49 Wis. 125; Bradley *v.* Eau Claire, 56 Wis. 168. When the statute requires notice of any "claim or demand of whatsoever nature," it includes claims founded upon torts, as well as contract claims, in its operation. Van Frachen *v.* Fort Howard, 88. Wis. 570; Flieth *v.* Wausau, 93 Wis. 446; McCue *v.* Waupun, 96 Wis. 625; Mason *v.* Ashland, 98 Wis. 540; Morgan *v.* Rhinelander, 105 Wis. 138. As to sufficiency of evidence of misfeasance, see Flanagan's Adm. *v.* Wilmington, 4 Houst. (Del.) 548. On a claim against a city for damages from a defective highway, the mayor cannot waive the notice in writing required by the Maine statute (1876), chap. xcvii. Veazie *v.* Rockland, 68 Me. 511.

[3] See next section and cases.

[4] Cunningham *v.* Denver, 23 Colo. 18; Colorado Springs *v.* Neville, 42 Colo. 219; Denver *v.* Barron, 6 Colo. App. 72; Crocker *v.* Hartford, 66 Conn. 387, 390; Walters *v.* Ottawa, 240 Ill. 259; Ouimette *v.* Chicago, 242 Ill. 501; Nichols *v.* Minneapolis, 30 Minn. 545; Sargent *v.* Gilford, 66 N. H. 543; Reining *v.* Buffalo, 102 N. Y. 308; Curry *v.* Buffalo, 135 N. Y. 366, 370; s. c. 57 Hun (N. Y.), 25;

r charter notice of claim is in the *nature of a condition precedent* to he right of the plaintiff to maintain an action, and failure to give he prescribed notice is fatal to the plaintiff's right to sue.[1] It is lso the rule, in some States, that as the statutory requirement is condition precedent to the right of action, the plaintiff must ffirmatively allege in his complaint that the prescribed notice has een given.[2] As the municipality itself is created by charter or by

MacMullen *v.* Middletown, 187 N. Y. 7, 42, rev'g 112 N. Y. App. Div. 81; Patterson *v.* Brooklyn, 6 N. Y. App. Div. 127, 129; Thrall *v.* Cuba, 88 N. Y. App. Div. 410, 413; Bernreither *v.* New York City, 123 N. Y. App. Div. 91; aff'd 196 N. Y. 506; Higgins *v.* Albany, 130 N. Y. App. Div. 276; Rider *v.* Mt. Vernon, 87 Hun (N. Y.), 27, 29; Scurry *v.* Seattle, 8 Wash. 278; Daniels *v.* Racine, 98 Wis. 649; McKeague *v.* Green Bay, 106 Wis. 577, 579. See *infra*, § 1614.

The legislature may constitutionally require *notice to the abutter* of the claim as a condition of express statutory liability of an abutter to a person injured by reason of the failure of the abutter to keep the *sidewalk in repair*. McKibben *v.* Amory, 89 Wis. 607. The legislature in providing by statute that a *street railroad company* shall be liable for injuries caused by a defect in the portion of the highway, which it is bound by its charter to keep in repair, may impose the condition that *notice of the injury and of the claim* shall be given within a prescribed time before action is brought. Shalley *v.* Danbury & B. H. R. Co., 64 Conn. 81; Lavigne *v.* New Haven, 75 Conn. 693, 700. See also Fields *v.* Hartford & W. H. R. Co., 54 Conn. 9. Constitutionality of statute as general legislation. See Daniels *v.* Racine, 98 Wis. 649.

Freeholders' Charter: A city in framing a *freeholders' charter* under a constitutional provision authorizing it so to do, *may require notice* of claim before action brought. State *v.* St. Louis County Dist. Ct., 90 Minn. 457; Scurry *v.* Seattle, 8 Wash. 278. Index — *Freeholders' Charter*.

Washington. In this State it is held that charter provisions requiring *notice of claim* as conditions precedent to action thereon, whether enacted by the legislature, or adopted by the city as a part of its freeholders' charter, are valid only so far as they are reasonable, and tend to the due administration of justice. When such provisions so far depart from reasonableness as to amount to a denial of justice, they are void. Durham *v.* Spokane, 27 Wash. 615. A provision of an ordinance requiring the claimant to state his residence for one year past was held to be unreasonable and void. The court said that a requirement that claimant state his residence might possibly be sustained, but the past residence of the claimant was immaterial and unnecessary for the protection of the city and the requirement thereof was unreasonable. Hase *v.* Seattle, 51 Wash. 174; Jones *v.* Seattle, 51 Wash. 245. A *freeholders' charter* containing a provision for notice of claim, held to supersede the general law on the same subject. Peterson *v.* Red Wing, 101 Minn. 62.

[1] Barret *v.* Mobile, 129 Ala. 179; Bigelow *v.* Los Angeles, 141 Cal. 503; Crim *v.* San Francisco, 152 Cal. 279; Farmers' & M. Bank *v.* Los Angeles, 151 Cal. 655; Diamond Rubber Co. *v.* Harryman, 41 Colo. 415; Hoyle *v.* Putnam, 46 Conn. 56, 61; Gardner *v.* New London, 63 Conn. 267, 269; Crocker *v.* Hartford, 66 Conn. 387; Forbes *v.* Suffield, 81 Conn. 274; Erford *v.* Peoria, 229 Ill. 546; Walters *v.* Ottawa, 240 Ill. 259; Ouimette *v.* Chicago, 242 Ill. 501; Greenleaf *v.* Norridgwock, 82 Me. 62, 63; Huntington *v.* Calais, 105 Me. 144; Gay *v.* Cambridge, 128 Mass. 387; Kenady *v.* Lawrence, 128 Mass. 318; Madden *v.* Springfield, 131 Mass. 441; Woodworth *v.* Kalamazoo, 135 Mich. 233; Bausher *v.* St. Paul, 72 Minn. 539; State *v.* St. Louis County Dist. Ct., 90 Minn. 457; Lincoln *v.* Grant, 38 Neb. 369; Reining *v.* Buffalo, 102 N. Y. 308; Biggs *v.* Geneva, 100 N. Y. App. Div. 25; Brown *v.* Salt Lake City, 33 Utah, 222; Steltz *v.* Wausau, 88 Wis. 618; Daniels *v.* Racine, 98 Wis. 649.

[2] Barret *v.* Mobile, 129 Ala. 179;

statute, and has no powers other than those conferred upon it by its charter or by statute, *it cannot waive* the giving of the statutory

Forbes *v.* Suffield, 81 Conn. 274; Walters *v.* Ottawa, 240 Ill. 259, rev'g 144 Ill. App. 379; Pardey *v.* Mechanicsville, 101 Iowa, 266; Low *v.* Windham, 75 Me. 113; Greenleaf *v.* Norridgwock, 82 Me. 62; Lincoln *v.* Grant, 38 Neb. 369; Reining *v.* Buffalo, 102 N. Y. 308; Watts *v.* New York City, 133 N. Y. App. Div. 400; Hiner *v.* Fond du Lac, 71 Wis. 74, 78; Steltz *v.* Wausau, 88 Wis. 618; Daniels *v.* Racine, 98 Wis. 649, 650.

But in *Wisconsin*, it has also been held that where the cause of action against the city is not created by statute, but is founded on the common law, *e. g.*, a trespass on plaintiff's property, the giving of notice is not essential to the cause of action and need not be set forth in the complaint, but must be pleaded by the defendant by way of plea in abatement. Bunker *v.* Hudson, 122 Wis. 43.

New York. In this State there are charter and statutory provisions requiring the presentation of claims to the city council or to the comptroller or other public official for the purpose of investigation and prohibiting the commencement of an action until the expiration of a specified period after presentation. There are other statutory provisions which require that actions for personal injuries arising from the negligence of the municipality be commenced within one year after the cause of action accrued and that notice of intention to commence such action and of the time when and place at which the injuries were received be filed within six months after the cause of action shall have accrued. The requirements of these different statutes are not inconsistent and both statutes must be complied with. Curry *v.* Buffalo, 135 N. Y. 366, aff'g 57 Hun (N. Y.), 25. See also Higgins *v.* Albany, 130 N. Y. App. Div. 276. These statutory provisions have *a two-fold effect.* In prescribing the presentation of the notice of claim and notice of intention to sue to the appropriate city officials *they create conditions precedent* to the right to maintain an action. In limiting the time within which an action may be begun *they are statutes of limitation.* See Bernreither *v.* New York City, 123 N. Y. App. Div. 291, aff'd 196 N. Y. 506; Conway *v.* New York City, 139 N. Y. App. Div. 446. The requirement that notice of claim be presented for adjustment and investigation within a prescribed period is not a statute of limitation and is not affected by exceptions and disabilities, *e. g.*, infancy, contained in the general statutes of limitations. Winter *v.* Niagara Falls, 190 N. Y. 198, rev'g 119 N. Y. App. Div. 586. But the requirement that the action shall be begun against the city within one year is a limitation of the cause of action, and, although contained in a separate and independent statutory enactment, is subject to and controlled by the exceptions and disabilities, *e. g.*, infancy, contained in the general statute of limitations. McKnight *v.* New York City, 186 N. Y. 35, rev'g 98 N. Y. App. Div. 622. And where the cause of action is the death of the person injured, through the negligence of the city, the provisions of the general statute of limitations which suspend the running of the statute of limitations until the appointment of an administrator are applicable and the special statutory limitation does not apply until the expiration of one year after the appointment of the administrator. Crapo *v.* Syracuse, 183 N. Y. 395; Conway *v.* New York City, 139 N. Y. App. Div. 446; Barnes *v.* Brooklyn, 22 N. Y. App. Div. 520. The simple requirement, however, that before commencing an action notice of claim shall be given to the city officials and the prescribed period, *e. g.*, thirty days, shall elapse thereafter before an action is begun does not operate to suspend the running of the statute of limitations. Dickinson *v.* New York City, 92 N. Y. 584; Bernreither *v.* New York City, 123 N. Y. App. Div. 291, aff'd 196 N. Y. 506 (disapproving Werner *v.* Rochester, 77 Hun (N. Y.), 33).

A statutory requirement that notice of claim and of the time, place and manner in which the injuries were sustained must be given is to be reasonably construed and a substantial compliance therewith is sufficient. If

notice,[1] although in some jurisdictions it is held that, by accepting and acting on a defective notice, the right to object to the sufficiency of the notice is waived.[2]

Statutes requiring notice of claim against a city are construed, unless otherwise provided, to be *prospective in their operation* only, and do not apply to claims arising after the date of enactment but before the statute takes effect.[3] In the construction of these statutory provisions, it has been held that the requirement of notice by any person who receives any bodily injury or suffers any damage to his property through any defect in a street or through the negligence of the city, *does not apply to the claim of the executor or administrator* of a party deceased for damages for death through the default or negligence of the city.[4] It is generally held, construing

the plaintiff has failed to give the notice within the prescribed time by reason of inability arising from his mental or physical condition, service of the notice within a reasonable time after he is able to give it, is a sufficient compliance with the statute, and it is a question to be decided by the jury whether the notice was given within a reasonable time after the termination of the disability. Walden *v.* Jamestown, 178 N. Y. 213, 217; Forsyth *v.* Oswego, 191 N. Y. 441, rev'g 114 N. Y. App. Div. 616. Sufficiency of service and filing of notice of intention to sue, see Missano *v.* New York City, 160 N. Y. 123, 133.

[1] Hoyle *v.* Putnam, 46 Conn. 56; Walters *v.* Ottawa, 240 Ill. 259, rev'g 144 Ill. App. 379; Lucas *v.* Pontiac, 142 Ill. App. 470; Starling *v.* Bedford, 94 Iowa, 194; Huntington *v.* Calais, 105 Me. 144; Blumrich *v.* Highland Park, 131 Mich. 209; Hungerford *v.* Waverley, 125 N. Y. App. Div. 311; Batchelder *v.* White, 28 R. I. 466. See also Winter *v.* Niagara Falls, 190 N. Y. 198.

[2] Germaine *v.* Muskegon, 105 Mich. 213 (unauthorized verification by attorney); Canfield *v.* Jackson, 112 Mich. 120 (question first raised on motion for new trial); Griswold *v.* Ludington, 116 Mich. 401 (lack of verification waived); Wright *v.* Portland, 118 Mich. 23 (same point); Foster *v.* Bellaire, 127 Mich. 13 (not itemized and not verified); Davis *v.* Adrian, 147 Mich. 300 (details of claim); Morlan *v.* Marcellus, 150 Mich. 400 (lack of verification); Bowman *v.* Ogden City, 33 Utah, 196 (not verified and extent of injury insufficiently stated). See *contra*, Forsyth *v.* Oswego, 191 N. Y. 441, rev'g 114 N. Y. App. Div. 616; Purdy *v.* New York City, 193 N. Y. 521. In Ridgeway *v.* Escanaba, 154 Mich. 68, the court held that *to constitute a waiver* of the defect in the notice the council must be shown to have had knowledge of the fact that the notice was defective and must have taken action upon the merits of the claim. See also Chamberlain *v.* Saginaw, 135 Mich. 61, 64.

A notice given pursuant to the statute *cannot be amended at the trial* by inserting the information required by the statute to be stated in it. Leonard *v.* Bath, 61 N. H. 67.

[3] Montgomery *v.* Shirley, 159 Ala. 239; Crim *v.* San Francisco, 152 Cal. 279; Colorado Springs *v.* Neville, 42 Colo. 219; Broffee *v.* Grand Rapids, 127 Mich. 89; Boughner *v.* Bay City, 156 Mich. 193; Baldwin *v.* Aberdeen, 23 So. Dak. 636; 123 N. W. Rep. 80.

[4] Perkins *v.* Oxford, 66 Me. 545, 549; Maylone *v.* St. Paul, 40 Minn. 406; Brown *v.* Salt Lake City, 33 Utah, 222. See also Clark *v.* Manchester, 62 N. H. 577, 581; Jewett *v.* Keene, 62 N. Y. 701. In cases of death the *notice may be given by the beneficiary* to whom the damages will accrue and need not be given by the administrator. Carpenter *v.* Rolling, 107 Wis. 559. Or the notice may be given by *the next of kin* entitled to administer the estate, although before appointment as administrator. Taylor *v.* Woburn, 130 Mass. 494, 497. Where the statute required *notice* of the in-

the statutes, that *infants* are not excepted from the operation of the statutes, and that the mere fact that the injured person is an infant is not sufficient to excuse failure to give the statutory notice.[1] On

jury to be given *within three months* and the injured party survived more than three months, but then died as a result of his injuries and had failed to give notice of claim to the municipality, it was held, that, as the *Iowa statute* merely continued the cause of action in the administrator, the failure of the injured party to give the notice within the prescribed time barred the claim of the administrator. Sachs *v.* Sioux City, 109 Iowa, 224.

In *New York*, it appears to be held that the claim for injuries resulting in death only accrues upon the appointment of an executor or administrator, and that notice given within the prescribed time after such appointment is sufficient. It must, however, be noted that the statute which confers the right of action for injuries resulting in death only authorizes the suit to be brought within two years and the claim for injuries resulting in death must, therefore, be brought within that time, whether an administrator be appointed or not. See Crapo *v.* Syracuse, 183 N. Y. 395; Barnes *v.* Brooklyn, 22 N. Y. App. Div. 520.

Statutes imposing special limitation on claims against cities, or requiring notice of claims for injuries received from any defect, or want of repair, or obstruction of any street or highway, have in some cases been construed as applying only to causes of action growing out of defects in public ways as such, and with regard to their usefulness and safety for purposes of travel, and as having no application to claims arising from other causes, *e. g.*, from injuries or damages sustained in the construction of the street. Pye *v.* Mankato, 38 Minn. 536; Moran *v.* St. Paul, 54 Minn. 279; McIntee *v.* Middletown, 80 N. Y. App. Div. 434; Giuricevic *v.* Tacoma, 57 Wash. 329; 106 Pac. Rep. 908. It has been held that a statute which requires notice of injury arising from any *defect* in a street, is not applicable to an action founded on nuisance created by the positive act of the city's agent, such as leaving a large wooden roller in the street. Hughes *v.* Fond du Lac, 73 Wis. 380. But when the statute requires that notice be given before any "*action in tort*" shall lie, the notice must be given although the claim is founded on a nuisance created by the city. Steltz *v.* Wausau, 88 Wis. 618. When the statute requires notice as a condition precedent to any action for injuries caused by the insufficiency or want of repair of a street, it applies to an action for injuries caused by the failure of the city, in constructing the street, to make it reasonably safe for public travel. Ziegler *v.* West Bend, 102 Wis. 17. A statute requiring notice of claim for "injuries" was construed as applying to claims for injuries to property, as well as to claims for injuries to the person. Nichols *v.* Minneapolis, 30 Minn. 545.

The *service of a complaint* in an action within the time prescribed for notice cannot be accepted as an equivalent, or as a substitute for the statutory notice. Forbes *v.* Suffield, 81 Conn. 274, *sed quære;* Erford *v.* Peoria, 229 Ill. 546; Curry *v.* Buffalo, 135 N. Y. 366. But compare Jacobs *v.* St. Joseph, 127 Mo. App. 669.

Notice by whom given: In Reed *v.* Madison, 83 Wis. 171, 179, a complaint in an action *by a father* for damages sustained by him through the loss of the services of his infant child, who was injured through the negligence of the city, was held to be sufficient notice, when served within the prescribed period, for the purposes of a subsequent action by the child to recover his damages. But in McKeague *v.* Green Bay, 106 Wis. 577, the preceding case was overruled and it was held that where separate and distinct claims may arise out of the same accident, the notice of the accident must show that it is given on behalf of the plaintiff in the particular action. Hence, a notice which stated that *the wife* would claim satisfaction for her injuries was held not to be available to the husband to support an action by him for his damages through the injuries to his wife.

[1] Morgan *v.* Des Moines, 60 Fed. Rep. 208; Madden *v.* Springfield, 131 Mass. 441; Davidson *v.* Muskegon, 111 Mich. 454; Winter *v.* Niagara Falls, 190 N. Y. 198, rev'g 119 N. Y.

the question whether *physical or mental incapacity* arising from the accident, is sufficient to excuse the giving of the statutory notice within the prescribed time, the decisions are not in harmony. In some cases it is held that physical inability to give the notice continuing during the prescribed period, is not a sufficient excuse.[1] But in other jurisdictions, physical inability to give the notice, when such disability results from the accident, is sufficient to excuse a failure to comply with the requirements of the statute as to the time of service, if the notice be given immediately upon the termination of the disability or within a reasonable time thereafter.[2] And in some cases, express provision is made by statute, excusing failure to comply with the statute by reason of the physical disability of the person injured.[3]

The *provisions of the statute* prescribing the terms and contents of the notice, such as the time and place of the accident, the nature of the injury, the defect in the street or highway, or the cause of the injury, *must be substantially complied with;* otherwise, the condition precedent to the right to maintain the action has not been performed, and the action will not lie. It is impossible in the present treatise to critically examine the numerous decisions of the courts on these

App. Div. 586. An infant may sign and verify the statutory notice. Donovan *v.* Oswego, 42 N. Y. App. Div. 539. The *father*, as natural guardian of his infant child, may give notice of injury to his child and claim therefor. Taylor *v.* Woburn, 130 Mass. 494, 497; Reed *v.* Madison, 83 Wis. 171, 179. Notice may be given by the legally appointed *guardian* of an infant. Stoliker *v.* Boston, 204 Mass. 522.

[1] Schmidt *v.* Fremont, 70 Neb. 577; McCollum *v.* South Omaha, 84 Neb. 413 (unconscious from accident for twenty days); Ellis *v.* Kearney, 80 Neb. 51. Failure to give notice of the occurrence of the accident was held not to be excused by the fact that the injured person had no suspicion or knowledge of his injury until after the time for giving notice had expired. Crocker *v.* Hartford, 66 Conn. 387.

[2] Webster *v.* Beaver Dam, 84 Fed. Rep. 280; Walden *v.* Jamestown, 178 N. Y. 213, 217; Forsyth *v.* Oswego, 191 N. Y. 441, rev'g 114 N. Y. App. Div. 616.

It is for the jury to decide whether the notice was given within a reasonable time after the termination of the disability. Walden *v.* Jamestown, 178 N. Y. 213, 217; Forsyth *v.* Oswego, 191 N. Y. 441, rev'g 114 N. Y. App. Div. 616; Born *v.* Spokane, 27 Wash. 719.

[3] Canterbury *v.* Boston, 141 Mass. 215; May *v.* Boston, 150 Mass. 517; Carberry *v.* Sharon, 166 Mass. 32; Saunders *v.* Boston, 167 Mass. 595; Barclay *v.* Boston, 173 Mass. 310; Stoliker *v.* Boston, 204 Mass. 522.

When the statute expressly recognizes physical inability as sufficient to excuse a compliance with its requirements, the inaction of the father, or other nearest relative of the person injured, before his legal appointment as guardian does not affect or impair the right of the injured person to recover. Stoliker *v.* Boston, 204 Mass. 522. As to the *nature and extent of the disability*, which is required to excuse failure to give notice under an express statutory provision therefor, see May *v.* Boston, 150 Mass. 517; Saunders *v.* Boston, 167 Mass. 595; Barclay *v.* Boston, 173 Mass. 310. When there is evidence tending to establish disability, the question whether the plaintiff was incapacitated from giving the notice should be left to the jury. Saunders *v.* Boston, 167 Mass. 596.

subjects, and the practising lawyer is referred to the cases cited in the notes which will illustrate the rules laid down by the courts on these points.[1]

[1] *Sufficiency of notice:* See generally Langley *v.* Augusta, 118 Ga. 590, 600; Smith *v.* Elberton, 5 Ga. App. 286; Pittsburgh, C., C. & St. L. R. Co. *v.* Chicago, 242 Ill. 178, aff'g 144 Ill. App. 293; Owen *v.* Ft. Dodge, 98 Iowa, 281; Harrison *v.* Albia (Iowa), 122 N. W. Rep. 816; Schnee *v.* Dubuque, 122 Iowa, 459; Boughner *v.* Bay City, 156 Mich. 193; Hawley *v.* Saranac, 157 Mich. 70; Knudsen *v.* Muskegon, 158 Mich. 185; Lyons *v.* St. Joseph, 112 Mo. App. 681; Carson *v.* Hastings, 81 Neb. 681; Sheehy *v.* New York City, 160 N. Y. 139, rev'g 29 N. Y. App. Div. 263; Purdy *v.* New York City, 193 N. Y. 521; Scheer *v.* Perry, 119 N. Y. App. Div. 606; Ellis *v.* Seattle, 47 Wash. 578.

Place of accident: Biesiegel *v.* Seymour, 58 Conn. 43; Wood *v.* Stafford Springs, 74 Conn. 437; Judd *v.* New Britain, 81 Conn. 300; Pueblo *v.* Babbitt, 47 Colo. 596; 108 Pac. Rep. 175; Denver *v.* Barron, 6 Colo. App. 72; Lucas *v.* Pontiac, 142 Ill. App. 470; Wikel *v.* Decatur, 146 Ill. App. 51; Rusch *v.* Dubuque, 116 Iowa, 402; Buchmeier *v.* Davenport, 138 Iowa, 623; Sollenbarger *v.* Lineville, 141 Iowa, 203; Harrison *v.* Albia (Iowa), 122 N. W. Rep. 816; Cook *v.* Topeka, 75 Kan. 534; Larkin *v.* Boston, 128 Mass. 521; Lowe *v.* Clinton, 133 Mass. 526; Lyman *v.* Hampshire, 138 Mass. 74; Barribeau *v.* Detroit, 147 Mich. 119; Williams *v.* Lansing, 152 Mich. 169; Harder *v.* Minneapolis, 40 Minn. 446; Lincoln *v.* O'Brien, 56 Neb. 761; Carr *v.* Ashland, 62 N. H. 665; Horne *v.* Rochester, 62 N. H. 347; Davis *v.* Rumney, 67 N. H. 591; Beyer *v.* North Tonawanda, 183 N. Y. 338; Purdy *v.* New York City, 193 N. Y. 521; Lee *v.* Greenwich, 48 N. Y. App. Div. 391; McDowell *v.* Auburn, 126 N. Y. App. Div. 173, aff'd 197 N. Y. 529; Werner *v.* Rochester, 77 Hun (N. Y.), 33, aff'd 149 N. Y. 563; Maloney *v.* Cook, 21 R. I. 471; Holcomb *v.* Danby, 51 Vt. 428; White *v.* Stowe, 54 Vt. 510; Connor *v.* Salt Lake City, 28 Utah, 248; Piper *v.* Spokane, 22 Wash. 147; Hammock *v.* Tacoma, 40 Wash. 539; Mulligan *v.* Seattle, 42 Wash. 264; Ellis *v.* Seattle, 47 Wash. 578; Horton *v.* Seattle, 53 Wash. 316.

Whether the notice sufficiently describes *the place of the accident* is ordinarily a question for the court; whether the damages or injuries were received at the place described is ordinarily a question for the jury. Robin *v.* Bartlett, 64 N. H. 426. It has been held that the question whether the notice stated the "exact place" where the injury was sustained should on the facts of the case be regarded as a question of fact, to be determined by the trial court. Horne *v.* Rochester, 62 N. H. 347; Carr *v.* Ashland, 62 N. H. 665, 669; Currier *v.* Concord, 68 N. H. 294. Where the original notice did not fully state the place and cause of the plaintiff's injury, the court held that a supplemental statement served in reply to a request of the city for further particulars either cured the omission or justified the jury in finding that in giving the notice there was no intention to mislead and that in fact the defendant city was not misled. Winship *v.* Boston, 201 Mass. 273, 275. The description of the *place of the accident* in the notice cannot be aided by oral proof that the municipal authorities were verbally advised of the precise place of accident. Sollenbarger *v.* Lineville, 141 Iowa, 203; Shea *v.* Howell, 132 Mass. 187; Maloney *v.* Cook, 21 R. I. 471. See also Trost *v.* Casselton, 8 N. Dak. 534; Underhill *v.* Washington, 46 Vt. 767, 771; Sowle *v.* Tomah, 81 Wis. 349, 353. But compare Cook *v.* Topeka, 75 Kan. 534.

Sufficiency of notice. Time of accident: Shaw *v.* Waterbury, 46 Conn. 263; Lilly *v.* Woodstock, 59 Conn. 219, 224; Gardner *v.* New London, 63 Conn. 267; Ouimette *v.* Chicago, 242 Ill. 501; Lucas *v.* Pontiac, 142 Ill. App. 470; Marcotte *v.* Lewiston, 94 Me. 233; Canter *v.* St. Joseph, 126 Mo. App. 629; Werner *v.* Rochester, 77 Hun (N. Y.), 33, aff'd 149 N. Y. 563; Batchelder *v.* White, 28 R. I. 466; Bell *v.* Spokane, 30 Wash. 508; King *v.* Spokane, 52 Wash. 601.

Sufficiency of notice. Nature of injury: Tuttle *v.* Winchester, 50 Conn. 496, 500; Brown *v.* Southbury, 53 Conn. 212; Biesiegel *v.* Seymour, 58 Conn. 43; Lilly *v.* Woodstock, 59 Conn. 219, 223; Manning *v.* Woodstock, 59

§ 1614. **Legislative Restriction of Remedies against Municipalities.** — A statutory requirement that a claim or demand shall be

Conn. 224; Dean *v.* Sharon, 72 Conn. 667; Wood *v.* Stafford Springs, 74 Conn. 437, 441; Denver *v.* Barron, 6 Colo. App. 72; Fairfield *v.* Sechrest, 136 Ill. App. 8; Low *v.* Windham, 75 Me. 113; Wadleigh *v.* Mt. Vernon, 75 Me. 79; Lord *v.* Saco, 87 Me. 231; Goodwin *v.* Gardiner, 84 Me. 278; Joy *v.* York, 99 Me. 237; Spear *v.* Westbrook, 104 Me. 496; Ridgeway *v.* Escanaba, 154 Mich. 68; Haney *v.* Pinckney, 155 Mich. 656; Jacobs *v.* St. Joseph, 127 Mo. App. 669; Bemis *v.* Omaha, 81 Neb. 352; Robin *v.* Bartlett, 64 N. H. 426; Noble *v.* Portsmouth, 67 N. H. 183; Born *v.* Spokane, 27 Wash. 719; Durham *v.* Spokane, 27 Wash. 615; Horton *v.* Seattle, 53 Wash. 316.

Name of physician: Graham *v.* Rockford, 238 Ill. 214, aff'g 142 Ill. App. 306.

Whether the *injury* received is *sufficiently described* is ordinarily a question to be determined at the trial as a fact. Robin *v.* Bartlett, 64 N. H. 426.

Notice — Defect in Street; Cause of injury: Shaw *v.* Waterbury, 46 Conn. 263; Manning *v.* Woodstock, 59 Conn. 224; Lilly *v.* Woodstock, 59 Conn. 219, 223; Dean *v.* Sharon, 72 Conn. 667; Breen *v.* Cornwall, 73 Conn. 309; Wood *v.* Stafford Springs, 74 Conn. 437; Denver *v.* Bacon, 44 Colo. 166; Denver *v.* Barron, 6 Colo. App. 72; Denver *v.* Bradbury, 19 Colo. App. 441; Stoors *v.* Denver, 19 Colo. App. 159; Neeley *v.* Mapleton, 139 Iowa, 582; Giles *v.* Shenandoah, 111 Iowa, 83; Noonan *v.* Lawrence, 130 Mass. 161; Miles *v.* Lynn, 130 Mass. 398; Spellman *v.* Chicopee, 131 Mass. 443; Madden *v.* Springfield, 131 Mass. 441; Kandelin *v.* Ely, 110 Minn. 55; 124 N. W. Rep. 449; Mears *v.* Spokane, 22 Wash. 323; Falldin *v.* Seattle, 50 Wash. 561; Hase *v.* Seattle, 51 Wash. 174; Horton *v.* Seattle, 53 Wash. 316; Van Frachen *v.* Fort Howard, 88 Wis. 570. Whether a misdescription of the defect in the highway which caused the injury was intended to and did mislead the city officers so as to defeat plaintiff's cause of action was held to be a question for the jury. Berndt *v.* Cudahy, 141 Wis. 457.

In *Massachusetts*, it is provided that any inaccuracy or insufficiency of the statement of the injuries and the cause thereof will not render the notice invalid "provided it is shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby." See Canterbury *v.* Boston, 141 Mass. 215; Carberry *v.* Sharon, 166 Mass. 32. The court may submit to the jury the question whether the city was misled by the inaccuracies of the statement. Norwood *v.* Somerville, 159 Mass. 105. Where the *statements in the notice are inaccurate*, the question whether the notice was or was not prepared for the purpose of misleading and whether the city authorities were or were not misled, are questions for the jury. Pueblo *v.* Babbitt, 47 Colo. 596; 108 Pac. Rep. 175. A recovery cannot be had by reason of a defect other than that specified in the notice. Olcott *v.* St. Paul, 91 Minn. 207. See also Diamond Rubber Co. *v.* Harryman, 41 Colo. 415. Although the statute requires the claimant to specify *the compensation demanded*, the claimant is not concluded by the amount stated. He may recover his actual damages. Wyandotte *v.* White, 13 Kan. 191; Reed *v.* New York City, 97 N. Y. 620; Terryll *v.* Faribault, 84 Minn. 341. See also Minick *v.* Troy, 83 N. Y. 514. *Signature* held not to be essential to the validity of the notice. Neeley *v.* Mapleton, 139 Iowa, 582. The sufficiency of the notice held to be a question of law to be determined by the court. Denver *v.* Barron, 6 Colo. App. 72, 77. A *notice mailed* within the prescribed period but not received by the local authorities until after that period had elapsed was held under the statute to be insufficient. Chase *v.* Surry, 88 Me. 468.

Where the statute required that notice should be served on "one of the municipal officers" the court held that the mayor and aldermen were the officers of a city; that the city clerk was not an officer, and that *service on the city clerk* was insufficient. Huntington *v.* Calais, 105 Me. 144. But see to the contrary, Durham *v.* Spokane, 27 Wash. 615, where it was held that the service on the city clerk was sufficient under the statute there in

presented to the municipality for audit and adjustment may, under the decisions, be imposed not only in the case of *claims for torts* but also in the case of *claims founded upon contract*,[1] and it has been held in Wisconsin that charter provisions to the effect that the council shall have power to audit, adjust and allow all claims and demands of every nature against the city; that no action shall be maintained by any person against the city upon any claim or demand unless such person shall have first presented such claim or demand to the council for audit and adjustment; and that the determination of the council, disallowing in whole or in part any such claim or demand, shall be final and conclusive and a perpetual bar to an action in any court founded upon such claim or demand, unless an appeal shall be taken within a prescribed time from the decision and determination of the council, or unless the council shall consent and agree to the commencement of an action by the claimant against the city or refuse to act upon such claim or demand, is valid legislation, and that an action cannot be begun against the city or the claim enforced in any manner except that prescribed by the statute.[2]

question. Statute requiring notice of claim for personal injury to be presented to mayor and common council for audit and allowance held to be sufficiently complied with when notice of claim was presented to and filed with the *city auditor* within the specified time. Grand Forks *v.* Allman, 153 Fed. Rep. 532. See to the same effect, Pyke *v.* Jamestown, 15 N. Dak. 157. Sufficiency of service on *head of law department* of city or chief assistant. See Beatty *v.* Detroit, 137 Mich. 319, 325; Abbott *v.* Detroit, 150 Mich. 245; McAuliff *v.* Detroit, 150 Mich. 346. Notice *given by an agent* is sufficient although not expressly authorized by statute. Ayer *v.* Somersworth, 66 N. H. 476.

[1] Reining *v.* Buffalo, 102 N. Y. 308; Philomath *v.* Ingle, 41 Oreg. 289.

[2] Watson *v.* Appleton, 62 Wis. 267; Koch *v.* Ashland, 83 Wis. 361, 362 (personal injuries from defective sidewalk); Drinkwine *v.* Eau Claire, 83 Wis. 428; Von Frachen *v.* Fort Howard, 88 Wis. 570 (personal injuries caused by defective sidewalk); McCue *v.* Waupun, 96 Wis. 625 (injuries to city employee through defective appliances); Mason *v.* Ashland, 98 Wis. 540 (salary of police officer); Telford *v.* Ashland, 100 Wis. 238 (illegal grading of street in front of abutter's lot); Seegar *v.* Ashland, 101 Wis. 515 (damages by mob); Morgan *v.* Rhinelander, 105 Wis. 138 (personal injuries through defective sidewalk); Oshkosh Waterworks Co. *v.* Oshkosh, 106 Wis. 83 (action for rental of fire hydrants); O'Donnell *v.* New London, 113 Wis. 292 (negligently flooding lands by damming stream); Morrison *v.* Eau Claire, 115 Wis. 538 (personal injuries from defective sidewalk); Appleton Waterworks Co. *v.* Appleton, 136 Wis. 395, 401 (claim for water supply).

It was at first held that an action might be brought notwithstanding the statute referred to in the text, if no claim were presented to the council, and that the bar of the charter provision only applied when the claim had been presented to the council. Sheel *v.* Appleton, 49 Wis. 125. But this decision, so far as it permitted the court to take jurisdiction when no claim was presented, was expressly overruled in Telford *v.* Ashland, 100 Wis. 238, which holds that the court can only acquire jurisdiction over the claim by an appeal in the manner provided by the statute, and that a determination by the court of the claim is barred if there is a failure to appeal within the prescribed time.

And these views have been affirmed by the Supreme Court of the United States. In an action to recover water rents under a contract made prior to the adoption of charter provisions to the above effect, but upon a claim which accrued after these charter provisions were adopted, the Supreme Court of the United States held that the provisions of the charter were only reasonable regulations for the protection of the city against unnecessary litigation, that they affected the remedy and not the substantial cause of action, and that they did not impair the obligation of any contract by depriving the creditor of his remedy, although the time allowed for appeal was only twenty days and the claimant was required to give bond to secure the costs as a condition of being permitted to take and prosecute the appeal.[1]

§ 1615 (938). **Implied Assumpsit.** — Municipal corporations are liable to actions of *implied assumpsit.* The principles governing such liability have already been referred to.[2] Some additional illustrations of the subject may be here appropriately noticed. Thus, if the officers or agents of a municipal corporation, acting under ordinances which are void, make sales and deeds of corporate property, which pass *no* right to the purchaser, and can never ripen into a title, and receive the purchase-money, and place the same in the treasury of the corporation, which *appropriates the money to its own use,* by virtue of ordinances or resolutions legally adopted, the purchaser may recover back the purchase-money, and, the sale being void, he need not make or tender a reconveyance before bringing his action.[3] So a *bona fide* purchaser from a city

[1] Oshkosh Waterworks Co. *v.* Oshkosh, 187 U. S. 437, aff'g 109 Wis. 208.

[2] *Ante,* §§ 793–799, 1610; Clark *v.* Saline County, 9 Neb. 516, approving text; Norway Dist. Tp. *v.* Clear Lake Dist. Tp., 11 Iowa, 506, and cases cited; Lemington *v.* Blodgett, 37 Vt. 215; Sangamon County *v.* Springfield, 63 Ill. 66; Hathaway *v.* Cincinnatus, 62 N. Y. 434; Parsons *v.* Monmouth, 70 Me. 262, approving text and notes; Nashville *v.* Toney, 10 Lea, 643; Billings *v.* Monmouth, 72 Me. 174; Belfast Nat. Bank *v.* Stockton, 72 Me. 522; Bodewig *v.* Port Huron, 141 Mich. 564; Central Bitulithic Pav. Co. *v.* Mt. Clemens, 143 Mich. 259; Wood *v.* Kansas City, 162 Mo. 303; Valley Falls Co. *v.* Taft, 27 R. I. 136.

[3] The principle stated in the text was settled after great consideration, by the Supreme Court of *California,* in an interesting series of cases known as the "City Slip Cases." *Ante,* § 994; McCracken *v.* San Francisco, 16 Cal. 591; Grogan *v.* San Francisco, 18 Cal. 590; Pimental *v.* San Francisco, 21 Cal. 351, where Mr. Chief Justice *Field* reviews the previous cases, and sums up the propositions they establish. The "City Slip Cases" and the author's reference to them are commented on and approved by Prof. Pomeroy in his *Legislative and Judicial Work of Justice Field,* pp. 30–32. See to the same effect, Rice *v.* Ashland County, 114 Wis. 130. See also Satterlee *v.* San Francisco, 23 Cal. 214; Herzo *v.* San Francisco, 33 Cal. 134. In this last case the principle stated above was reaffirmed, but it was held that the city would not be liable simply by reason of the receipt and retention of the money by its officers

corporation of its bonds which are apparently valid but which are *wholly void* may, it has been held, recover back from the city the money paid, as upon a failure of consideration; and in such case, the bonds being void, it was also held not to be necessary for the plaintiff to offer to return them before bringing suit, it being sufficient to produce them at the trial to be surrendered.[1] Where two municipal corporations are jointly and equally bound to keep a

or the treasurer; that an appropriation by the city is necessary, which could only be by a valid ordinance; and hence where the appropriation was by virtue of an ordinance which was void, because not passed as required by the charter, the city is not liable, even if the money has been applied in payment of its debts. This last decision was participated in by part of the court only, and it is not clear to our mind that it does not lay down too strict a rule as to the necessity of a valid ordinance to constitute such an *appropriation* or *conversion* of the money as will make the city liable to refund. See Dill *v.* Wareham, 7 Met. (Mass.) 438; *ante*, § 793.

As to liability of COUNTIES *on implied contract.* Alton *v.* Madison County (pauper), 21 Ill. 115; Wolcott *v.* Lawrence County (denying such liability under statute of *Missouri*), 26 Mo. 272; Aldrich *v.* Londonderry (pauper), 5 Vt. 441; 17 Vt. 79, 447; Lehigh County *v.* Kleckner (erecting county bridge), 5 Watts & S. (Pa.) 181; *post*, §§ 1638, 1640; Sangamon County *v.* Springfield, 63 Ill. 66; Clark *v.* Saline County, 9 Neb. 516; s. c. 21 Neb. L. J. 378. Instance of implied assumpsit on the part of a county, for the use of a room belonging to the plaintiff, by the county treasurer, for his office, with the knowledge and consent of the county commissioners. Butler *v.* Neosho County, 15 Kan. 178. Distinguished from Neosho County *v.* Stoddard (furnishing court-house), 13 Kan. 207, where there was no consent of the commissioners. Where an order of record is made authorizing a person named to purchase property for public use at a specified price, such person is not authorized to purchase at a higher price than that named, and cannot recover for any excess expended by him. Jackson County *v.* Applewhite, 62 Ind. 464; Moon *v.* Howard County, 97 Ind. 176.

[1] Paul *v.* Kenosha, 22 Wis. 266; *ante*, § 792, note. The case of Wood *v.* Louisiana, 5 Dillon C. C. R. 122, affirmed 102 U. S. 294, holds a city liable under the special circumstances for the consideration received for bonds issued *ultra vires*, upon reasoning that in like cases must everywhere secure professional approval. The Supreme Court in substance said: Where a city *has authority to borrow money* and puts into the hands of a broker bonds which are invalid by virtue of misrepresentations upon their face, but which are *apparently valid*, and they are sold, and the proceeds are received by the city, the transaction is a borrowing of money by the city notwithstanding the purchaser was ignorant of the fact that he was dealing with the city; and he may disregard the bonds, and maintain his action for the money paid. See also Gause *v.* Clarksville, 5 Dillon C. C. R. 165. Under circumstances it has been held that a city was not liable to pay money received and used for its benefit on securities issued without authority. Kelley *v.* Lindsey, 7 Gray (Mass.), 287; Agawam National Bank *v.* South Hadley, 128 Mass. 503; Railroad National Bank *v.* Lowell, 109 Mass. 214. See also chapter iv. on Constitutional Limitations on the power to incur Debt, §§ 190–215, where the effect of *constitutional and statutory limitations upon the amount of indebtedness* of public and municipal corporations, as respects their liability on implied as well as express contracts, is considered. The cases on the subject of the implied liability of municipal corporations in respect of the consideration of bonds issued without lawful authority, run on nice lines of distinction, and exact a critical reference in each instance to the provisions of the Constitution and enabling statutes, and to the circumstances under which and purposes for which the bonds were issued, and the uses to which the money received therefor was applied. See *ante*, § 209.

bridge in repair, and there is a recovery for a neglect of this duty by a traveller against one of the corporations, it may recover contribution from the other.[1]

§ 1616 (939). **Actions to recover back Illegal Taxes.** — An important class of actions, in form *ex contractu*, remains to be noticed. We refer to actions against municipal corporations *to recover back money paid to them for taxes.* They are usually brought in *assumpsit* for money had and received,[2] and are equitable in their nature; and hence they will not lie, in the absence of statutory provision,[3] except for money actually paid to the corporation, and which it is against equity and good conscience that it should retain. If, therefore, a tax has been levied upon the plaintiff's property, and if that property is subject to the tax, the amount is justly and equitably due, and cannot, for any *mere irregularities* in the detail or mode of proceeding, be recovered back.[4]

§ 1617 (940). **Same Subject; Elements of Liability.** — Actions against a municipal corporation to recover back money upon the ground of the *illegality of the tax or assessment* are, upon principle and the weight of authority, maintainable when, and in general only when (if there be no statute enlarging the liability) the following requisites co-exist: 1. The authority to levy the tax, or to levy it upon the property in question, must be *wholly wanting*, or the tax itself wholly unauthorized, in which cases the assessment is not simply irregular, but absolutely void. 2. The money sued for must have been *actually received* by the defendant corporation, and received by it for *its own use*, and not as an agent or instru-

[1] Armstrong County *v.* Clarion County, 66 Pa. 218.

The history of *Assumpsit* as a form of action at common law and also of *Indebitatus Assumpsit*, showing the gradual development and extension of this latter action under the influence of Lord Mansfield and other judges, so that it could be made to give effect at law to the equitable and just principle that a defendant cannot be allowed to retain money which he is "obliged by the ties of natural justice and equity to refund," and can be obliged in this form of action in proper cases "to pay for unjust enrichment enjoyed at the expense of another although no money has been received," is given by Professor *James Barr Ames* of Harvard in his learned and instructive Essay, *The History of Assumpsit*, Harvard Law Review, Vol. ii. (1888), reprinted with additions in Vol. iii. of *Select Essays in Anglo-American Legal History* (Little, Brown, and Company, 1909). See also Professor Keener's recent admirable work on *Quasi Contracts*.

[2] Guaranty Trust Co. *v.* New York, 108 N. Y. App. Div. 192; Carton *v.* Uinta County, 10 Wyo. 416; Ætna Ins. Co. *v.* New York, 153 N. Y. 331, 339.

[3] Hawkeye Loan & Brokerage Co. *v.* Marion, 110 Iowa, 468.

[4] See *infra*, §§ 1617, 1618, and cases cited.

ment to assess and collect money for the benefit of the State, or other public corporation or person. 3. The payment by the plaintiff must have been made *upon compulsion*, as, for example, to prevent the immediate seizure of his goods or the arrest of the person, *and not voluntarily*. Unless these conditions concur, *paying under protest* will not, without statutory aid, give a right of recovery. The same principles are applicable to actions for the recovery back of money paid for *illegal license taxes or fines* imposed by a municipal court.[1] We proceed to illustrate these principles and their application.

§ 1618 (941). **Same Subject.** — Accordingly, an action lies against a municipal corporation to recover the amount of taxes *compulsorily* collected by it upon an *illegal or void assessment in respect of property not liable to taxation.*[2] So an illegal or void tax for a local improvement exacted by the city under color of process and paid to the city's officers under protest may be recovered with interest.[3] The tax or assessment must be illegal or void, and not

[1] Lincoln *v.* Worcester, 8 Cush. (Mass.) 55. The opinion in this case is by *Shaw*, C. J., where the general subject is fully and ably examined, and the prior cases in *Massachusetts* reviewed, commented on, and distinguished. If it cannot be inferred that the propriety of such actions is to be doubted in any case, it is clearly insisted upon that they should be limited to cases where the plaintiff brings himself within *all* of the conditions stated in §§ 1616, 1617 of the text. *Ante*, § 507; *infra*, § 1618, and note; McKee *v.* Anderson Council (municipal fine), Rice L. (S. Car.) 24; Marriott *v.* Hampton, 2 Esp. 546; s. c. 2 Smith's Leading Cases, 237; Collector *v.* Hubbard, 12 Wall. (U. S.) 1, 12; Stephenson County *v.* Manny, 56 Ill. 160; Grimley *v.* Santa Clara County, 68 Cal. 575 (money voluntarily paid for illegal license tax); O'Brien *v.* Colusa County, 67 Cal. 503; Foley *v.* Haverhill, 144 Mass. 352; Winter *v.* Montgomery, 65 Ala. 403; First Nat. Bank of A. *v.* Americus, 68 Ga. 119; Hawkeye Loan & Brokerage Co. *v.* Marion, 110 Iowa, 468; Connelly *v.* Trego County, 64 Kan. 168; Carton *v.* Uinta County, 10 Wyo. 416. Liability when a defendant does not receive the money for its own use or in its own right, but as an instrumentality for others. Dewey *v.* Niagara County, 62 N. Y. 294. In Howell *v.* Buffalo, 15 N. Y. 512, and Bennett *v.* Buffalo, 17 N. Y. 383, *actions of tort* were maintained for the trespass of the city officers of the corporation in seizing bank-bills to pay void assessments upon the plaintiffs. Where a city sold its own property on a void assessment, it must refund the amount received at the sale, and not double the amount. Taylor *v.* People, 66 Ill. 322.

[2] National Bank of Chemung *v.* Elmira, 53 N. Y. 49; Indianapolis *v.* McAvoy, 86 Ind. 587; Godkin *v.* Doyle Tp., 143 Mich. 236.

[3] Grand Rapids *v.* Blakely, 40 Mich. 367. This was an action in assumpsit for money had and received to recover a sum of money alleged to have been illegally claimed and collected by the city of Grand Rapids as a special tax for a street improvement. The controverted point related to the original validity of the tax roll, and not to minor incidents. *Graves*, J., said: "The further point that, as the fund is not for city use, the city is not liable, is untenable. If the money was illegally exacted by the marshal under color of city authority, and was by him paid to and received by the city, the latter cannot escape liability

simply irregular, as, for example, an irregularity in mode of assessment, over-valuation, &c., to authorize its recovery back.[1]

by reason of the special object of the tax. Where the party entitled demands restoration, it is no answer for the city to say it holds the fund for somebody else." The court cites Joyner *v.* Egremont Third School Dist., 3 Cush. 567, where the inhabitants of a school district, situated within a town, having voted to raise money to build a school-house, the town authorities made an assessment, and the money collected was paid over to the town treasurer, who in turn paid it to a building committee duly appointed by the school district. The assessment being illegal and void, an inhabitant of the district, who had paid his proportion of the tax, was held to be entitled to recover it back from the *school district*. See also Tuttle *v.* Everett, 51 Miss. 27; Tallant *v.* Burlington, 39 Iowa, 543; Smith *v.* Tecumseh Nat. Bank, 17 Mich. 479; Wattles *v.* Lapeer, 40 Mich. 624 (proceedings fatally defective on their face); Callaway *v.* Milledgeville, 48 Ga. 309; Peoples Gas E. & H. Co. *v.* Harrell, 36 Ind. App. 588; Moss *v.* Cummings, 44 Mich. 359; Bank of Commonwealth *v.* New York, 43 N. Y. 184, 189; Stephenson County *v.* Manny, 56 Ill. 160; Union Nat. Bank *v.* New York, where in an action to recover the amount of a tax paid by plaintiff, alleged to have been illegally assessed upon a portion of its capital invested in United States stocks, the complaint, after alleging the imposition of the tax, set forth its confirmation by the Supreme Court on *certiorari*, and that after the rendition of judgment notice was served by the receiver of taxes that unless paid a penalty would be imposed by way of interest and a warrant issued; that payment was compulsorily made under said judgment; that defendants took the amount so paid from the receiver, and had ever since, and at the time of the commencement of the action still held it; that the judgment was reversed by the court of appeals; that the assessment was rescinded, and the complaint also alleged a demand and refusal. Defendants demurred. Judgment was given for the defendants on the demurrer, upon the ground that *the payment was voluntary*, and that the tax was imposed for three separate purposes, *i. e.*, for city, county, and State taxes. It was held by the Court of Appeals that the tax was *not voluntarily* paid (upon authority of Bank of Commonwealth *v.* New York, 43 N. Y. 184, 189), and as the demurrer admitted the allegations in the complaint that defendants held the amount illegally collected, they must be deemed to hold it for the use of plaintiff, and, having refused to pay it over on demand, they were liable. Union Nat. Bank *v.* New York, 51 N. Y. 638.

The *burden of proving*, in an action to recover back taxes, the illegality of the tax or an ordinance, is on the plaintiff. Ligonier *v.* Ackerman, 46 Ind. 552; Douglasville *v.* Jones, 60 Ga. 423; Sullivan *v.* McCammon, 51 Ind. 264.

[1] Sumner *v.* Dorchester First Parish, 4 Pick. (Mass.) 361; Stetson *v.* Kempton, 13 Mass. 272; Osborn *v.* Danvers, 6 Pick. 98; Preston *v.* Boston, 12 Pick. (Mass.) 7; Boston Water Power Co. *v.* Boston, 9 Met. (Mass.) 199; Howe *v.* Boston, 7 Cush. (Mass.) 273; Powers *v.* Sanford, 39 Me. 183; Wright *v.* Boston, 9 Cush. 233; Lee *v.* Templeton, 13 Gray, 476; Emery *v.* Lowell, 127 Mass. 138; Peyser *v.* New York, 70 N. Y. 497; Hayford *v.* Belfast, 69 Me. 63; Rogers *v.* Greenbush, 58 Me. 390; Gilman *v.* Waterville, 59 Me. 491; Cook *v.* Boston (money paid for license), 9 Allen, 393; Benson *v.* Monroe, 7 Cush. (Mass.) 125; First Eccl. Soc. of H. *v.* Hartford, 38 Conn. 274; Hawkeye Loan & Brokerage Co. *v.* Marion, 110 Iowa, 468; Shelden *v.* Marion Tp., 101 Mich. 256; Armstrong *v.* Ogden City, 11 Utah, 476; Carton *v.* Uinta County, 10 Wyo. 416. The validity of a meeting called by a committee *de facto* cannot be inquired into in an action by an inhabitant against the public corporation to recover back a tax. Williams *v.* Lunenburg School Dist., 21 Pick. (Mass.) 75; *ante*, §§ 485, 507, 518, 1377, note, 1554, note, as to acts of *de facto* officers, and void assessment of taxes. As to recovery back of money from city *after payment on execution*, in cases where the court had, and also where it had not, jurisdiction to render judgment. Gordon *v.* Baltimore, 5 Gill (Md.), 231; McKee *v.* Anderson Council, Rice L.

§ 1619 (942). **The Payment must not have been Voluntarily made, but made upon Compulsion.** — Money paid by a person *to prevent an illegal seizure* of his person or property by an officer claiming authority to seize the same, or paid *to liberate his person or property from illegal detention* by such officer, may be recovered back in an action for money had and received, on the ground that the payment was compulsory, or by duress or extortion. Under this rule, illegal taxes, or other public exactions, paid to prevent such seizure or remove such detention, may be recovered back, unless otherwise provided by statute.[1] This rule has been held not to apply where a special assessment is paid to the officer while having in his hands a precept which can only be levied upon the *lands* of the owner; the payment was regarded as *voluntary*, because a sale under the precept would not disturb the owner in the enjoyment of his property, and other adequate remedies would still remain to him, in case the assessment was illegal.[2] But payment of an illegal tax

(S. Car.) (fine) 24; Horn *v.* New Lots, 83 N. Y. 100. Payment to the wrong officer will not justify the refunding of taxes paid. Carroll County *v.* Graham, 98 Ind. 279. Where a city failed to open a street, and abandoned the project after it had obtained judgment against and sold land charged with an assessment therefor, it was held that the owner, after paying the sum necessary to redeem it to the city treasurer, had a right of action against the city as for money had and received. Valentine *v.* St. Paul, 34 Minn. 446. The rule stated in the text prevails where it is sought to recover back money paid for the purchase of land sold for city taxes, on the ground of failure to acquire title. McWhinney *v.* Indianapolis, 98 Ind. 182. The action held not to lie in the case of a special assessment. Easterbrook *v.* San Francisco (Cal.), 44 Pac. Rep. 800; Davis *v.* San Francisco, 115 Cal. 67. *Infra*, § 1619.

[1] Lamborn *v.* Dickinson County, 97 U. S. 181; *supra*, § 1618, and cases; *infra*, § 1624; Falls *v.* Cairo, 58 Ill. 403; Kansas Pac. R. Co. *v.* Wyandotte County, 16 Kan. 587; Bradford *v.* Chicago, 25 Ill. 411; Ripley *v.* Gelston, 9 Johns. (N. Y.) 201; Preston *v.* Boston, 12 Pick. 7; approved, Union Pacific R. Co. *v.* Dodge County, 98 U. S. 541, noted *infra*, § 1624; Boston & S. Glass Co. *v.* Boston, 4 Met. 181; Powers *v.* Sanford (distress), 39 Me. 183; Haines *v.* Readfield School Dist. (duress, arrest), 41 Me. 246; Cook *v.* Boston, 9 Allen, 393; Benson *v.* Monroe, 7 Cush. (Mass.) 125; *per Perkins*, J., in Jenks *v.* Lima Tp., 17 Ind. 326, and cases cited; Allentown Bor. *v.* Saeger, 20 Pa. St. 421; Jersey City *v.* Riker, 38 N. J. L. 225; Harvey *v.* Olney, 42 Ill. 336; approved, Princeton *v.* Vierling, 40 Md. 340; Silliman *v.* Wing, 7 Hill (N. Y.), 159; Oates *v.* Hudson, 5 Eng. L. & Eq. 469, note; Elliott *v.* Swartwout, 10 Pet. 137; Clinton *v.* Strong, 9 Johns. (N. Y.) 370; Allen *v.* Burlington, 45 Vt. 202; Fellows *v.* Fayette School Dist., 39 Me. 559; Clarke *v.* Dutcher, 9 Cow. (N. Y.) 674; Stewart *v.* Stewart, 6 Cl. & Fin. 911; Ege *v.* Koontz, 8 Pa. St. 109; Miles *v.* Duncan, 6 B. & C. 671; McGehee *v.* Columbus, 69 Ga. 581; Babcock *v.* Fond du Lac, 58 Wis. 230; Phelps *v.* New York, 112 N. Y. 216; Bank of Kentucky *v.* Stone, 88 Fed. Rep. 383, aff'd 174 U. S. 799; Creamer *v.* Bremen, 91 Me. 508; Dexter *v.* Boston, 176 Mass. 247; Bateson *v.* Detroit, 143 Mich. 582; Oakland Cemetery Assoc. *v.* Ramsey County, 98 Minn. 404; Carton *v.* Uinta County, 10 Wyo. 416.

[2] Falls *v.* Cairo, 58 Ill. 403, noted *infra*, § 1621, note; Kansas Pac. R. Co. *v.* Wyandotte County, 16 Kan. 587; Wabaunsee County *v.* Walker, 8 Kan. 431; Phelps *v.* Tacoma, 15 Wash. 367.

upon lands may, we think, under circumstances, be deemed compulsory.[1]

[1] Lamborn *v.* Dickinson County, 97 U. S. 181, noted *infra*, § 1624.

Cases showing when the payment is deemed compulsory, and when voluntary. Preston *v.* Boston, 12 Pick. 7; *infra*, § 1624; Ashley *v.* Reynolds, 2 Stra. 916; Bank of New Orleans *v.* New Orleans, 12 La. An. 42; Louisville *v.* Zanone, 1 Met. (Ky.) 151; Baltimore *v.* Lefferman, 4 Gill (Md.), 425, 432; Morris *v.* Baltimore, 5 Gill (Md.), 244, 248; Walker *v.* St. Louis, 15 Mo. 563, 574; Boston & S. Glass Co. *v.* Boston, 4 Met. (Mass.) 181, 188; Cahaba T. Council *v.* Burnett, 34 Ala. 400, and cases cited; Philadelphia *v.* Cooke, 30 Pa. St. 56; Allentown Bor. *v.* Saeger, 20 Pa. St. 421; Phillips *v.* Jefferson County, 5 Kan. 412; Robinson *v.* Charleston, 2 Rich. L. (S. Car.) 317; Shoemaker *v.* Grant County, 36 Ind. 175; Coulson *v.* Portland, Deady, 481; Dew *v.* Parsons, 2 B. & Ald. 562; s. c. 18 Eng. Com. L. 87; Colwell *v.* Peden, 3 Watts (Pa.), 327, 328; La Salle County *v.* Simmons, 10 Ill. 513; Elliott *v.* Swartwout, 10 Pet. (U. S.) 137, 150; Clarke *v.* Dutcher, 9 Cow. (N. Y.) 674; Leonard *v.* Canton (license), 35 Miss. 189; Harvey *v.* Olney, 42 Ill. 336. Text approved, Princeton *v.* Vierling, 40 Ind. 340; Bellinger *v.* Gray, 51 N. Y. 610; Detroit *v.* Martin, 34 Mich. 170, and note and cases cited; Lyon *v.* Receiver of Taxes, 52 Mich. 271; Galveston City Co. *v.* Galveston, 56 Tex. 486; Shaw *v.* Allegheny, 115 Pa. St. 46; Harrison *v.* Milwaukee, 49 Wis. 247; Muscatine *v.* Keokuk N. L. Packet Co., 45 Iowa, 185; Elston *v.* Chicago (special assessment), 40 Ill. 514; Cook *v.* Boston (license), 9 Allen, 393; Meylert's Ex. *v.* Sullivan County, 19 Pa. St. 181; Palomares Land Co. *v.* Los Angeles, 146 Cal. 530; Phelan *v.* San Francisco, 120 Cal. 1; Morris *v.* New Haven, 78 Conn. 673; Williams *v.* Stewart, 115 Ga. 864; Walser *v.* Board of Education, 160 Ill. 272; Yates *v.* Royal Ins. Co., 200 Ill. 202; Roedel *v.* White Cloud, 108 Mich. 506; H. M. Loud & Sons Lumber Co. *v.* Vienna Tp., 120 Mich. 382; Gage *v.* Saginaw, 128 Mich. 682; Wheeler *v.* Hennepin County, 87 Minn. 243; Dixon County *v.* Beardshear, 38 Neb. 389; Martin *v.* Kearney County, 62 Neb. 538; Poth *v.* New York, 151 N. Y. 16; Ætna Ins. Co. *v.* New York, 153 N. Y. 331; *In re* Edison Co. *v.* Brooklyn, 22 N. Y. App. Div. 371; Adams *v.* Monroe County, 18 N. Y. App. Div. 415; Van Hise *v.* Rensselaer County, 21 N. Y. Misc. 572; Boston Manufacturer's Mut. Fire Ins. Co. *v.* Hendricks, 41 N. Y. Misc. 479; Feist *v.* New York, 74 N. Y. App. Div. 627; Davies' Ex'rs *v.* Galveston, 16 Tex. Civ. App. 13; Ostrum *v.* San Antonio (Tex. Civ. App.), 71 S. W. 304; Stowe *v.* Stowe, 70 Vt. 609; Montgomery *v.* Cowlitz County, 14 Wash. 230; Kelley *v.* Rhoads, 7 Wyo. 237; Carton *v.* Uinta County, 10 Wyo. 416.

As to right to recover back taxes paid *to avoid a sale of lands for taxes*, the United States Supreme Court, in deciding a case from *Kansas*, says: "It has undoubtedly been held (though perhaps not directly adjudged) that a *payment of illegal taxes on lands to avoid or remove a cloud upon the title, arising from a tax sale, is a compulsory payment.* The case of Stephan *v.* Daniels, 27 Ohio St. 527, is of this character; though, in that case, the plaintiff relied on the provisions of a local statute; and besides this, a legal tax was combined with an illegal assessment; and perhaps a sale would have conferred a valid title upon the purchaser. Where such would be the effect of a tax sale, we cannot doubt that a payment of the tax, made to prevent it, should be regarded as compulsory and not voluntary. The threatened divesture of a man's title to land is certainly as stringent a duress as the threatened seizure of his goods, and if imminent, and he has no other adequate remedy to prevent it, justice requires that he should be permitted to pay the tax, and test its legality by an action to recover back the money. But as, in general, an illegal tax cannot furnish the basis of a legal sale, the case supposed cannot often arise. If the legality of the tax is merely doubtful, and the validity of the sale would depend on its legality, according to the law of *Kansas*, the party, if he chooses to waive the other remedies given him by law to test the validity of the tax, must take his risk, either voluntarily to pay the tax and thus avoid the question,

§ 1620 (943). **Compulsion defined.** — The coercion or duress which will render a payment of taxes *involuntary* must in general

or to let his land be sold at the hazard of losing it if the tax should be sustained. Having a knowledge of all the facts, it is held that he must be presumed to know the law, and, in the absence of any fraud or better knowledge on the part of the officer receiving payment, he cannot recover back money paid under such mistake." Lamborn *v.* Dickinson County, 97 U. S. 181.

The adjudged rule in *New York*, which is placed on the general principle of the right to equitable relief against mistake, is, that where lands are covered by an assessment that is valid on its face and is an apparent lien on lands, but which assessment is, by reason of matters not of record, illegal and void, and the owner has compulsorily paid the assessment in ignorance of the facts, he may, on discovery thereof, maintain an action to set aside the assessment and to recover back the money so paid; and if, in such case, the assessment is void for want of jurisdiction (as, for example, want of a jurisdictional petition for the improvement), he may, under such circumstances, where the payment was not voluntarily made, recover back the amount without first setting aside the assessment. Diefenthaler *v.* New York, 111 N. Y. 331, and cases cited; Jex *v.* New York, 111 N. Y. 331, 339. Six years' limitation held applicable. *Ib.* Where an ordinance directing a local improvement *is void on its face*, payment without compulsion of an assessment thereunder, being a pure mistake of law, the sum paid cannot be recovered back. Phelps *v.* New York, 112 N. Y. 216.

Under protest. Voluntary payment, although made under protest, cannot be recovered. Ligonier *v.* Ackerman, 46 Ind. 552; Rogers *v.* Greenbush, 58 Me. 390; Detroit *v.* Martin, 34 Mich. 170; Gage *v.* Saginaw, 128 Mich. 682; Traverse Beach Assoc. *v.* Elmwood Tp., 142 Mich. 78; Oakland Cemetery Assoc. *v.* Ramsey County, 98 Minn. 404; Robins *v.* Latham, 134 Mo. 466; Haven *v.* New York, 67 N. Y. App. Div. 90; Palmer *v.* Syracuse, 26 N. Y. Misc. 561; Whitbeck *v.* Minch, 48 Ohio St. 210; Peebles *v.* Pittsburgh, 101 Pa. St. 304; Phoebus *v.* Manhattan Social Club, 105 Va. 144. Money paid *under protest* can under certain circumstances be recovered. District of Columbia *v.* Glass, 27 App. D. C. 576; Gill *v.* Oakland, 124 Cal. 335; St. Louis & S. F. R. Co. *v.* Labette Co., 63 Kan. 889; Chicago, B. & Q. R. Co. *v.* Lincoln County, 66 Neb. 228; Schulz *v.* Albany, 27 N. Y. Misc. 51; Rumford Chemical Wks. *v.* Ray, 19 R. I. 456; Whittaker *v.* Deadwood, 12 S. Dak. 608. *Merely paying under protest* does not make the payment a compulsory one. Lee *v.* Templeton, 13 Gray (Mass.), 476; *ante*, § 273, note; *infra*, § 1624, and note.

As to payment under protest; effect of these words. Baker *v.* Cincinnati, 11 Ohio St. 534; Jenks *v.* Lima Tp., 17 Ind. 326; Taylor *v.* Philadelphia Board of Health, 31 Pa. St. 73; Valpey *v.* Manley, 1 C. B. 592; Parker *v.* Great Western Ry. Co., 7 M. & G. 253; Boston & S. Glass Co. *v.* Boston, 4 Met. 181; Union Pac. R. Co. *v.* Dodge County, 98 U. S. 541, noted *infra*, § 1624; Allentown Bor. *v.* Saeger, 20 Pa. St. 421; Cook *v.* Boston, 9 Allen, 393; Galveston City Co. *v.* Galveston, 56 Tex. 486. Payment under protest to an officer who has a warrant for collecting taxes and who threatens a levy and sale of the property is not a voluntary payment. Ruggles *v.* Fond du Lac, 53 Wis. 436. An assessment was made under a law afterward *declared unconstitutional, and was paid under protest* and to prevent a threatened sale; it was held that since the sale would not have constituted any cloud on the title, the payment was voluntary and could not be recovered back. Detroit *v.* Martin, 34 Mich. 170; Ligonier *v.* Ackerman, 46 Ind. 552; Grim *v.* Weissenberg School Dist., 57 Pa. 433; Kansas Pac. Ry. Co. *v.* Wyandotte County, 16 Kan. 587; *infra*, § 1621. In *Iowa* it is held that taxes illegally exacted, paid under protest, the fact being endorsed by the treasurer upon the receipt, may be recovered, though there was no compulsion used. Thomas *v.* Burlington, 69 Iowa, 140; Winzer *v.* Burlington, 68 Iowa, 279.

Legalization of the illegal tax by the legislature before it is recovered back will defeat the action. Grim *v.* Weis-

consist of some actual or threatened exercise of power possessed, or assumed to be possessed, by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means or reasonable means of immediate relief except by making payment.[1]

§ 1621 (944). **Voluntary Payment: Mistake of Law.** — Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license, or fine, cannot without statutory aid — there being no coercion, no ignorance or mistake of facts, but only ignorance or pure mistake of the law — be recovered back from the corporation, either at law or in equity, even though such tax, license fee, or fine could not have been legally demanded and enforced.[2]

senberg School Dist., 57 Pa. 433; *ante*, chaps. iv., xxvii., §§ 1400, 1469, as to extent of legislative power. Index, tit. *Curative Acts*.

Enjoining collection of illegal taxes. See *ante*, §§ 1589, 1590; Coulson *v.* Portland, Deady, 481.

[1] Radich *v.* Hutchins, 95 U. S. 210; *infra*, § 1624; Baltimore *v.* Lefferman, 4 Gill (Md.), 425; Brumagim *v.* Tillinghast, 18 Cal. 265; Mays *v.* Cincinnati, 1 Ohio St. 268; Westlake *v.* St. Louis, 77 Mo. 47 (payment of a water license under threat of turning off the water held compulsory); First Nat. Bank of A. *v.* Americus, 68 Ga. 119; Thompson *v.* Detroit, 114 Mich. 502; Chicago *v.* Klinkert, 94 Ill. App. 524; Robins *v.* Latham, 134 Mo. 466; Benton *v.* Goodale, 66 N. H. 424. In *Mississippi* if the tax is wholly unauthorized by law and void, and is paid to one having formal authority to collect it, the payment is treated as involuntary. Tuttle *v.* Everett, 51 Miss. 27.

[2] *Ante*, §§ 1619, 1620, and cases; Robinson *v.* Charleston Council, 2 Rich. (S. Car.) Law, 317; Smith *v.* Hutchinson, 8 Rich. (S. Car.) Law, 260; Elston *v.* Chicago (void special assessment), 40 Ill. 514; Welch *v.* Marion, 48 Ala. 291; Churchman *v.* Indianapolis, 110 Ind. 259; Bailey *v.* Paulina, 69 Iowa, 463; Savannah *v.* Feeley, 66 Ga. 31; El Paso *v.* Colorado Springs Co., 15 Colo. App. 274; Johnson *v.* Atkins, 44 Fla. 185; Conkling *v.* Springfield, 132 Ill. 420; Yates *v.* Royal Ins. Co., 200 Ill. 202; Gannaway *v.* Barracklow, 203 Ill. 410; Chicago *v.* Klinkert, 94 Ill. App. 524; Newcomb *v.* Davenport, 86 Iowa, 291; Lindsey *v.* Boone Co., 92 Iowa, 86; Odendahl *v.* Rich, 112 Iowa, 182; Louisville & N. R. Co. *v.* Commonwealth, 89 Ky. 531; German Security Bank *v.* Coulter, 112 Ky. 577; German Security Bank *v.* Coulter (Ky.), 66 S. W. Rep. 425; Wheeler *v.* Hennepin County, 87 Minn. 243; Falvey *v.* Hennepin County, 76 Minn. 257; Gould *v.* Hennepin County, 76 Minn. 379; Couch *v.* Kansas City, 127 Mo. 436; McCue *v.* Monroe County, 162 N. Y. 235; McKibben *v.* Oneida County, 25 N. Y. App. Div. 361; *In re* Reid, 52 N. Y. App. Div. 243; Palmer *v.* Syracuse, 26 N. Y. Misc. 561; Toal *v.* New York, 34 N. Y. Misc. 18; People *v.* Wemple, 69 Hun (N. Y.), 367; Bristol *v.* Morgantown, 125 N. Car. 365; Wehmer *v.* Hamilton County, 11 Ohio Dec. 190; Union & Planters' Bank *v.* Memphis, 107 Tenn. 66; Moller *v.* Galveston, 23 Tex. Civ. App. 693.

In a case in *Massachusetts* it appeared that by resolutions of the board of mayor and aldermen of the city of Lowell, passed March 28, 1876, and May 2, 1876, the fee for a liquor license of the first class was established at $200; and on May 9, 1876, the board voted to grant the plaintiffs a license of the first class. On May 10, 1876, the plaintiffs called upon the city treasurer and made a tender of $200, and demanded of him a license. The treasurer informed him it would not be ready until the next day. On May 11, 1876, the plaintiffs again called on the

§ 1622 (945). **Principle that Voluntary Payments without Mistake or Fraud are not recoverable back is a general one.** — In this

treasurer, but were informed that since the aforesaid tender the said board had voted to change the fee to $1,000. The plaintiffs thereupon paid the treasurer $1,000, under protest in writing, and received their license. In an action to recover the excess ($800), it was *held*, that the payment was voluntary and could not be recovered. The license when granted is not a contract between the licensee and the city or town by the officers of which it is granted. Municipal officers, in acting under the statute, are merely exercising the police authority which the statute gives them as public officers. Emery *v.* Lowell, 127 Mass. 138.

The doctrine that in cases like those stated in the text *there is no implied assumpsit* is carefully examined and vindicated by *Carr*, J., and *Tucker*, Pres., in the opinions pronounced by them in Richmond *v.* Judah, 5 Leigh (Va.), 305, and which will repay perusal. Same principle, see also the full and able opinion of *Walker*, C. J., in Cahaba T. Council *v.* Burnett, 34 Ala. 400, and cases cited; Christy's Adm. *v.* St. Louis, 20 Mo. 143; Walker *v.* St. Louis, 15 Mo. 563; Smith *v.* Readfield, 27 Me. 145; Union Pac. R. Co. *v.* Dodge County, 98 U. S. 541; Emery *v.* Lowell, 127 Mass. 138; Dickinson County *v.* National Land Co., 23 Kan. 196; Kansas Pac. R. Co. *v.* Wyandotte County, 16 Kan. 587; Cook *v.* Boston, 9 Allen (Mass.), 393; Muscatine *v.* Packet Co., 45 Iowa, 185; Delancey, *In re*, 52 N. Y. 80; Swift *v.* Poughkeepsie, 37 N. Y. 514; Bank of Commonwealth *v.* New York, 43 N. Y. 184; Wilkes *v.* New York, 79 N. Y. 621; Moss *v.* Cummings, 44 Mich. 359; Gachet *v.* McCall, 50 Ala. 307; Falls *v.* Cairo, 58 Ill. 403; Sullivan *v.* McCammon, 51 Ind. 264; Stephenson County *v.* Manny, 56 Ill. 160.

Money paid under a *mistake of fact* may (the other elements of liability existing), be recovered back, if the defendant's position has not been changed in consequence thereof. Mayer *v.* New York, 63 N. Y. 455. *Mistake of law* alone held not sufficient ground for recovery. Bucknall *v.* Story, 46 Cal. 589.

The doctrine of non-liability has been applied to the case of money paid under an *unconstitutional act* of the legislature and ordinances passed in pursuance thereof, the court adopting the principle that money voluntarily paid under a mistake of legal right cannot be recovered back, and that *mere apprehension* of an impending distress warrant did not make the payment a compulsory one; Baltimore *v.* Lefferman, 4 Gill (Md.), 425, where *Martin*, J., adverts to the leading authorities, and deduces from them rules substantially the same as those stated in the text, §§ 1616 *et seq.* Approved, Morris *v.* Baltimore, 5 Gill (Md.), 244; *supra*, § 1619, note. See also Gordon *v.* Baltimore, *Ib.* 231; Detroit *v.* Martin, 34 Mich. 170; S. P. Taylor *v.* Philadelphia Bd. of Health, 31 Pa. St. 73, holding that a *threat to use legal remedies* to collect does not make the payment compulsory.

What constitutes COMPULSORY *payment; further illustrations.* Where a person, *on his own motion*, goes to the city clerk and *pays* money as a price of a *license*, under an ordinance afterwards judicially declared void, the payment is voluntary, and not upon compulsion, although the ordinance imposed a fine and imprisonment as a penalty for not obtaining a license: hence, in such cases, the money cannot be recovered back in an action against the corporation. Cahaba T. Council *v.* Burnett, 34 Ala. 400; Ligonier *v.* Ackerman, 46 Ind. 552. Where the action lies, the remedy to recover back illegal taxes paid is ordinarily *at law* and not in equity. Turner *v.* Althaus, 6 Neb. 54.

In *Ohio* the doctrine is judicially asserted that money *will be deemed to have been paid compulsorily* not only where the payment was made to release person or property from detention, but also in cases *where the parties do not stand on an equal footing*, and where the one party, before he would perform a duty enjoined on him by law, illegally compelled or required the other to pay a sum of money to induce or secure such performance. Baker *v.* Cincinnati, 11 Ohio St. 534 (action to recover money paid for theatre license "*under protest*"), qualifying and explaining Mays *v.* Cincinnati, 1 Ohio St. 268. This seems to be a just

connection it may be stated that the principle is a general one applicable not only to taxes but, with perhaps not the same degree of strictness, to other claims, *that money voluntarily* paid to a municipal

and reasonable modification or application of the general doctrine as to what will constitute a compulsory payment. So, where a county court gave notice that they would grant a certain ferry to the person who would donate the largest sum to the county, and in accordance therewith, the then holder of the franchise bid the sum of $500, in an action against the county he was allowed to recover it back, on the ground that the county authorities had, under the statute, no right to impose any such condition or restriction upon the grant. La Salle County v. Simmons, 10 Ill. 513, 516. As to liability of *county* for a *fine* paid to it; Cook v. Middlesex County, 26 N. J. L. 326. So, also, it has been decided that *a payment is not voluntary if the collector has a warrant* by virtue of which he may levy and sell, and this is exhibited to the person paying by the collector; the party in that State not being entitled in such case to replevy personal property. Bradford v. Chicago, 25 Ill. 411, 412.

Money compulsorily paid to a city on a void assessment for the purpose of opening a street may be recovered back, the right to such recovery being especially clear if the improvement be abandoned by the corporation. Bradford v. Chicago, 25 Ill. 412. So, *it seems*, that if in such case the money is voluntarily paid, it may be recovered back, as on the *ground of a total failure of consideration*, when the scheme of *the improvement* for which the money was collected *has been abandoned*, or is unreasonably delayed by the corporate authorities. *Ib.* Godfrey v. Claflin, 21 Pick. 1, 9, 13, 14, as to effect of total failure of consideration. The case of Bradford v. Chicago, *supra*, distinguished in Falls v. Cairo, 58 Ill. 403, in which it was held that a party could not recover back money voluntarily paid upon a special assessment, where the only mode of collection was by a levy upon lands. *Ante*, §§ 1044, 1046, 1619, and note. Right of recovery back where the assessment is set aside. Jersey City v. O'Callaghan, 4 N. J. L. 349; Jersey City v. Riker, 38 N. J. L. 225; Peyser v. New York, 70 N. Y. 497. Where plaintiff sought to recover of a city under an ordinance requiring the city to refund taxes erroneously levied, it was considered that the *mere fact that he saw the improvement for which the tax was levied being made without protesting against* it would not estop him from denying the validity of the assessment, it not appearing that he knew it was the intention to assess adjacent property for its cost; nor would the fact that he paid the first instalment of the tax without protest preclude a recovery, a protest not being required by the terms of the ordinance. Robinson v. Burlington, 50 Iowa, 240. See Weber v. San Francisco, 1 Cal. 455; Kellogg v. Ely, 15 Ohio St. 64, the cases on this question in Herman on Estoppel and Cooley on Taxation, *passim*. *Ante*, § 1455. In *Kentucky* it is held that an action lies to recover money paid under a clear and palpable *mistake of law or fact*, and when, in law, honor, or conscience, it was not due. Louisville v. Henning, 1 Bush (Ky.), 381. What is such a mistake? *Ib.* Noble v. Bullis, 23 Iowa, 559; Ripon v. Joint School Dist., 17 Wis. 83. In *Indiana* the question, What is necessary to make a payment of a license fee required by ordinance invalid? is discussed, and the leading authorities examined at length, by *Burdick*, J., in Ligonier v. Ackerman, 46 Ind. 552. *Rules of the civil law* and provisions of the *Louisiana* Code on this subject, which are not entirely coincident with the English and American jurisprudence. See Worsley v. Second Municipality, 9 Rob. (La.) 324, relating to *wharfage* illegally collected, and Catholic Soc. of R. & L. Ed. v. New Orleans, 10 La. An. 73, as to recovery back of taxes assessed upon *exempt property* and voluntarily paid. See, however, Campbell v. New Orleans, 2 La. An. 34; Factors & Tr. Ins. Co. v. New Orleans, 25 La. An. 454. The disbursement of money voluntarily paid for taxes under an illegal assessment cannot be enjoined at the suit of the *State*. Atchison v. State, 34 Kan. 379; *ante*, chap. xxxi.

Remedy where illegal taxes have reached *State* treasury. Shoemaker v. Grant County, 36 Ind. 175. See also Cooley on Taxation (2d ed.), 804.

corporation under a cl m of right, th e being no fraud or mistake of *fact*, although the pa or is mistake n point of law as to his legal liability, is not, at leas in general, r overable back.[1] Such is undoubtedly the general le; and i not intended to affirm more than that this rule ap s to municipal corporations the same as, under like circumstan t would apply to private corporations and individuals. It does belong to this work to consider the limitations upon or exce ns to the general proposition that pure mistakes in law are no elievable, as exemplified in the more recent equity decisions in Great Britain and this country.[2] Where a board of supervisors acting for a county has power "to examine, settle, and allow" all accounts chargeable against the county, their allowance and settlement is, as a rule, binding upon the county so as to preclude it from recovering back money paid pursuant thereto.[3] But

[1] Marriott *v.* Hampton, 2 Esp. 546; s. c. 2 Smith Leading Cases, 237; Clarke *v.* Dutcher, 9 Cow. (N. Y.) 674; Mowatt *v.* Wright, 1 Wend. 355; Onondaga County *v.* Briggs, 2 Denio (N. Y.), 26, and cases cited on p. 40; Johnson *v.* Atkins, 44 Fla. 185; Floyd *v.* Atlanta Banking Co., 109 Ga. 778; Lindsey *v.* Boone County, 92 Iowa, 86; Toal *v.* New York, 34 N. Y. Misc. 18; Union & Planters' Bank *v.* Memphis, 107 Tenn. 66.

Mistake, in order to be a ground to recover back taxes, must be a mistake of fact, and not mere mistake of law. Lamborn *v.* Dickinson County, 97 U. S. 181; Hunt *v.* Rousmaniere, 1 Pet. 15; Bilbie *v.* Lumley, 2 East, 469; 2 Smith's Lead. Cas. 398, 6th ed., 458; Marriott *v.* Hampton, *supra*. A voluntary payment, made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, cannot be revoked, and the money so paid cannot be recovered back. Clarke *v.* Dutcher, 9 Cow. (N. Y.) 674; Ege *v.* Koontz, 8 Pa. St. 109; Boston & S. Glass Co. *v.* Boston, 4 Met. (Mass.) 181, 187; Benson *v.* Monroe, 7 Cush. (Mass.) 125; Milnes *v.* Duncan, 6 B. & C. 671; Stewart *v.* Stewart, 6 Cl. & Fin. 911, 968; and see cases cited in note to 2 Smith's Lead. Cas. 403, 404, 6th ed., 466; Marriott *v.* Hampton, *supra*. See on general subject *supra*, §§ 1619, 1622, and notes.

[2] There is a strong tendency in the later cases, both English and American, to give relief where justice requires it against a common mistake of law, although there may be no element of actual fraud. A principle applicable to all cases cannot be formulated. See on this subject, 1 Spence Equity, 632, 633; Bispham Equity, §§ 185–188; Story Equity Jurisp., § 212 *a*, written by Judge *Redfield;* Cooper *v.* Phibbs, L. R. 2 H. L. 149; s. c. below, 17 Irish Ch. R. 79; note luminous judgment of Lord *Westbury*, drawing a distinction between a mistake of the general law of the land and one relating to a matter of private right, the latter being considered as a matter of fact rather than of law. Stone *v.* Godfrey, 5 De G. M. & G. 76, opinion of Lord Justice *Turner;* Saxon Life Ass. Co., *In re*, 2 J. & H. 408, and note opinion of Vice Chancellor *Wood;* Condon, *In re*, L. R. 9 Ch. App. 609, and opinion of Lord Justice *James*, *Ib.* p. 614. The manner in which courts of equity deal with mistakes of law is well stated, and the cases reviewed, in Daniel *v.* Sinclair, L. R. 6 App. Cases, 181, 190. See Hunt *v.* Rousmanier's Admrs., 8 Wheat. (U. S.) 174; s. c. 1 Pet. 1; s. c. below, 2 Mason, 342; 3 Mason, 294; Mr. Justice *Story's* comments, Equity Jurisp., §§ 114, 115; Snell *v.* Belleville Ins. Co., 98 U. S. 85, opinion of *Harlan*, J.; Mutual Sav. Inst. *v.* Eustin, 46 Mo. 200, 203; Underwood *v.* Brockman, 4 Dana (Ky.), 309; Northrop *v.* Graves, 19 Conn. 548.

[3] Onondaga County *v.* Briggs, 2 Denio (N. Y.), 26; s. c. 2 Hill (N. Y.), 135; followed, Snelson *v.* State, 16 Ind. 29.

before payment, the county may, in the author's judgment, defend, notwithstanding the allowance, if not liable in law.[1]

§ 1623 (946). **Same Subject. Payment must be Compulsory.** — *Where there is no mistake of fact or fraud, voluntary payment cannot be recovered back* on the *mere* ground that the party was under no legal obligation to pay, and the other had no right to receive. Where a party would recover back taxes which he was under no legal obligation to pay, the payment must be compulsory.[2] The statute of limitations was held to apply to an action of this kind.[3]

§ 1624 (947). **The Doctrine of the Supreme Court of the United States as to the Right to recover back Taxes, stated.** — The principles above stated in sections 1616, 1617, as those which govern the common-law right, in the absence of statutory regulations, to *recover back illegal taxes*, and the elements necessary to constitute a *compulsory payment*, have been sanctioned as correct by the Supreme Court of the United States.[4] The general or common-law doctrine on the subject is thus recognized: "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary." But

[1] *Ante*, chap. xix. §§ 856, 857, 866.

[2] *Infra*, § 1624; McCrickart *v.* Pittsburgh, 88 Pa. St. 133; Benson *v.* Monroe, 7 Cush. (Mass.) 125; Mays *v.* Cincinnati, 1 Ohio St. 268; Clarke *v.* Dutcher, 9 Conn. 674; Taylor *v.* Philadelphia Bd. of Health, 31 Pa. St. 73; Allentown Bor. *v.* Saeger, 20 Pa. St. 421; Wharton *v.* Birmingham Bor., 37 Pa. St. 371; Knibbs *v.* Hall, 1 Esp. 279; Robinson *v.* Charleston Council, 2 Rich. 317; Lester *v.* Baltimore, 29 Md. 415; Tupelo *v.* Beard, 56 Miss. 532; Cahaba T. Council *v.* Burnett, 34 Ala. 400; Raisler *v.* Athens, 66 Ala. 194; Palomares Land Co. *v.* Los Angeles County, 146 Cal. 530. In State *v.* Butler, 11 Lea, 418, the court said "notwithstanding the voluntary payment of taxes illegally assessed does not constitute or confer a right of action to recover them back, yet it did create a moral obligation on the part of the city to repay them, and was a sufficient consideration to support a *subsequent promise* to do so." But *quaere* as to any *inherent* power in the city authorities without legislative sanction to convert mere moral obligations not enforceable at law or in equity into legally finding obligations. See Index — *Curative Acts*; *Moral Obligation*; *Legislature*.

[3] Brown *v.* Painter, 44 Iowa, 368; Hamilton *v.* Dubuque, 50 Iowa, 213; Callanan *v.* Madison County, 45 Iowa, 561; Commonwealth *v.* Philadelphia, 27 Pa. St. 497; and see generally, Cooley on Taxation, chap. xxiv.

[4] Lamborn *v.* Dickinson Co., 97 U. S. 181; Union Pac. R. Co. *v.* Dodge County, 98 U. S. 541; see also First Nat. Bank of A. *v.* Americus, 68 Ga. 119.

"when a party not liable to taxation is called upon peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable, recover it back as money had and received." Applying these principles in a case where it appeared that the lands of a railroad company were taxed, some of which were, and some of which were not taxable, and a tax warrant was out which authorized the seizure of personal property, but under which no demand had been made or special or active steps had been taken and no immediate seizure threatened, and the company presented itself and made payment of all of its taxes in the usual way, but *under a general protest* in writing "that the taxes were illegally assessed and levied, were wholly unauthorized by law, and that suit would be instituted to recover back the money paid," it was held that *the payment was not compulsory* in such a sense as to give the right to recover back taxes thus paid.[1]

[1] Union Pac. R. Co. *v.* Dodge County, 98 U. S. 541, *supra*. Mr. Chief Justice *Waite*, in giving the judgment of the court in the case last cited, accompanied the statement of the rules appearing in this section of the text (§ 1624) with the following observations upon several judgments of the Supreme Court which had sometimes been erroneously supposed to lay down a different doctrine: —

"There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a *protest alone* was sufficient to show that the payment was not voluntary, but on examination it will be found that the protest was used to give effect to the other attending circumstances. Thus, in Elliott *v.* Swartwout, 10 Pet. (U. S.) 137, and Bond *v.* Hoyt, 13 Pet. (U. S.) 266, which were customs cases, the payments were made to release goods held for duties on imports, and the protest became necessary in order to show that the legality of the demand was not admitted when the payment was made. The recovery rested upon the fact that the payment was made to release property from detention, and the protest saved the rights which grew out of that fact. In Philadelphia *v.* Collector, 5 Wall. (U. S.) 730, and Collector *v.* Hubbard, 12 Wall. 13, which were internal revenue tax cases, the actions were sustained 'upon the ground that the several provisions in the internal revenue acts referred to warranted the conclusion as a necessary implication that Congress intended to give the taxpayer such remedy.' It is so expressly stated in the last case (p. 14). As the case of Erskine *v.* Van Arsdale, 15 Wall. (U. S.) 75, followed these, and was of the same general character, it is to be presumed that it was put upon the same ground. In such cases the protest plays the same part it does in customs cases, and gives notice that the payment is not to be considered as admitting the right to make the demand."

Adverting to the case in judgment the chief justice, in the case from which the last extract was taken, thus proceeds to define and illustrate the subject of compulsory payments: "*The real question in this case is whether there was such an immediate and urgent necessity for the payment of the taxes in controversy as to imply that it was made upon compulsion.* The treasurer had a warrant in his hands which would have authorized him to seize the goods of the company to enforce the collection. This warrant was in the nature of an execution running against the property of the parties charged with taxes upon the lists it accompanied, and no opportunity had been afforded the parties of

§ 1625 (948). **Actions for Torts; Mode of Treatment.**— We find it impossible to state, by way of definition, any rule sufficiently exact to be of much practical value which will *precisely embrace the torts for which a civil action* will, in the absence of a statute declaring the liability, lie against a municipal corporation. The difficulty experienced by the courts on this subject has been often confessed, and, speaking of it, Mr. Justice Foote remarks: "All that can be done with safety is to determine each case as it arises." [1] It is justly observed in Mersey Dock cases (relating to the liability of a public corporation required to maintain suitable docks and harbor accommodations, for the use of which they were authorized to demand certain dues) "that in every case the liability of a body created by statute must be determined under a true interpretation of the statutes under which it is created." [2] While the powers and duties

obtaining a judicial decision of the question of their liability. As to this class of cases Chief Justice *Shaw* states the rule in Preston *v.* Boston, 12 Pick. 7, 14, as follows: 'When a party not liable to taxation is called upon peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by *duress*, and not voluntarily, and, by showing that he is not liable, recover it back as money had and received.' *This, we think, is the true rule, but it falls far short of what is required in this case.* No attempt had been made by the treasurer to serve his warrant. He had not even personally demanded the taxes from the company, and certainly nothing had been done from which his intent could be inferred to use the legal process he held to enforce the collection, if the alleged illegality of the claim was made known to him. All that appears is that the company was charged upon the tax-lists with taxes upon its real and personal property in the county. After all the taxes had become delinquent under the law, but before any active steps whatever had been taken to enforce their collection, the company presented itself at the treasurer's office, and in the usual course of business paid in full everything that was charged against it, accompanying the payment, however, with a general protest against the legality of the charges, and a notice that suit would be commenced to recover back the full amount that was paid. No specification of alleged illegality was made, and no particular property designated as wrongfully included in the assessment of the taxes. The protest was in the most general terms, and evidently intended to cover every defect that might thereafter be discovered, either in the power to tax or the manner of executing the power. Three years afterwards, and after the case of Union Pac. R. Co. *v.* McShane, 22 Wall. (U. S.) 444, which was supposed to decide that the particular lands now in question were not subject to taxation, this suit was brought. Under such circumstances we cannot hold that the payment was compulsory in such a sense as to give a right to the present action."

[1] Lloyd *v.* New York, 5 N. Y. 369, 375; Cobb *v.* Dalton, 53 Ga. 426. "No rule on this subject can be so precisely stated as to embrace all the torts for which it has been held by some court or another that a private action will lie against a municipal corporation." *West*, J., in Conway *v.* Beaumont, 61 Tex. 10.

[2] Mersey Docks *v.* Gibbs; Same *v.* Penhallow, Law R. 1 H. L. Cases, 93; s. c. 1 H. & N. 439; 3 H. & N. 164; 7 H. & N. 329; approved by *Rives*, J., in his learned opinion in Richmond *v.* Long's Adm., 17 Gratt. (Va.) 375; s. p. Southampton, &c. Bridge Co. *v.* Southampton Local Board, 8 El. & Bl. 812; Winch *v.* Thames Conservators, L. R. 9 C. P. C. 378; Clark *v.* Atlantic City, 180 Fed. Rep. 598, 601, citing text.

of our ordinary municipalities are more numerous and varied than those of a public corporation for a defined purpose, still the same general principle applies, viz., that liability must be determined (when not expressly declared) by the nature of the power and duty, and the charter and legislative provisions applicable thereto. We can, perhaps, most satisfactorily present the state of the law respecting the liability of municipal corporations in actions for torts, by referring to, and, as far as possible, classifying, the cases (which may be grouped according to the subject-matter) in which such liability has been judicially asserted or denied. And first, we will mention cases in which these corporations are *not liable to civil actions*, unless the liability be expressly created by statute.

§ 1626 (949). **Discretionary and Legislative Powers.** — A municipal corporation is not impliedly liable to an action for damages either for the non-exercise of, or for the manner in which in good faith it exercises, *discretionary powers of a public or legislative character*. Thus, where such a corporation has under its charter a *discretion as to the time and manner or plan of making public or corporate improvements*, as, for example, grading streets, constructing sewers, drains, vaults, &c., building market-houses, improving its harbor, and the like, neither *mandamus* nor a private action will lie against the corporation for *omitting or neglecting* to act; and the reason is that such powers are conferred to be exercised or not, as the public interest is deemed to require, and there is no implied liability for deciding either that the public interest does not require action, or that it requires action in a particular way.[1]

[1] Trescott *v.* Waterloo, 26 Fed. Rep. 592; Trammell *v.* Russellville, 34 Ark. 105; Brown *v.* Bentonville (Ark.), 126 S. W. Rep. 93; Veraguth *v.* Denver, 19 Colo. App. 473; Rivers *v.* Augusta, 65 Ga. 376; Collins *v.* Savannah, 77 Ga. 745 (not opening a street); Ison *v.* Griffin, 98 Ga. 623; Tarbutton *v.* Tennille, 110 Ga. 90; Dalton *v.* Wilson, 118 Ga. 100; Anderson *v.* East, 117 Ind. 126; Vaughtmann *v.* Waterloo, 14 Ind. App. 649; Spitzer *v.* Runyan, 113 Iowa, 619, 622, citing text; McGrew *v.* Kansas City, 69 Kan. 606; Keeley *v.* Portland, 100 Me. 260, quoting text; Henkel *v.* Detroit, 49 Mich. 249; Bauman *v.* Campau, 58 Mich. 444; McArthur *v.* Saginaw, 58 Mich. 357; Williams *v.* Grand Rapids, 59 Mich. 51; Miller *v.* Kalamazoo, 140 Mich. 494; Claussen *v.* Luverne, 103 Minn. 491; Keating *v.* Kansas City, 84 Mo. 415; Tritz *v.* Kansas City, 84 Mo. 632; Funke *v.* St. Louis, 122 Mo. 132, 140, citing text; Urquhart *v.* Ogdensburg, 91 N. Y. 67; Astoria Heights Land Co. *v.* New York, 179 N. Y. 579; Rogers *v.* Binghamton, 101 N. Y. App. Div. 352, 356, aff'd 186 N. Y. 595, citing text; Cole *v.* Medina, 27 Barb. (N. Y.) 218; Wilson *v.* New York, 1 Denio (N. Y.), 595; Lacour *v.* New York, 3 Duer (N. Y.), 406; *post*, § 1739; Custer *v.* New Philadelphia, 20 Ohio Cir. Ct. R. 177, 181, quoting text; McDade *v.* Chester City, 117 Pa. St. 414; Betham *v.* Philadelphia, 196 Pa. 302, 309, citing text; Robinson *v.* Norwood, 27 Pa. Super. Ct. 481; Parks *v.* Greenville, 44 S. Car. 168; Horton *v.* Bristol, 4 Lea (Tenn.),

There may be, however, as elsewhere shown, an implied liability for the negligent or unskilful manner in which *strictly corporate or*

39; *infra*, § 1627, and note; Jones v. Williamsburg, 97 Va. 722, citing text; Jordan v. Benwood, 42 W. Va. 312, citing text; Bartlett v. Clarksburg, 45 W. Va. 393, quoting text.

A limitation on the doctrine of the text is asserted in many cases, where it is held that a municipal corporation cannot so exercise its discretionary powers *in adopting a plan* for a public improvement as *practically to take private property for public use without compensation*. *Post*, §§ 1739–1745, and cases.

In a case where the plan of a sewer was proved to be defective, and being negligently maintained caused the inundation of plaintiff's property, *Ruger*, Ch. J., said: "We are also of the opinion that the exercise of a judicial or discretionary power, by a municipal corporation, which results in a direct and physical injury to the property of an individual, and which from its nature is liable to be repeated and continued, but is remediable by a change of plan or the adoption of prudential measures, renders the corporation liable for such damages as occur in consequence of its continuance of the original cause after notice, and an omission to adopt such remedial measures as experience has shown to be necessary and proper." Seifert v. Brooklyn, 101 N. Y. 136; *post*, §§ 1739–1745, and cases, where the subject is more fully considered. Shearm. & Red. Neg. (4th ed.) §§ 269–279; Thomps. Neg., chap. 16.

The text cited and the principle applied to a case in which it was unsuccessfully sought to make the corporation liable for *suspending the ordinance forbidding fireworks*, during which time the plaintiff's house was destroyed by fireworks negligently used by boys. Hill v. Charlotte, 72 N. Car. 55; Davis v. Montgomery Council, 51 Ala. 139; Campbell's Adm. v. Same, 53 Ala. 527; Ball v. Woodbine, 61 Iowa, 83; *post*, §§ 1703, 1737–1747; White v. Yazoo City, 27 Miss. 357; Griffin v. Mayor, 9 N. Y. 456, and cases cited. Followed, Dewey v. Detroit, 15 Mich. 307, where the council had a discretion as to the number of subordinate officers it would appoint; Western College v. Cleveland, 12 Ohio St. 375; Carr v. Northern Liberties (authority to construct sewers), 35 Pa. St. 324; followed in Lehigh County v. Hoffort, 116 Pa. St. 119 (erecting barrier between roadway and foot-path on a bridge).

The passage of an ordinance *permitting the use of a street for coasting* held not to render the city liable for injuries to persons resulting from such use, because the adoption of such an ordinance is an exercise of legislative power and discretionary. Burford v. Grand Rapids, 53 Mich. 98; see on this point *infra*, §§ 1628, note, 1705 and notes; Grant v. Erie (fire and damages from failure to repair reservoir), 69 Pa. St. 420; McDade v. Chester (failure to prohibit dangerous occupation), 117 Pa. St. 414, citing text; Bennett v. New Orleans, 14 La. An. 120; Cooley Const. Lim. 208; *infra*, § 1636; Kelly v. Milwaukee (damage by swine at large), 18 Wis. 83; Joliet v. Verley, 35 Ill. 58, *per Beckwith*, J.; Alton v. Hope, 68 Ill. 167; Goodrich v. Chicago, 20 Ill. 445, in which it was held, where a city corporation had, among other powers, express authority "*to remove all obstructions in the harbor*," that it was not liable to a party who received damages from a sunken hulk therein, if the city had never undertaken to exercise the power granted to it to clear out the harbor. *Canto*, J., says, in substance: If, however, the city had entered upon the work of removing the hulk, and in doing so had carelessly left it in an exposed situation, by reason of which a navigator's vessel was injured, it would be liable for such negligence. A city held not to be liable for damages by spiles in front of pier owned by it in a navigable river. Seaman v. New York, 80 N. Y. 239; Armstrong v. Brunswick, 79 Mo. 319 (failing to abate a nuisance). See *infra*, §§ 1655, 1665; New York v. Furze, 3 Hill (N. Y.), 612, explained in Wilson v. New York, 1 Denio (N. Y.), 595, 600, and in Mills v. Brooklyn, 32 N. Y. 489, cited *infra*, §§ 1739, 1740; these cases distinguished in Seifert v. Brooklyn (noted *supra*), 101 N. Y. 136; see *post*, §§ 1739–1745; Shearm. & Red. Neg. § 285, and cases cited; Dayton v. Pease, 4 Ohio St. 80. Cor-

municipal powers, as distinguished from *public powers*, are carried into execution, although there was no perfect or absolute duty resting on the corporation to enter upon the works or undertakings involving the exercise of such powers.[1] But the liability in such cases attaches only when the duties cease to be judicial in their nature, and become ministerial.[2] This is the principle; its application, as will be hereafter seen, is oftentimes extremely difficult.

§ 1627 (950). **Failure to enforce By-laws.** — Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation *is not bound to secure a perfect execution of its by-laws*, relating to its public powers, and it is not responsible civilly for neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened.[3] Conformably to the

poration of Trinity House, having power to raise a fund by the levy of light duties, held liable for the negligence of its servant in leaving an iron stump standing under water on which the plaintiff's ship struck. Gilbert *v.* Trinity House, L. R. 17 Q. B. Div. 795, and cases cited.

As to mandatory and discretionary powers, see ante, §§ 246, 1489, 1515; *post*, §§ 1737–1747; Steines *v.* Franklin Co., 48 Mo. 167; Shearm. & Red. Neg. § 269 *et seq.* As to private action for damages for breach of duty imposed by statute or municipal ordinance. Heeney *v.* Sprague, 11 R. I. 456; Flynn *v.* Canton Co., 40 Md. 312; Thomps. Neg., chaps. 14, 15, 16.

A city is not liable in damages for the *wrongful repeal* of a street railway franchise ordinance or for the conduct of its officers in publishing and subsequently enforcing the repealing ordinance. Edson *v.* Olathe, 81 Kan. 328. City not liable for act of council in passing ordinance which wrongfully interferes with right of *property owner to connect with sewer* under grant by municipality. Property owner's only remedy is by injunction. Stevens *v.* Muskegon, 111 Mich. 72.

[1] *Post*, §§ 1630, note, 1665, 1708, 1717, 1741 *et seq.* The text cited, Clarence *v.* Auburn, 66 N. Y. 334, 341.

[2] *Post*, § 1741, *et seq.*; 2 Thomps. Neg., chap. 16, pp. 625–806, and cases there cited; Keeley *v.* Portland, 100 Me. 260, quoting text.

[3] Levy *v.* New York, 1 Sandf. (N. Y.) 465, relating to injury committed by *swine running at large* in the streets in violation of by-laws, referred to with approval, 11 N. Y. 396, and see cases there cited, and in Griffin *v.* New York, 9 N. Y. 456, 459, *per Denio*, J.; S. P. Peck *v.* Austin (market ordinance), 2 Tex. 162, in which the court, admitting that such a corporation may be liable for "the wrongful acts of its officers done under its authority, and pursuant to its will, express or implied," says that "such a rule cannot be enforced in this case, because the action, or non-action, of the officers complained of was contrary to the will of the corporation as expressed in the ordinance." See also observations (*arguendo*) of *Marshall*, C. J., in Fowle *v.* Alexandria, 3 Pet. (U. S.) 398, 409; Caldwell *v.* Prunelle, 57 Kan. 511; Henkel *v.* Detroit, 49 Mich. 249; Sutton *v.* Carroll County Pol. Board, 41 Miss. 236; Sherman *v.* Granada, 51 Miss. 186; *ante*, § 1626, note; Chandler *v.* Bay St. Louis, 57 Miss. 327; Funke *v.* St. Louis, 122 Mo. 132, 146, citing text; Moran *v.* Pullman Palace Car Co., 134 Mo. 641; Harman *v.* St. Louis, 137 Mo. 494; Butz *v.* Cavanagh, 137 Mo. 503; Sallee *v.* St. Louis, 152 Mo. 615; Lorillard *v.* Monroe, 11 N. Y. 392, 396, aff'g 12 Barb. (N. Y.) 161; Howard *v.* Brooklyn, 30 N. Y. App. Div. 217; Rogers *v.* Binghamton, 101 N. Y. App. Div. 352; Hull *v.* Roxboro, 142 N. Car. 453 (ordinance prohibiting hogpens); McCrowell *v.* Bristol, 5 Lea

foregoing principles the Supreme Court of Georgia held that a municipal corporation is not liable for damages resulting from a failure on the part of its council to perform, or from an improper performance of those powers and duties which are legislative or judicial in their character. For damages resulting from their neglecting to perform, or negligence in the performance of corporate duties which are purely ministerial, the corporation, it was admitted, would be liable. There is no sound distinction, says the court, as to the liability of the corporation, between a failure to pass an ordinance, in the first instance, and its repeal or suspension after being passed. Therefore, where a city council passed an ordinance forbidding the running at large of cattle in its streets, but subsequently suspended its operation indefinitely, on the ground, among others, that the growth of weeds and grass was too luxuriant for comfort, health, and good appearance, *one who is gored by a cow running at large in the streets* has no cause of action against the city; and

(Tenn.), 685, approving text; Jones *v.* Williamsburg, 97 Va. 722.

In Kiley *v.* Kansas City, 87 Mo. 103, a city, having an ordinance against nuisances which would include an insecure wall upon private property but on the line of the street, was held not to be liable for the death of a child caused by the fall of such a wall upon an adjoining house. See also Cain *v.* Syracuse, 95 N. Y. 83. So in Anderson *v.* East, 117 Ind. 126, a municipal corporation was held not to be liable to a citizen, whose building is situate on *his own ground*, for damages sustained by him by reason of the walls of a building, on the opposite side of the alley belonging to another citizen and negligently permitted by him to become dangerous, falling upon his building and destroying it. In such case if the owner of a building which has been burned negligently permits the ruined walls to become dangerous, he, and not the city, is liable to the adjacent owner for injury to his property caused by the walls falling upon it, although the city marshal volunteered to take charge of the ruins and have the walls torn down if necessary. But see Hagerstown *v.* Klotz, 93 Md. 437. *Infra*, §§ 1628, 1705, and notes (as to injuries in streets and public places caused by *awnings and falling substances*); Howe *v.* New Orleans, 12 La. An. 481. Index — *Awning*. A municipal corporation is not ordinarily liable for the illegal and unauthorized acts of its officers under an ordinance, nor is it made liable by the fact that its board of trustees are cognizant of the tortious act, or even participate therein. Odell Trs. *v.* Schroeder, 58 Ill. 353 (false imprisonment by town officer; no municipal liability).

A city is not liable in damages to a person *struck by a bicycle ridden* on the sidewalk by reason of its failure to pass an ordinance prohibiting the riding of bicycles on sidewalks; Tarbutton *v.* Tennille, 110 Ga. 90; Howard *v.* Brooklyn, 30 N. Y. App. Div. 217; Rogers *v.* Binghamton, 101 N. Y. App. Div. 217; aff'd 186 N. Y. 595; Custer *v.* New Philadelphia, 20 Ohio Cir. Ct. Rep. 177; Bryant *v.* Orangeburg, 70 S. Car. 137; Jones *v.* Williamsburg, 97 Va. 722; nor is a city liable for its failure to enforce an ordinance prohibiting the riding of bicycles on sidewalks. Millett *v.* Princeton, 167 Ind. 582. But see *contra*, Hagerstown *v.* Klotz, 93 Md. 437. A city is not liable for its failure to adopt or enforce an ordinance prohibiting *horse racing in streets*. Marth *v.* Kingfisher, 22 Okla. 602. A city is not liable for its failure to enforce an ordinance prohibiting the *discharge of cannon* in the city streets. O'Rourke *v.* Sioux Falls, 4 So. Dak. 47. See, further, as to displays and exhibitions in public streets, *post*, § 1703.

the principle is not altered by the fact that the owner paid a municipal tax on the cow.[1]

§ 1628 (951). **Failure to abate Nuisances.** — A failure by the corporation *to exercise its charter power to abate nuisances* not rendering its streets unsafe does not give a person who is injured by such failure a private action against the corporation;[2] and therefore where a house in a city was destroyed by fire caused by sparks from an engine on the adjoining property, which was by ordinance a nuisance that the city might have abated, but which after notice and request it had neglected to abate, the city is not liable in damages for such non-action and neglect, to the owner of the house destroyed.[3]

[1] Rivers *v.* Augusta Council, 65 Ga. 376; *ante*, § 1626, note. See also Tarbutton *v.* Tennille, 110 Ga. 90. But, in *Maryland*, the contrary view appears to be adopted and it appears to be held that if a city has by its charter power to prevent cattle from running at large within the corporate limits and fails to exercise such power, it is liable to a person injured by *cattle so running at large*. Cochrane *v.* Frostburg, 81 Md. 54. See also Hagerstown *v.* Klotz, 93 Md. 437.

[2] Davis *v.* Montgomery, 51 Ala. 139; Campbell's Adm. *v.* Montgomery, 53 Ala. 527; *ante*, § 1627, note; Collins *v.* Savannah, 75 Ga. 745, 748, citing text; Dalton *v.* Wilson, 118 Ga. 100; James' Adm'r. *v.* Harrodsburg, 85 Ky. 191; Bliven *v.* Sioux City, 85 Iowa, 346 (billboard); Cason *v.* Ottumwa, 102 Iowa, 99 (billboard); Arnold *v.* Stanford, 113 Ky. 852; Georgetown *v.* Commonwealth, 115 Ky. 382; Frankfort *v.* Commonwealth (Ky.), 75 S. W. Rep. 217; Butz *v.* Cavanagh, 137 Mo. 503; Howard *v.* Brooklyn, 30 N. Y. App. Div. 217, 223, quoting text; Leonard *v.* Hornellsville, 41 N. Y. App. Div. 106 (shooting gallery on private property endangering travellers on street); Hull *v.* Roxboro, 142 N. Car. 453 (hog-pens); Mansfield *v.* Bristor, 76 Ohio St. 270; Chattanooga *v.* Reid, 103 Tenn. 616, citing text; State *v.* Burlington, 36 Vt. 521; Miller *v.* Newport News, 101 Va. 432, 436, citing text; Wood *v.* Hinton, 47 W. Va. 645; Hubbell *v.* Viroqua, 67 Wis. 343 (not liable for injury caused by a bullet from a shooting gallery licensed by the city but situated on private property, plaintiff being at the time on the sidewalk); Kent *v.* Cheyenne, 2 Wyo. 6. But see Boothe *v.* Fulton, 85 Mo. App. 16.

In Taylor *v.* Cumberland, 64 Md. 68, a city was held responsible for injuries caused by coasting in violation of an ordinance. Compare Burford *v.* Grand Rapids, 53 Mich. 98; noted *supra*, § 1626, note; *post*, §§ 1630, note, 1713–1717; Shearm. & Red. Neg. (4th ed.) § 262, and cases. City held liable for creating and maintaining a nuisance. Hart *v.* Union County, 57 N. J. L. 90; Bolton *v.* New Rochelle, 84 Hun (N. Y.), 281. City held liable under the circumstances for failure to abate a nuisance. Hillsboro *v.* Ivey, 1 Tex. Civ. App. 653. A municipal corporation is *not liable for sickness* of its inhabitants arising from its failure to enforce legally enacted ordinances imposing penalties for the maintenance of nuisances. Hull *v.* Roxboro, 142 N. Car. 453. Although a city may have power to provide for the razing or demolishing of buildings which by reason of fire may become dangerous, the power conferred is simply one of local legislation, and the failure to exercise it does not make the city liable for injuries caused *by the falling of the wall* of a building which became dangerous by reason of fire. So held in a case where plaintiff's intestate was killed in a building on the lot adjoining the dangerous wall, and not on the street. Cain *v.* Syracuse, 95 N. Y. 83.

[3] Davis *v.* Montgomery, 51 Ala.

§ 1629 (952). **Failure to observe By-laws.** — Nor is a city liable to the plaintiff for the value of his house destroyed by the taking fire of a *wooden building which the city permitted* to be erected in violation of its ordinances.[1] It has sometimes, indeed, been broadly declared that, in the absence of a statute giving it, an action at law for damages will not lie against a municipal corporation for failing to exercise its legislative functions or powers to the injury of private individuals, even where the duty of exercising them is imperative or mandatory.[2]

§ 1630 (953). **Mistake of Corporate Power by Corporation; Municipal Licensees.** — A municipal corporation is not liable to a private individual for losses caused by its having *misconstrued the extent of its powers, and issued a license* which it had no authority to grant.[3] The license in the case just cited from the United States Supreme Court [4] was granted by the corporation, without authority

139. A city is not liable to one who is injured in assisting in the extinguishment of a fire in a manufactory of fireworks upon the ground that it failed to exercise the power expressly committed to its council to prohibit such manufacture. McDade *v.* Chester, 117 Pa. St. 414. As to liability for negligent acts of firemen, see *post*, § 1660. As to displays of fireworks, see *post*, § 1703.

[1] Forsyth *v.* Atlanta, 45 Ga. 152. See also Harman *v.* St. Louis, 137 Mo. 494; Chattanooga *v.* Reid, 103 Tenn. 616, citing text.

[2] Reock *v.* Newark, 33 N. J. L. 129. The judgment in this case can, however, rest on other grounds. *Post*, § 1679; *ante*, § 246, note. See also Howard *v.* Brooklyn, 30 N. Y. App. Div. 217.

As to who are *corporate officers*, and what are *corporate duties*, see *infra*, §§ 1630, 1634, 1655, 1665, 1737, 1747.

As to contract to enforce ordinances, see Le Claire *v.* Davenport, 13 Iowa, 210. *Ante*, § 704; Gale *v.* Kalamazoo, 23 Mich. 344.

[3] Fowle *v.* Alexandria, 3 Pet. 398; s. c. below, 3 Cranch, C. C. 70; Vaughtmann *v.* Waterloo, 14 Ind. App. 649; *ante*, §§ 791, 1610; *infra*, § 1647. Nor is a municipal corporation liable for the act of its council in *erroneously*, but without any corruption or malice, *refusing to grant a retail license*, by mistake supposing it had discretion over the subject when in fact it had none. The exemption from liability is placed by the court upon the ground that such functions are *substantially judicial in their nature*. Duke *v.* Rome, 20 Ga. 635; White *v.* Yazoo City, 27 Miss. 357; *supra*, § 1626; *post*, §§ 1739, 1740. So a city is not liable for the acts of an abutting owner, in or upon the streets, to whom it has granted permission to connect his private drain with the sewers, unless it has been guilty of neglect in respect of its own duty to keep the streets in safe condition for travel. Masterson *v.* Mt. Vernon, 58 N. Y. 391; Shearm. & Red. Neg. (4th ed.) § 263.

[4] Fowle *v.* Alexandria, *supra*. In Cole *v.* Nashville, 4 Sneed (Tenn.), 162, arising on demurrer to the declaration, it was properly held that as the *municipal corporation had no jurisdiction over lunatics*, and no power and no duty to arrest and confine them, or to take measures for this purpose, it could not be made liable for a *supposed omission of duty* for not doing so. *Post*, § 1647. But in the same case it was also decided that if such a corporation, or its officers, *knowing that a person was a lunatic, granted him a license to carry on a dangerous vocation*, as that of a druggist, it was liable in damages to a party injured by such person while in pursuit of the business for which he was thus licensed. This decision was based upon the ground that the injury

therefor, to a person to exercise the trade of auctioneer; and the plaintiff, having sustained losses from his fraudulent conduct, brought an action against the city, the injury alleged in the declaration being an omission by the city to take a bond, as required by law, and the corporation having no authority to require or take such a bond, it was held that the action could not be maintained. The court observed that the auctioneer was not "the officer or agent of the corporation, but acted for himself, as entirely as a tavern-keeper or other person who carries on any business under a license from the corporate body." The proposition may, we think, be affirmed as unquestionably sound, that the *licensees of a municipal corporation to exercise any independent trade or business* for their own profit are not the officers or agents of the corporation so as to make it impliedly liable, on the principle of *respondeat superior*, or otherwise, for their conduct.[1] On similar principles,

which happened was a natural and probable result of the power granted, and that such corporations are liable for the wrongful acts and neglect of their officers in the course, and within the scope, of their employment. But was the act of granting a license to a druggist a *corporate* act? Was it not rather a public power to be exercised by the corporation as a public agency of the State? And if so, the acts or neglect of the officers would impose no liability on the corporation. *Ante*, § 109; *post*, §§ 1634, 1650, 1655–1665.

[1] In Cohen *v.* New York, 113 N. Y. 532, a city, without authority, and in violation of a statute enacting that it should have no power to authorize the placing or continuing of encroachments or obstructions upon any street or sidewalk (except building materials), granted by permit to a grocer, in consideration of an annual license fee, the privilege of keeping a wagon used in his business, the same not being a public licensed cart, in the street in front of his store day and night. The wagon being so placed at night with the thills tied up by a string in a perpendicular position, a passing ice-wagon struck it, turning it around and causing the thills to fall upon and kill a passer-by upon the sidewalk. It was held, in an action by his administratrix against the city, that under these circumstances the city was liable, being regarded as itself maintaining the nuisance. *Peckham*, J., said: "We do not say that this principle of responsibility would render the city liable in every case of a mistaken exercise of power, authorizing the use or occupancy of a public street by an individual. We confine ourselves to the decision of this case, and we simply say that when the city, without the pretence of authority, and in direct violation of a statute, assumes to grant to a private individual the right to obstruct the public highway, while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance, so long as the obstruction is continued by reason of and under such license, and it must be liable for all damages which may naturally result to a third party who is injured in his person or property by reason or in consequence of the placing of such obstruction in the highway."

If this case is well decided, it is so upon grounds which, as we think, do not impeach the doctrines of the text, the controlling considerations therein being not the relation of licensee of the city, but the authorization by it, in violation of a statute, of a nuisance upon a street, rendering the same unsafe to travellers. See *infra*, §§ 1702, 1705; Stanley *v.* Davenport, 54 Iowa, 463, noticed *ante*, § 1248, note; Shearm. & Red. Neg. § 263. In *Kentucky*, it has been held that a municipality must answer in damages to any person injured by the enforcement of an unconstitutional ordinance by the municipal officers when such ordinance is

a municipality acts in a governmental capacity in *revoking a license* issued by it, and the municipality is not liable for an abuse of the power of revocation by its officers and agents.[1]

§ 1631 (954). **Municipal Water-Works; Failure to supply Water.** — A municipal corporation, *owning waterworks or gasworks* which supply private consumers on the payment of tolls, is liable for the negligence of its agents and servants the same as like private proprietors would be.[2] But in the absence of contract it is not liable to the consumer of water *for negligently laying its mains* too near the surface of the ground so that they are frozen, whereby the water is cut off, except for the loss of the rents during the period when the water is not supplied: the court observing that the claim in suit was not for damages caused by the bursting of the water-pipes laid by the city, but for the loss of water, and that the introduction of water by the city into private houses was a *license* which was paid for, and was not on the footing of a contract guaranteeing a constant supply.[3]

enacted for the sole benefit of the corporation or its citizens. Hence, a person imprisoned by a town marshal for failure to pay a fine under such a void ordinance was held to have a right of action against the town therefor. The ordinance in this case required transients to pay a license tax for the privilege of selling merchandise at auction or retail. McGraw *v.* Marion, 98 Ky. 673. But *quære?*

[1] Ison *v.* Griffin, 98 Ga. 623; Lerch *v.* Duluth, 88 Minn. 295; Claussen *v.* Luverne, 103 Minn. 491. Licensee held entitled to repayment of license fee for unexpired portion of license upon revocation by municipality. Lydick *v.* Korner, 15 Neb. 500; State *v.* Weber, 20 Neb. 473; Chamberlain *v.* Tecumseh, 43 Neb. 221; Auburn *v.* Mayer, 58 Neb. 161. It has been said that if the municipal authorities wrongfully attempt to revoke a license or permit, the remedy of the owner is by injunction to restrain the enforcement of the void revocation. Lerch *v.* Duluth, 88 Minn. 295 (permit to remove building within fire limits); Claussen *v.* Luverne, 103 Minn. 491 (liquor license). A city is not liable for the wrongful or mistaken acts of its officers *in refusing to issue* a license. Butler *v.* Moberly, 131 Mo. App. 172.

[2] Bailey *v.* New York, 3 Hill (N. Y.), 531; 2 Denio, 433; Western Sav. F. Soc. *v.* Philadelphia, 31 Pa. St. 175; Irving's Ex'rs *v.* Media, 194 Pa. 648; Ysleta *v.* Babbitt, 8 Tex. Civ. App. 432; Shearm. & Red. Neg. (4th ed.) § 286. *Infra*, §§ 1669–1673. See generally *ante*, §§ 1317–1322 as to the duty of municipality to furnish water, light, &c., from municipal works.

[3] Smith *v.* Philadelphia, 81 Pa. St. 38; *ante*, § 1212. See also United States *v.* Sault Ste. Marie, 137 Fed. Rep. 258; Sandusky *v.* Central City (Ky.), 58 S. W. Rep. 516; Planters' Oil Mill *v.* Monroe Waterworks Co., 52 La. An. 1243; Springfield F. & M. Ins. Co. *v.* Keeseville, 148 N. Y. 46. But see Watson *v.* Needham, 161 Mass. 404. Liability for water escaping from the pipes or reservoir, and for damages from the bursting of pipes, see Hand *v.* Brookline, 126 Mass. 324; Wilson *v.* New Bedford, 108 Mass. 261; McAvoy *v.* New York, 54 How. Pr. (N. Y.) 245; Chicago *v.* Setz, 202 Ill. 545; Aschoff *v.* Evansville, 34 Ind. App. 25; Jenney *v.* Brooklyn, 120 N. Y. 164; Stock *v.* Boston, 149 Mass. 410, where a city, having contracted to supply the owner of a green-house with water and steam heat, was held liable for the destruction of plants by reason of the freezing of the water-supply pipe from being

§ 1632 (955). **Demolition of Houses to prevent spreading of Fire.** — The rights of private property, inviolable as the law regards them, are yet subordinate to the higher demands of the public welfare. *Salus populi suprema est lex.* Upon this principle, *in cases of imminent and urgent public necessity, any individual or municipal officer may raze or demolish houses and other combustible structures* in a city or compact town, to prevent the spreading of an existing conflagration. This he may do independently of statute, and without responsibility to the owner for the damages he thereby sustains. The ground of this exemption from liability is the *public necessity*, the public good; and, therefore, if the public good did not require the act to be done, — if the act was not apparently and reasonably necessary, — the actors cannot justify, and would be responsible.[1]

uncovered and negligently exposed while the city was constructing a sewer in the adjacent street, it appearing that the owner could not obtain a supply of water and heat by the use of ordinary diligence. The exposure of the water-pipe was the proximate cause of the injury, and the city was liable in tort, notwithstanding the owner might recover the same damages in an action on the contract. *Infra*, §§ 1638, 1646, 1669, 1671.

[1] Mouse's Case, 12 Coke, 63; *Ib.* 13, where Lord *Coke* says: "For the commonwealth, a man shall suffer damage; as for the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do, without being liable to an action." Maleverer *v.* Spinke, 1 Dyer, 36 *b*; British Cast Plate Co. *v.* Meredith, 4 T. R. 794, 797, *per Buller*, J.; Respublica *v.* Sparhawk, 1 Dallas, 337, and authorities cited by *McKean*, C. J. "We find, indeed, a memorable folly recorded in the third volume of Clarendon's History, where it is mentioned that the lord mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down of forty wooden houses, or to removing the furniture, &c., belonging to the lawyers of the Temple, then on the circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half of that great city was burned." *Ib.*; 15 Vin. Abr. title "*Necessity*," pl. 8; 2 Kent Com. 338; Taylor *v.* Plymouth, 8 Met. (Mass.) 462, 465, *per Shaw*, C. J.; Neuert *v.* Boston, 120 Mass. 338; New York *v.* Lord, 18 Wend. (N. Y.) 126, aff'g s. c. 17 Wend. (N. Y.) 285; Smith *v.* Rochester, 76 N. Y. 506; Conwell *v.* Emrie, 2 Ind. 35; Field *v.* Des Moines, 39 Iowa, 575, where *Miller*, C. J., applies the doctrine of the text; Keller *v.* Corpus Christi, 50 Tex. 614; Bowditch *v.* Boston, 101 U. S. 16; Quebec *v.* Mahoney, 10 Rep. Jud. Que. B. R. 378.

In the case of Field *v.* Des Moines, *supra*, the court held that the fact that the officers of a municipal corporation are authorized by ordinance to direct the destruction of private dwellings and other property to prevent the spread of fire, does not make the corporation liable, on the doctrine of *respondeat superior*, to the owners for property thus destroyed, unless there is an express statute or provision in the charter creating such liability. The *destruction of private property to prevent the spread of conflagration is not a "taking of private property for public use,"* entitling the owner to compensation from the city. The destruction of private property in such cases is an exercise of the right which individuals possess to destroy private property in cases of imperative necessity. See also the interesting cases of the American Print Works *v.* Lawrence, 23 N. J. L. 590, aff'g s. c. *Ib.* 9; and see s. c. on former appeal, 21 N. J. L. 248; *Ib.* 714, which arose out of the great fire of 1835, in the city of New York; *ante*, § 301. See opinion of Mr. Justice *Field* in the case of United States *v.* Pacific Railroad, 120 U. S. 227, in respect of property destroyed in the Civil War, in pursuance of military

§ 1633 (956). **Same Subject; Statutory Liability.** — Municipal corporations, or certain officers thereof, are sometimes appointed, by charter or statute, "*agents to judge of the emergency*, and direct the performance of acts which any individual might do at his peril, without any statute at all." [1] And by statute or charter, such corporations are not unfrequently made liable for damages which individuals may sustain for buildings or property which are destroyed, under the direction of the proper officers, to prevent the extension of a fire. *The liability of the municipal corporation in such cases is purely statutory*, and therefore, in order to charge the corporation, the case must be clearly and fairly within the enactment.[2] Thus, where the statute allows such a recovery only when a building is demolished by the order of *three* fire wards or directors, a destruction of it by the order or direction of one of these officers creates no liability against the corporation; and a *by-law* authoriz-

orders or from military necessity. It was there held by the court that the United States are not liable in damages for the injury or destruction of private property caused by their military operations; nor are private parties chargeable for works constructed on their property by the United States to facilitate such operations. Accordingly, where bridges on the line of the Pacific Railroad (of Missouri) were destroyed during the Civil War by either of the contending forces, their subsequent rebuilding by the United States as a measure of military necessity, without the request of, or any contract with, the railroad company, imposed no liability upon it therefor. If it becomes necessary for the improvement of the sanitary condition of its inhabitants, that a city must create a nuisance, — as the depositing of refuse, filth, &c., in a particular place, — its liability to persons affected thereby is confined to its careless or negligent execution of the work. Fort Worth *v.* Crawford, 64 Tex. 202.

[1] People *v.* Wynhammer, 12 How. Pr. (N. Y.) (Court App.) 260, *per Comstock*, J.; s. p. *per Selden*, J., *Ib.* 274 (*sub nom.* Wynhamer *v.* People, 13 N. Y. 378); Russell *v.* New York, 2 Denio (N. Y.), 461, 474, opinions of *Sherman* and *Porter*, Senators; *infra*, § 1655, note. Text approved; Keller *v.* Corpus Christi, 50 Tex. 614; and see Harman *v.* Lynchburg, 33 Gratt. (Va.) 37, where, in 1865, whiskey was destroyed by the police in anticipation of the presence of fugitive soldiers, and of the occupation of the city by Federal troops; and Jones *v.* Richmond, 18 Gratt. (Va.) 517, noticed *ante*, § 771, note.

[2] Taylor *v.* Plymouth, 8 Met. (Mass.) 462, 465; Ruggles *v.* Nantucket, 11 Cush. (Mass.) 433; Hafford *v.* New Bedford, 16 Gray, 297; McDonald *v.* Red Wing, 13 Minn. 38; Sorocco *v.* Geary, 3 Cal. 69; Dunbar *v.* San Francisco, 1 Cal. 355; Howard *v.* San Francisco, 51 Cal. 52; Wheeler *v.* Cincinnati, 19 Ohio St. 19; Western Col. of Hom. Med. *v.* Cleveland, 12 Ohio St. 375, *per Gholson*, J.; Fisher *v.* Boston, 104 Mass. 87; Neuert *v.* Boston, 120 Mass. 338; Hayes *v.* Oshkosh, 33 Wis. 314. The text was approved in Field *v.* Des Moines, 39 Iowa, 575, in which it was held, where the mayor of the city, in pursuance of an ordinance, caused buildings to be destroyed to prevent the spread of fire, that the city was not liable to the owner of the buildings. *Miller*, C. J., collects and reviews the principal cases. See also Bowditch *v.* Boston, 101 U. S. 16. *Contra*, Bishop *v.* Macon, 7 Ga. 200, but the subject of *corporate* liability for the act of mayor and council in ordering the destruction is not distinctly discussed. *Lumpkin*, J., seems erroneously to suppose or assume that there is an *implied assumpsit* on the part of the city for the destruction of such property as might otherwise have been saved to the owner.

ing one to exercise, in urgent cases, the powers of the three, was adjudged to be void.[1]

§ 1634 (957). **Same Subject; Respondeat Superior not Applicable.** — The city council of Charleston, acting under the general municipal powers of the city, and without any special statute creating a liability, *adopted an ordinance authorizing the intendant*, among other officers, *in time of fire, to demolish such buildings "as may be judged necessary"* by him to prevent the further spread of fire, thereby investing this officer with the power to judge whether the necessity existed. A fire being in progress, the plaintiff's house was blown up by the order of the intendant, and the fire was subsequently extinguished before it reached his premises. He brought his action of trespass against the city, claiming that the property had been destroyed by the intendant without necessity, and that the ordinance authorizing the intendant to destroy the property for the benefit of the city was sufficient to charge the *city corporation* in case the plaintiff established that the destruction was unnecessary, and that the discretion of the officer had been abused. The court decided that the plaintiff could not recover, placing its judgment upon the broad ground that the city, being a public corporation, was not liable to an action by individuals, unless it be given by statute.[2]

[1] Coffin *v.* Nantucket, 5 Cush. (Mass.) 269. Note remarks of *Metcalf*, J., 272, as to whether a *majority* of the fire wards or directors could lawfully authorize the destruction of buildings. Bowditch *v.* Boston, 101 U. S. 16; *ante*, §§ 522, 587. See also Ruggles *v.* Nantucket, 11 Cush. (Mass.) 433, on this point, and on the construction of the word "owner." As to the estate or interest necessary to justify recovery, and as to the right of recovery for *personal property* under the *New York* statute (2 Rev. Laws, 368), see Stone *v.* New York, 25 Wend. 157, aff'g s. c. 20 Wend. (N. Y.) 139; New York *v.* Lord, 18 Wend. 126; 17 Wend. 285.

Insurance. It is held that the fact that the owner is insured does not affect the right of recovery or the amount to be recovered of the corporation. The insurers are entitled to be subrogated to the rights of the owner or assured, and to have applied on their policies the amount received by him from the corporation. New York *v.* Pentz, 24 Wend. (N. Y.) 668. And see Pentz *v.* Ætna Ins. Co., 9 Paige (N. Y.), 568; City F. Ins. Co. of New York *v.* Corlies, 21 Wend. 367. *Interest.* Interest on the amount should be allowed from time of destruction, New York *v.* Pentz, 24 Wend. (N. Y.) 668; 25 Wend. (N. Y.) 157, but not intermediate the time of assessment and confirmation by the court. Lord *v.* New York, 3 Hill (N. Y.), 426. *Evidence.* The opinions of *bystanders* as to whether the buildings destroyed *would* have taken fire, not admissible; as to the opinion of *firemen*, *quære*. New York *v.* Pentz, 24 Wend. (N. Y.) 668.

[2] White *v.* Charleston, 2 Hill (S. Car.), 571. The result was right; but assuming the power to pass the ordinance, the decision should be placed, we think, upon the ground that the intendant was discharging a *public*, as distinguished from a *municipal* or *corporate* duty, and is not in this matter to be regarded as the agent of the city, and therefore the city would not, on the principle of *respondeat superior*, be

§ 1635 (958). **Same Subject; Statutory Remedy.** — As one whose property has been destroyed by the order of the public authorities for the public benefit has a strong natural equity for compensation, and as *statutes making the public corporation liable are remedial,* while they are not to be strained to cover cases not fairly embraced by them, they are yet to be liberally expounded.[1] If the statute creating the liability against the corporation prescribes the remedy, that alone can be pursued, as, if the statute provides for an assessment, a civil action will not lie against the corporation.[2] But if the statute gives the right or creates the liability and prescribes no specific remedy, an action may be brought.[3]

§ 1636 (959). **Destruction of Property by Mobs.** — Public or municipal corporations are under no common-law liability to pay for the property of individuals destroyed by mobs or riotous assemblages;[4] but in such case, *the legislature may constitution-*

responsible for his acts. Approved, 18 Am. Law Review, 1009. See oscillations in later cases. Johnston *v.* Charleston, 3 S. Car. 232; Coleman *v.* Chester, 14 S. Car. 286; Black *v.* Columbia, 19 S. Car. 412. *Infra,* § 1660, note; *ante,* §§ 109, 1627; *post,* §§ 1655–1665, 1737–1747; Fisher *v.* Boston, 104 Mass. 87; Hafford *v.* New Bedford, 16 Gray (Mass.), 297; Neuert *v.* Boston, 120 Mass. 338; Wheeler *v.* Cincinnati, 19 Ohio St. 19; Keller *v.* Corpus Christi (citing text with approval), 50 Tex. 614; Hamilton County *v.* Garrett, 62 Tex. 602; Edgerly *v.* Concord, 59 N. H. 78.

[1] New York *v.* Lord, 17 Wend. (N. Y.) 285, 292, *per Nelson,* C. J.; aff'd 18 Wend. (N. Y.) 126; New York *v.* Pentz, 24 Wend. (N. Y.) 668; Stone *v.* New York, 25 Wend. (N. Y.) 157. In *Massachusetts* it is held that the statute does not apply to a building which is pulled down by order of the public officers *after* it is so far burnt that it is impossible to save it. Taylor *v.* Plymouth, 8 Met. (Mass.) 462. And the *New York* statute does not impose a liability on the corporation for property which would inevitably have been destroyed by the fire. Pentz *v.* Ætna F. Ins. Co., 9 Paige (N. Y.), 568; New York *v.* Lord, 17 Wend. (N. Y.) 285. Construction of *Georgia* statute, making municipal corporations liable. Dorrosan *v.* Huttner, 48 Ga. 133. As to liability for neglect of firemen, see *infra,* § 1660.

[2] Russell *v.* New York, 2 Denio (N. Y.), 461. Same principle, *infra,* § 1680; *supra,* §§ 1414–1417. Where in such a case there is power to demolish the building a court of equity will not in general be disposed to interfere with the exercise of the power. See Auckland *v.* Westminster Local Board, L. R. 7 Ch. 597; Kerr *v.* Preston Corp., L. R. 6 Ch. Div. 463. Remedy by action and by injunction in respect of acts by public boards and commissioners in excess of statutory powers, and to prevent unnecessary injury from the execution of such powers, see Addison on Torts (4th ed.), chap. 16, § 3.

[3] Lowell *v.* Wyman, 12 Cush. (Mass.) 273, 276.

[4] Western Col. of Hom. Med. *v.* Cleveland, 12 Ohio St. 375; Madisonville *v.* Bishop, 113 Ky. 106, citing text; Adamson *v.* New York, 110 N.Y. App. Div. 58, aff'd 188 N. Y. 255, citing text; Long *v.* Neenah, 128 Wis. 40, citing text. See also Iola *v.* Birnbaum, 71 Kan. 600; Allegheny County *v.* Gibson, 90 Pa. St. 397. It was held in Western Col. *v.* Cleveland, *supra,* that a provision *inter alia* in the constituent act of the city that it "shall be the *duty* of the council to regulate the police of the city, preserve the peace, *prevent riots,* disturbances, and disorderly assemblages," had reference to the passage of ordinances to be enforced by officers appointed for the purpose, and did not make the city responsible for the riotous destruction

ally give a remedy, and regulate the mode of assessing the damages.[1]

of property, or for the neglect of the officers of the city in not preventing such destruction. Hart *v.* Bridgeport, 13 Blatchf. C. C. R. 289, opinion by *Shipman,* J. *Supra,* § 1626. See also Prather *v.* Lexington, 13 B. Mon. (Ky.) 559; Ward *v.* Louisville, 16 B. Mon. (Ky.) 184. In these cases liability was sought to be grounded on the existence of power in the officers *to prevent and suppress mobs, and their failure and neglect of duty in this respect.* The court did not regard the omissions or acts of the executive officers of the city as imposing any liability on the city in its *corporate* capacity. Cheaney *v.* Hooser, 9 B. Mon. (Ky.) 330; Robinson *v.* Greenville, 42 Ohio St. 625, where a municipal corporation was held not to be liable for an injury caused by the *discharge of a cannon in a public street by an assembly of disorderly persons,* though it had given them permission to fire it and took no steps to stop the firing. To same effect on similar facts, Norristown *v.* Fitzpatrick, 94 Pa. St. 121; and see Lincoln *v.* Boston, 148 Mass. 578, where a city was held not to be liable for damages caused by the frightening of a horse in an adjacent street by the firing of cannon in a public common under a license from the city. See further as to fireworks in the public streets, *post,* § 1703. In further support of the doctrine stated in the text, see *supra,* § 1626; Ball *v.* Woodbine (damage from fireworks discharged in violation of ordinance), 61 Iowa, 83; Hill *v.* Charlotte, 72 N. Car. 55; *infra,* § 1655 *et seq.*; Pennsylvania Hall, *In re,* 5 Pa. St. 204; Allegheny County *v.* Gibson, 90 Pa. St. 397; Fauvia *v.* New Orleans (construing statute), 20 La. An. 410; Howe *v.* New Orleans, 12 La. An. 481; Baltimore *v.* Poultney (construing *Maryland* legislation), 25 Md. 107; Duffy *v.* Baltimore, Taney C. C. 200; Williams *v.* New Orleans, 23 La. An. 507; Hagerstown *v.* Dechert, 32 Md. 369; Brightman *v.* Bristol, 65 Me. 426; Martin *v.* Brooklyn, 1 Hill (N. Y.), 541, 545, 551; Underhill *v.* Manchester (liability of towns under statute), 45 N. H. 214; Chadbourne *v.* Newcastle, 48 N. H. 196; Bailey *v.* New York, 3 Hill (N. Y.), 531; Buttrick *v.* Lowell, 1 Allen (Mass.), 172; Ely *v.* Niagara County, 36 N. Y. 297; Dale County *v.* Gunter, 46 Ala. 118; Campbell's Adm. *v.* Montgomery, 53 Ala. 527; Newberry *v.* New York, 31 N. Y. Super. Ct. 369; Moody *v.* Niagara County, 46 Barb. (N. Y.) 659; New Orleans *v.* Abbagnato, 62 Fed. Rep. 240; Chicago League Ball Club *v.* Chicago, 77 Ill. App. 124; Wallace *v.* Norman, 9 Okla. 339.

[1] Pennsylvania Co. *v.* Chicago, 81 Fed. Rep. 317; Chicago *v.* Pennsylvania Co., 119 Fed. Rep. 497; Campbell *v.* Montgomery Council, 53 Ala. 527, citing text; Spring Valley Coal Co. *v.* Spring Valley, 65 Ill. App. 571; Spring Valley Coal Co. *v.* Spring Valley, 96 Ill. App. 230; Iola *v.* Birnbaum, 71 Kan. 600; Madisonville *v.* Bishop, 113 Ky. 106; Lowell *v.* Wyman, 12 Cush. (Mass.) 273, 276; Darlington *v.* New York, 31 N. Y. 164, cited *ante,* § 109, and notes; Marshall *v.* Buffalo, 176 N. Y. 545, s. c. 50 N. Y. App. Div. 149, 63 N. Y. App. Div. 603; Adamson *v.* New York, 188 N. Y. 255, aff'g 110 N. Y. App. Div. 58; Gray *v.* Brooklyn, 10 Abb. (N. Y.) Pr. N. S. 186; Russell *v.* New York, 2 Denio (N. Y.), 461; Pennsylvania Hall, *In re,* 5 Pa. St. 204. It is held under the *statutes of Kansas,* that an action against a city, for damages resulting from the *killing* of a man by a mob, should be brought in the *name of the personal representative* of the deceased. Atchison *v.* Twine, 9 Kan. 350. City held not liable for the killing of a man by a mob under a statute imposing liability on the city for "property." Gianfortune *v.* New Orleans, 61 Fed. Rep. 64. Statute of *Maine* construed. Brightman *v.* Bristol (contributory fault and measure of damages), 65 Me. 426. Statute of *New Hampshire* construed. Underhill *v.* Manchester, 45 N. H. 214. The fact that plaintiff kept a disorderly house held no defence. Ely *v.* Niagara, 36 N. Y. 297. The statutes in question held to apply to all injuries to persons and property and are not limited to such as result in loss of life. Spring Valley Coal Co. *v.* Spring Valley, 65 Ill. App. 571; Iola *v.* Birnbaum, 71 Kan. 600. As to what constitutes a mob, see Madisonville *v.* Bishop, 113 Ky. 106; Duryea *v.* New York, 10 Daly (N. Y.), 300, aff'd 100 N. Y. 625;

§ 1637 (960). **Same Subject; Legislative Power as to Remedy.** — As the right to reimbursement in such cases, when given, is wholly based upon the statute, and does not rest upon contract, the legislature may, in the absence of special constitutional limitations, *regulate the remedy or the means of enforcement of the liability* at its pleasure, even after judgment has been rendered against the municipality.[1]

Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, aff'd 176 N. Y. 545; Adamson *v.* New York, 110 N. Y App. Div. 58, aff'd 188 N. Y. 255; Aron *v.* Wausau, 98 Wis. 592. A *charivari party* held to be a mob. Cherryvale *v.* Hawman, 80 Kan. 170, citing numerous cases.

In *California* it is not necessary that a claim against a county, for damages for property destroyed by a mob, should be presented to the board of supervisors for allowance before bringing an action to recover judgment on it. The act of the legislature compelling a county to pay for property destroyed by a mob created a new right, and provided a new remedy therefor, complete in itself. The statute of *Pennsylvania* gives to the owner of *property destroyed by a mob* a right of action for damages *against the county* where such property is situated. But under the statute, no person can recover if it appears that the destruction was caused by his illegal or improper conduct, nor unless it appears that upon knowledge of the intention to destroy the property, if there be sufficient time, notice be given to the sheriff or other specified officials. In a case under this statute (The Pittsburg Riot) it was held (1) that the property-owner is not in default for not giving notice, unless he had first knowledge of the intention to destroy; (2) that the improper conduct to prevent recovery must be the proximate cause of the destruction, and the assertion of a legal right in a legal manner would not be improper conduct; (3) that the fact that the riot was widespread, and beyond the power of local authorities to anticipate or subdue, did not constitute a defence; (4) that the owner of personal property *in transitu*, though a non-resident, was entitled to the benefit of the statute; and (5) that such property destroyed in a county by a mob was situated in the county. Allegheny County *v.* Gibson, 90 Pa. St. 297. See Clear Lake W. W. Co. *v.* Lake County, 45 Cal. 90. Such statutes are generally considered *to be constitutional.* Pennsylvania Co. *v.* Chicago, 81 Fed. Rep. 317; Chicago *v.* Manhattan Cement Co., 178 Ill. 372; Sturges *v.* Chicago, 237 Ill. 46; Iola *v.* Birnbaum, 71 Kan. 600; Brown *v.* Orangeburg County, 55 S. Car. 45. A railway company, as a common carrier and bailee for hire, is the "owner" of property within the meaning of the *Illinois* statute authorizing a recovery for destruction by the act of a mob. Pittsburgh, C., C. & St. L. R. Co. *v.* Chicago, 242 Ill. 178; Chicago *v.* Pennsylvania Co., 119 Fed. Rep. 497. Under the *Kansas* statute whatever may have caused the conduct of the mob may be shown in mitigation of damages. Adams *v.* Salina, 58 Kan. 246. Hence, the conduct and reputation of the keeper of a saloon which was destroyed by the act of a mob may be given in evidence in mitigation of the damages to his property. Stevens *v.* Anthony, 82 Kan. 179.

[1] Louisiana *v.* New Orleans, 109 U. S. 285. In affirming a judgment in this case, which denied the writ of *mandamus* to compel a levy of taxes to pay judgments against a city for damages caused by a mob, Mr. Justice *Field* said: "The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure. . . . It is their [municipal corporations'] duty to exercise their authority so as to prevent violence from any cause, and particularly from mobs and riotous assemblages. It has, therefore, been generally considered as a just burden cast upon them to require them to make good any loss sustained from the acts of such assemblages which they should have repressed.

§ 1638 (961). **Implied Liability ex delicto; Distinction between Quasi Corporations and Municipal Corporations.** — In considering the subject of *the implied liability* (by which we mean a liability where there is no express statute creating or declaring it) of municipal corporations *to civil actions for misconduct or neglect on their part, or on the part of their officers in respect to corporate duties*, resulting in injuries to individuals, it is essential to bear in mind the distinction pointed out in a former chapter,[1] and to be noticed again hereafter,[2] between *municipal corporations proper*, such as towns and cities specially chartered or voluntarily organizing under general acts, and *involuntary quasi corporations*, such as townships, school districts, and counties (as these several organizations exist in most of the States), including therein for this purpose the peculiar form of organization, before referred to, known as the New England town.[3] The decisions of the courts in this country are almost uniform in holding the former class of corporations to a much more extended liability than the latter, even where the latter are invested with corporate capacity and with the power of taxation;[4] but

The imposition has been supposed to create, in the holders of property liable to taxation within their limits, an interest to discourage and prevent any movements tending to such violent proceedings. But, however considered, the imposition is simply a measure of legislative policy, in no respect resting upon contract, and subject, like all other measures of policy, to any change the legislature may see fit to make, either in the extent of the liability or in the means of its enforcement. And its character is not at all changed by the fact that the amount of the loss, in pecuniary estimation, has been ascertained and established by the judgments rendered. The obligation to make indemnity created by the statute has no more element of contract in it because merged in the judgments than it had previously." It was held, applying these principles, that a statute passed and a constitutional provision adopted, after the judgments were obtained, *which restricted the power of taxation by a city to such an extent as to make it impossible to pay the judgments*, were valid, and did not deprive the judgment creditor of property within the meaning of the Fourteenth Amendment to the Constitution of the United States. Louisiana *v.* New Orleans, 109 U. S. 285. Index — *Constitutional Provisions; Contracts; Judgments; Mandamus; Remedy.*

[1] *Ante*, chap. ii. §§ 34, 109.

[2] *Infra*, §§ 1639, 1687, 1708-1715.

[3] *Ante*, §§ 40-42.

[4] *Ante*, § 34 and note, § 109; Acme Road Machinery Co. *v.* Bridgewater, 185 N. Y. 1; Soper *v.* Henry County, 26 Iowa, 264; Sussex County *v.* Strader, 18 N. J. L. 108. Approved Cooley *v.* Essex County, 27 N. J. L. 415; Pray *v.* Jersey City, 32 N. J. L. 394; Passaic Br. Prop. *v.* Hoboken Land & Imp. Co., 13 N. J. Eq. 503, 504; Cooley Const. Lim., 240 *et seq.*; Niles Tp. *v.* Martin, 4 Mich. 557; Larkin *v.* Saginaw County (defective bridge), 11 Mich. 88; Lesley *v.* White, 1 Speers L. (S. Car.) 31; Young *v.* Edgefield R. Com'rs, 2 Nott & McC. (S. Car.) 537; Carroll *v.* Tishamingo Co. Pol. Bd., 28 Miss. 38; Anderson *v.* State, 23 Miss. 459; Hedges *v.* Madison County, 6 Ill. 567; Levy *v.* Salt Lake City, 3 Utah, 63; *infra*, §§ 1639, 1641, 1647, 1687, 1708, and cases cited.

In *Maryland*, a county is liable for injuries caused by unsafe roads and bridges. Calvert County *v.* Gibson, 36 Md. 229. Index, tit. *County*.

In *California*, incorporated cities are not liable for injuries sustained by private individuals, caused by the neg-

respecting the *grounds* for this difference, there is considerable diversity of opinion. The principle involved lies at the basis of a large class of actions against municipal corporations, and it is desirable to examine it in the light of the adjudications which have established it. It may, in the first place, be remarked that it is a general principle of law, founded in reason, that where one suffers an injury by the neglect of any duty of perfect obligation owing to him which rests upon another, the person injured has his action. This doctrine applies not only to individuals, but to private corporations aggregate, and it obliges such corporations to respond in a private action, though such action be not expressly given by statute, for the damages which another may suffer by reason of neglect or default in the performance of any such corporate duty.[1]

lect of the city officers in keeping streets or bridges in repair, unless made liable by charter or statute. In the case below cited the court says: "Incorporated cities in this State are mere governmental instruments formed under the State laws for the purposes of internal administration. They are not distinguishable in principle from counties created by law for the same purpose. Under the acts organizing counties, boards of supervisors and road overseers are charged with the duty of keeping public highways in repair; and it was held, in Huffman *v.* San Joaquin County, 21 Cal. 426, and Crowell *v.* Sonoma County, 25 Cal. 313, that counties are not liable for injuries sustained by private individuals through the neglect of the officers charged with such duties, and it was intimated that responsibility, if any, for such injuries rested upon the individual officers in default." Winbigler *v.* Los Angeles, 45 Cal. 36; Tranter *v.* Sacramento, 61 Cal. 271.

[1] As to private corporations, this is well illustrated by the early case in *Massachusetts* of Riddle *v.* Merrimac River Canal Prop., 7 Mass. 169. This was an action of *case* against the defendants, a canal corporation, which were bound by their charter to construct their canal so deep and wide that rafts of a certain description could pass through it when the same could pass the river with which it was connected, but which failed, to the plaintiff's injury, thus to construct their canal. It was objected that no private action lay against a corporation for a breach of its duty, even though special injury was suffered, the only remedy being by information or indictment. And it was specially urged that there were technical objections to maintaining trespass, or trespass upon the case. These objections were disposed of in the most satisfactory manner by the terse and luminous judgment of *Parsons*, C. J., who decided that the action would lie, and placed the decision upon the broad and clear grounds stated in the text, viz.: that private corporations, *i. e.*, corporations created for their own benefit, equally with individuals, are liable for any damages which another may suffer by reason of any neglect or default to perform any corporate duty. Weld *v.* Androscoggin Boom Prop., 6 Me. 93 (liability of boom companies); Ward *v.* Newark & P. Turnp. Co., 20 N. J. L. 323, 325; Parnaby *v.* Lancashire Canal Co., 11 A. & E. 223. This principle as to private corporations is at the present day so well established as to be among the fundamental doctrines of our jurisprudence. "The result of the cases is," says the Supreme Court of the United States, "that for acts done by the agents of a [private] corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances." This rule is applicable to municipal corporations, but it is applied with greater care. Salt Lake City *v.* Hollister, 118 U. S. 256, 262; Philadelphia, W. & B. R. R. Co. *v.* Quigley, 21 How. (U. S.) 202. In Quigley's Case, *supra*, it was held that the railroad company

§ 1639 (962). **Limited Liability of New England Towns.** — The question was presented for decision at an early day in Massachusetts, whether *towns* in that State (the statute being silent upon the subject) stood upon the same footing as respects liability for damages *arising from their neglect of duty* as individuals and private corporations; and it was decided that they did not, and that in order to subject them to a civil action in favor of an individual for neglect in respect to their public duties concerning highways, though such duties were enjoined by statute, the legislature must expressly give the action. Applying this principle, it was accordingly held, in Mower *v.* Leicester,[1] that a town was not liable in a common-law action for damages sustained by an individual through a *defect in the highways of the town.* This case, or the English case upon which it was based,[2] has been generally followed throughout the New England

might be liable to an action for *libel.* In Reed *v.* Home Sav. Bank, 130 Mass. 443, it was held that the bank might be liable to an action for *malicious prosecution. Infra,* § 1654.

[1] Mower *v.* Leicester, 9 Mass. 247. "From a very early period in *Massachusetts* towns have been, by general laws, required to keep highways and bridges in repair, and made liable to actions for defects therein by persons sustaining special damage in their persons or property. Mass. Col. St. 1648; 2 Mass. Col. Rec. 229; Mass. Col. Sts. (ed. 1672) 12; Prov. St. 1693–94 (5 W. & M.), chap. vi., §§ 1, 6; 1 Prov. Laws (State ed.), 136, 137; Anc. Chart. 55, 56, 267, 269; St. 1786, chap. lxxxi., §§ 1, 7; Rev. St., chap. xxv., §§ 1, 22; St. 1850, chap. v.; Gen. Sts., chap. xliv., §§ 1, 22." Hill *v.* Boston, 122 Mass. 344, 350. In Mower *v.* Leicester, says *Gray,* C. J., "the question was directly presented for judgment, in an action at common law against a town [in *Massachusetts*] for a personal injury caused by a defect in a highway, of which the town had not had the notice required to charge it under the statute. It was argued for the plaintiff that none of the objections which prevailed in Russell *v.* Devon County, 2 T. R. 661, 667, applied, because here the town was a corporation created by statute, capable of suing and being sued, was bound by statute to keep the public highways in repair, was called upon to answer only for its own default, and had a treasury out of which judgments recovered against it might be satisfied; and that the objection that a multiplicity of actions would be the consequence of levying the execution on one or more inhabitants of the town could have no effect, because it would equally apply to every action against a town or parish, and yet such actions were every day brought and supported. But the court arrested judgment, saying: 'It is well settled that the common law gives no such action. Corporations created for their own benefit stand on the same ground, in this respect, as individuals. But *quasi* corporations, created by the legislature for purposes of public policy, are subject, by the common law, to an indictment for the neglect of duties enjoined on them; but are not liable to an action for such neglect, unless the action be given by some statute.'" Hill *v.* Boston, *supra; post,* §§ 1642, 1688, 1694.

[2] Russell *v.* Devon Co., 2 T. R. 661, 667. In this case an individual brought his action against the county for an injury he sustained by its neglect to repair a county bridge. The duty to repair was admitted. That the defendant was liable to indictment for neglect to repair was conceded. And inasmuch as it had no *corporate fund,* or means of obtaining such a fund, out of which a judgment could be satisfied, and because each inhabitant would be liable to satisfy the judgment which might be levied on one or two individuals, who would have no (practicable) means whatever of reimbursing themselves, it was considered that the action could

States, and has resulted in the establishment therein, and in the very general recognition elsewhere, of the doctrine that, without a statute giving it, no private action lies against towns in New England or other *quasi* corporations, for the neglect of purely governmental duties imposed on them by general legislative enactment applicable to all such corporations as governmental or public agencies.[1]

not be maintained. But this reason clearly does not apply to ordinary chartered municipalities, or, in fact, to any public body having a corporate fund, or the means of obtaining one, out of which the judgment may be satisfied. In Riddle *v.* Merrimac River Canal Prop., 7 Mass. 169, 187, the decision in Russell *v.* Devon, *supra*, is considered as based upon "sound reason," and it was approved in England in Mackinnon *v.* Penson, 25 Eng. L. & Eq. 457; Cowley *v.* Newmarket Local Board, L. R. [1892] App. Cas. 345; see also Sydney *v.* Bourke, L. R. [1895] App. Cas. 433; Maguire *v.* Liverpool, L. R. [1905] 1 K. B. 767. It is reviewed and commented on in many subsequent cases; see particularly, Weightman *v.* Washington Corp., 1 Black (U. S.), 39, 52, 53; Morey *v.* Newfane, 8 Barb. (N. Y.) 645; Young *v.* Edgefield R. Com'rs, 2 Nott & McC. (S. Car.) 537; Beardsley *v.* Smith, 16 Conn. 368, 375; Ball *v.* Winchester, 32 N. H. 435; Gilman *v.* Laconia, 55 N. H. 130 (explaining and limiting Ball *v.* Winchester); Eastman *v.* Meredith, 36 N. H. 284, cited *infra*, § 1641, note; McConnell *v.* Dewey (road supervisor's liability), 5 Neb. 385; Altnow *v.* Sibley, 30 Minn. 186; Weltsch *v.* Stark, 65 Minn. 5; 1 Thomps. Neg., chap. xv.

Mode of enforcing liabilities of New England towns. It may here be remarked that, *at common law, corporators are not personally liable for the debts of the corporation; but by usage and practice*, peculiar in this country to the New England States, *quasi* corporations, as towns, counties, and parishes, are an exception to this rule, and private property may be taken to satisfy a corporate judgment. The history of this anomalous usage, and the reasons for it, are stated at large by *Church*, J., in Beardsley *v.* Smith, 16 Conn. 368. See also Hill *v.* Boston, 122 Mass. 344; Union *v.* Crawford, 19 Conn. 331; Fernald *v.* Lewis, 6 Me. 264, 268, *per Weston*, J.; Brewer *v.* New Gloucester, 14 Mass. 216; Merchants' Bank *v.* Cook, 4 Pick. (Mass.) 405, 414; Chase *v.* Merrimack Bank, 19 Pick. (Mass.) 564; Gaskill *v.* Dudley, 6 Met. (Mass.) 546, 551. The usage, as established by statute, is not a taking of property without "due process of law." Eames *v.* Savage, 77 Me. 212. See also § 1506, note. Remedy of inhabitant over, Beers *v.* Botsford, 3 Day (Conn.), 159. Index, tit. *New England Towns*. But it is otherwise in case of corporations proper; and the author is aware of no instance, out of New England, even in the case of *quasi* corporations, in which, without a statute to that effect, private property has been considered liable to pay public debts. *Ante*, §§ 992, 1506, note, 1519, note; North Lebanon *v.* Arnold, 47 Pa. St. 488; Miller *v.* McWilliams, 50 Ala. 427. In accord with the author's views are Flori *v.* St. Louis, 69 Mo. 341; Brabham *v.* Hinds County, 54 Miss. 363; Kincaid *v.* Hardin County, 53 Iowa, 430, distinguishing Wilson *v.* Jefferson County, 13 Iowa, 181; s. p. Sherbourne *v.* Yuba County, 21 Cal. 113; Mitchell *v.* Rockland, 52 Me. 118; Symonds *v.* Clay County, 71 Ill. 355; Crowell *v.* Sonoma County, 25 Cal. 313. Town in *Wisconsin* constructing and maintaining *a levee*, pursuant to statutory authority, is not liable to an owner of lands which are overflowed in consequence of the negligence of the town in maintaining the levee. Spellman *v.* Caledonia, 117 Wis. 254, 259. In the chapters on Corporate Boundaries, Dissolution, Contracts, and Mandamus we have had occasion to consider the remedies of creditors against municipal and public corporations, to which the reader is referred.

[1] In Rhobidas *v.* Concord, 70 N. H. 90, the court examined and reviewed the nature and extent of the implied or common-law liability of *towns* in an opinion of marked ability. *Peaslee*, J., who delivered the opinion of the court, summed up the cases in which *towns* in *New Hampshire* are *not* liable as follows: "It appears that

§ 1640 (963). **Limited Liability of Counties.** — According to the prevailing rule, *counties are under no liability in respect of torts*, except as imposed (expressly or by necessary implication) by statute. They are political divisions of the State created for convenience, and are usually regarded not to be impliedly liable for damages suffered in consequence of neglect to repair a county road or bridge;[1] such a liability, unless declared by statute, is generally, but not quite universally, denied to exist.[2] On the same grounds, such organizations as townships, school-districts, road-districts, and the like, though possessing corporate capacity and power to levy taxes and raise money, for their respective public purposes, have been very generally considered *not to be liable in case, or other form of civil action, for neglect of public duty, unless such liability be created by statute.*[3] A

towns are not liable at common law, (1) for the improper discharge of a purely governmental function; Eastman *v.* Meredith, 36 N. H. 284; Doolittle *v.* Walpole, 67 N. H. 554; (2) for neglect to perform duties imposed upon them without their consent; Sargent *v.* Gilford, 66 N. H. 543; (3) for the acts of officers whose powers and duties are so fixed by the legislature that the town cannot control or direct their actions; Ball *v.* Winchester, 32 N. H. 435; Hardy *v.* Keene, 52 N. H. 370; Edgerly *v.* Concord, 59 N. H. 78; Gross *v.* Portsmouth, 68 N. H. 266. In every case, in which it has been held there was no liability, the decision has been placed upon one of these grounds. In no case has non-liability been put upon the broad ground that there is no common-law liability of a municipal corporation." *Injra*, § 1640.

[1] *Post*, §§ 1688–1694, 1715; Granger *v.* Pulaski County, 26 Ark. 37; Waltham *v.* Kemper, 55 Ill. 346; White *v.* Bond County, 58 Ill. 297; Hollenbeck *v.* Winnebago County, 95 Ill. 148; Abbett *v.* Johnson County, 114 Ind. 67; Shearm. & Red. Neg. (4th ed.) § 256, note, and cases cited; Smith *v.* Allen County, 131 Ind. 116; Morris *v.* Switzerland County, 131 Ind. 285; Vigo County *v.* Daily, 132 Ind. 73; Cones *v.* Benton County, 137 Ind. 404; Jasper County *v.* Allman, 142 Ind. 573; State *v.* Marion County, 170 Ind. 595; Talbott *v.* St. Joseph County, 42 Ind. App. 198; Kincaid *v.* Hardin County, 53 Iowa, 430; Brabham *v.* Hinds County, 54 Miss. 363; Moest *v.* Buffalo, 116 N. Y. App. Div. 657, 662, aff'd 193 N. Y. 615; Hughes *v.* Monroe County, 147 N. Y. 49, 56, citing text; Markey *v.* Queens County, 154 N. Y. 675; Lefrois *v.* Monroe County, 162 N. Y. 563; White *v.* Chowan County, 90 N. Car. 437; Duncan *v.* Lynchburg, 2 Va. Dec. 700, citing text.

[2] Cases, *supra; post*, §§ 1687–1694, 1713, 1714; Askew *v.* Hale County, 54 Ala. 639; Barbour County *v.* Horn, 48 Ala. 566.

In *Indiana* it is considered that the *duty of the county to keep bridges in repair is imperative*, and having the power to make appropriations of money for that purpose, *the county is held impliedly liable for damages sustained by a traveller* from a county bridge negligently suffered to remain out of repair. House *v.* Montgomery County, 60 Ind. 580; Knox County *v.* Montgomery, 109 Ind. 69, and cases cited; Abbett *v.* Johnson County, 114 Ind. 67. *Post*, §§ 1688–1694, 1713, 1715.

In *Nebraska* the general rule of the *non-liability of counties* in such cases is held. Woods *v.* Colfax County, 10 Neb. 552; s. c. 23 Alb. L. J. 14.

[3] Weightman *v.* Washington Corp., 1 Black (U. S.), 39; Van Eppes *v.* Mobile, 25 Ala. 460; Sherbourne *v.* Yuba County, 21 Cal. 113; Beardsley *v.* Smith, 16 Conn. 368, 375; Chidsey *v.* Canton, 17 Conn. 475; Bray *v.* Wallingford, 20 Conn. 416, 419; Hedges *v.* Madison County, 6 Ill. 567; Hollenbeck *v.* Winnebago County, 95 Ill. 148; Kincaid *v.* Hardin County, 53 Iowa, 430, approving text; Lane *v.* Woodbury, 58 Iowa, 462; Adams *v.* Wiscasset Bank, 1 Me. 361; Niles Tp.

county, though it has power to erect and repair public buildings, and to levy and collect a tax for that purpose, is not responsible, in the absence of a statute making it so, for *injuries resulting from the unsafe and dangerous condition of county buildings*, especially where there exists no statute authorizing the levy of a tax to satisfy such a judgment. A county was accordingly held not to be liable for an injury suffered by the plaintiff, who, when in attendance upon court as a witness, was precipitated into the cellar of the court-house, in consequence of the *negligent omission of the agents or officers of the county* to guard or light a dangerous opening leading into the cellar.[1]

H. Com'rs *v.* Martin, 4 Mich. 557; Larkin *v.* Saginaw County, 11 Mich. 88; Sutton *v.* Carroll County Pol. Bd., 41 Miss. 236; Reardon *v.* St. Louis, 36 Mo. 555; Tritz *v.* Kansas City, 84 Mo. 632; Farnum *v.* Concord, 2 N. H. 392; Eastman *v.* Meredith, 36 N. H. 284; Sussex County *v.* Strader, 18 N. J. L. 108; State *v.* Hudson County, 30 N. J. L. 137; Lorillard *v.* Monroe, 11 N. Y. 392; Bartlett *v.* Crozier, 17 Johns. (N. Y.) 439; Treadwell *v.* Hancock County, 11 Ohio St. 190, *per Gholson*, J.; Baxter *v.* Winooski Turnp. Co., 22 Vt. 114, 123; *ante*, §§ 34, 109, 1638, and cases cited.

The doctrine of the text, as elsewhere shown in this chapter, does not apply to New England towns, where the duty is private or corporate, as distinguished from public; nor does it appear to be applied when the wrongful act is in the nature of a trespass upon the property rights of others. Gilman *v.* Laconia, 55 N. H. 130; explaining and limiting Ball *v.* Winchester, 32 N. H. 435. See Rhobidas *v.* Concord, 70 N. H. 90, cited *ante*, § 1639; *infra*, § 1641; Weed *v.* Greenwich, 45 Conn. 170. In order to establish a liability upon such an organization for damages, it must be shown that prior to the accident the corporation must have had exclusive control of the bridge or building where the injury occurred. Titler *v.* Iowa County, 48 Iowa, 90; Hollenbeck *v.* Winnebago County, 95 Ill. 148, *supra*.

[1] *Liability of counties for neglect of officials, &c. Post*, §§ 1688–1694, 1713, 1714; Index, tit. *County;* Hamilton County *v.* Mighels, 7 Ohio St. 109, cited *ante*, § 37, note (overruling the early case of Brown County *v.* Butt, 2 Ohio, 348, recognized, but without examination, as authoritative, in Richardson *v.* Spencer, 6 Ohio, 13, following Russell *v.* Devon County, 2 T. R. 661, approving Riddle *v.* Merrimac River Canal Prop., 7 Mass. 169); Mower *v.* Leicester, 9 Mass. 247; Young *v.* Edgefield R. Com'rs, 2 Nott & McC. (S. Car.) 537; White *v.* Charleston, 2 Hill (S. Car.), 571; Ward *v.* Hartford County, 12 Conn. 404; Sussex County *v.* Strader, 18 N. J. L. 108; Kincaid *v.* Hardin County, 53 Iowa, 430 (distinguishing Wilson *v.* Jefferson County, 13 Iowa, 181); s. p. Sherbourne *v.* Yuba County, 21 Cal. 113; Mitchell *v.* Rockland, 52 Me. 118; Dosdall *v.* Olmsted County (failure to repair court-house), 30 Minn. 96; Crowell *v.* Sonoma County, 25 Cal. 313; Hedges *v.* Madison County, 6 Ill. 557; Hollenbeck *v.* Winnebago Co. (defective construction of public building), 95 Ill. 148; Symonds *v.* Clay County (negligent setting fire to brush by county employee), 71 Ill. 355; Fowle *v.* Alexandria, 3 Pet. (U. S.) 398, 409; Morey *v.* Newfane, 8 Barb. (N. Y.) 645. See similar case of Eastman *v.* Meredith, 36 N. H. 284; *infra*, § 1641, note. See also § 1673, and note. But a *city* is liable. Campbell *v.* Montgomery, 53 Ala. 527. Nor is a township liable in *Kansas*. Eikenberry *v.* Bazaar, 22 Kan. 556. It was said, *arguendo*, in 7 Ohio St. 109, *supra*, that a municipal corporation proper would, under like circumstances, have been liable. See, on this point, *infra*, §§ 1655–1668; Cleveland *v.* King, 132 U. S. 295. So in *Georgia*, a county, although it is its duty to keep a good and sufficient jail, is *not liable for an escape caused by the insufficiency of the jail*, though the sheriff may have been made liable therefor, there being no statute giving such an action. The Governor *v.* Clark County, 19 Ga. 97, citing Russell *v.* Devon County, 2 T. R. 661; s. p. Haygood *v.* Clark

§ 1641 (964). **Statutory and Implied Liability of New England Towns.** — In New England, as will hereafter be shown, there is, in-

County, 20 Ga. 845. See also Peters *v.* State, 9 Ga. 109; Scales *v.* Chattahoochee County (non-repair of bridges), 41 Ga. 225.

The non-liability of counties in *Virginia*, in the absence of a statute declaring the liability, is asserted by the Court of Appeals in Fry *v.* Albemarle County, 86 Va. 195. The county was sued to recover damages resulting from the alleged negligence of a State convict engaged in working on the public roads, and of the alleged negligence of a superintendent who was appointed under the authority of State law. "No suit," said the court, "can be maintained against the county of Albemarle upon the principle of *respondeat superior*, because the relation of master and servant did not exist. Such officers are *quasi* public officers of the State; for, although the officer in charge was appointed by the county, yet the office and duties incident to it were created by an act of the legislature, for the general public welfare; the public roads of Albemarle county being highways of the commonwealth for the common benefit of all the people of the State who have a right to use them. We have been referred to numerous decisions concerning the character of the duty required of these and other officials similarly situated, drawing a distinction where the duty is for the benefit of the general public and where it is for the benefit of a corporation, but we do not cite them. They are more distinctly applicable to municipal corporations proper than to such organizations as counties, which are rather political subdivisions of the State, or, as sometimes denominated, '*quasi* corporations.'"

A county is not liable for a nuisance to a citizen in the erection of a jail in the immediate vicinity of his residence, or for suffering it to become so filthy and disorderly as to be a nuisance to him and his family. Wehn *v.* Gage County, 5 Neb. 494; s. p. Crowell *v.* Sonoma County, 25 Cal. 313; Threadgill *v.* Anson County, 99 N. C. 352 (not liable for a nuisance on courthouse square). *County courts* in *Missouri* are not agencies of the county, but a branch of the State judiciary, and hence the county is not liable for their judicial action or non-action. Miller *v.* Iron County, 29 Mo. 122; State *v.* St. Louis County Court, 34 Mo. 546. *The county is part of the body of the State.* Commonwealth *v.* Brice, 22 Pa. St. 211. It is liable as at common law for services of *physicians* in making a *post mortem* examination at request of coroner. Allegheny County *v.* Shaw, 34 Pa. St. 301. But not liable for *medical treatment of prisoner* taken ill on his trial. Commonwealth *v.* Hall, 7 Watts (Pa.), 290; *supra*, § 1615, note. Liability of counties on *warrants or orders.* See Index, tit. *Orders; Warrants. Road districts* are political subdivisions of counties, and road officers are not liable to civil action unless by force of statute. McConnell *v.* Dewey, 5 Neb. 385, 392. If a statute creates a claim or liability against a county, and provides no remedy for its enforcement, an action at law, by ordinary summons and complaint, will lie. Lowndes County *v.* Hunter, 49 Ala. 507. See Index, tit. *Mandamus.*

Where a claim against a county for money is properly presented to the county board, and they fail or refuse to take any action thereon, or fail or refuse to allow the same, the holder may then commence an action thereon against the county for the amount. In such action it is not necessary that he should set forth that he had previously presented the claim to the county board for their allowance. Such presentation does not constitute any part of his cause of action. Ordinarily the records of the county furnish the best evidence of the acts and proceedings of the commissioners, but when such acts and proceedings amount in law to a contract, and this for services or property, or something of value to be furnished, and such contract has been executed by the other party, and the county has received the benefit of it, it would not be proper to allow the county commissioners to defeat an action merely because the commissioners and their clerk had failed to do their duty by making their records show all their acts and proceedings. In such a case, where the records are silent with

deed, *a liability on both cities and towns for injuries caused by unsafe or defective highways and streets*, but this liability is regarded as wholly and strictly statutory. The rule of law above mentioned [1] is there adhered to, but it is not of universal application even as to towns, for it is considered that *there may be other instances in which they are civilly liable for neglect of duty, without an express statute to that effect.*[2] Speaking of the rule established in the before-mentioned case of Mower *v.* Leicester, that a private action cannot be maintained against a *quasi* corporation for neglect of public duty unless the action be given by statute, Mr. Justice Metcalf, in a much later case,[3] says: "And so it has ever since been held by this and

reference thereto, the contract may be shown by parol evidence. Gillett *v.* Lyon County, 18 Kan. 410. See Index, tit. *County; Mandamus; Records and Documents.*

[1] *Supra*, § 1639.

[2] Oliver *v.* Worcester, 102 Mass. 489, 496; Blodgett *v.* Boston, 8 Allen (Mass.), 237; Stickney *v.* Salem, 3 Allen (Mass.), 374; Chidsey *v.* Canton, 17 Conn. 475, 478, approving Mower *v.* Leicester, 9 Mass. 247; Reed *v.* Belfast, 20 Me. 246. See also Weisenberg *v.* Winneconne, 56 Wis. 667; *infra*, §§ 1687, 1688, 1691, 1692.

[3] Bigelow *v.* Randolph, 14 Gray (Mass.), 541, 543; Eastman *v.* Meredith, 36 N. H. 284, and Conrad *v.* Ithaca, 16 N. Y. 158, elsewhere referred to, are approved. The extract in the text from Bigelow *v.* Randolph approved by *Sherwood*, J., in Hannon *v.* St. Louis County, 62 Mo. 313, 316. See also *ante*, §§ 37, 109, 1638 *et seq.*; *post*, §§ 1655, 1665, 1737.

New England town; liability for neglect of public duty; defective town-house. The question of the right to maintain an action against a New England town (the nature of which has been before considered) for neglect of duty, in the absence of statute either giving or prohibiting such an action, was learnedly and ably examined by the Supreme Court of *New Hampshire*, in the case of Eastman *v.* Meredith, just mentioned and heretofore referred to (*ante*, § 41). The material facts were, that the defendant (the town of Meredith) built a town-house, in which, among other purposes, to hold town-meetings. The house, by the negligence of those who built it for the town, was so defectively constructed that the flooring, at an annual town-meeting, gave way, and the plaintiff, an inhabitant and legal voter, in attendance upon the meeting, received a serious bodily injury. The plaintiff's injury was caused by the insufficiency of the building. The court concedes for the argument that it was the duty of the town to provide a safe and suitable place for holding town-meetings (see *ante*, § 34, note), and, treating the case on this basis, states the question to be decided thus: "Whether a citizen of the town who suffers a private injury in the exercise of his public rights, from neglect of the town to perform this public duty, can maintain an action against the town to recover damages for the injury?" It was held that the plaintiff could not recover; and this decision rests mainly upon the ground that a statute is necessary, and has been uniformly so considered in New England since the early cases of Riddle *v.* Merrimac River Canal Prop., 7 Mass. 169, 187 (*supra*, § 1639, note), and Mower *v.* Leicester, 9 Mass. 250 (*supra*, § 1639), in order to subject towns to a civil action for neglect to perform a public duty. Towns in *New Hampshire* and the New England States, it is stated, are created by general law. They give no assent, at least no express assent, to the act creating them. They are involuntary territorial and political divisions of the State, for the purposes of government and municipal regulation. They are declared by statute to be corporations, but this does not enlarge their duties or liabilities. *Ante*, §§ 34, 41. The case was considered to be one of new impression, and on these grounds was distinguished by the court from cases in England decided under charters which

other courts. *This rule of law, however, is of limited application.* It is applied in the case of towns only to the neglect or omission of a town to perform those duties which are imposed upon *all* towns, without their corporate assent, and exclusively for public purposes, and not to the neglect of those obligations which a town incurs when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred on it, at its request. In the latter cases, a town is subject to the same liabilities, for the neglect of those special duties, to which private corporations would be, if the same duties were imposed or the same authority conferred on them, including their liability for the *wrongful neglect* as well as the *wrongful acts of their officers and agents.*" [1]

imposed a public duty upon the corporation as the *condition or price of the corporate franchises*, and from cases decided in other States in this country, in which cities and towns have been held liable to a civil action for neglect to perform public duties growing out of grants conferring special powers and privileges for local advantage or benefit. *Ante*, § 109; see *infra*, §§ 1642, 1655, 1665, 1668, 1741 *et seq.*

Conformably to these principles, it was held in Bigelow *v.* Randolph, 14 Gray, 541, above cited, that a town in *Massachusetts* which has assumed the duties of a school-district is *not liable for an injury sustained by a scholar* attending the public school *from a dangerous excavation in the school-house yard*, owing to the negligence of the town officers. On the same ground it has since been held, in an elaborate opinion, that a child, attending a public school in a school-house provided by a city, under the duty imposed upon it by *general laws*, cannot maintain an action against the city for an injury suffered by reason of the unsafe condition of a staircase in the school-house, over which he is passing. Hill *v.* Boston, 122 Mass. 344; *infra*, § 1642; Sullivan *v.* Boston, 126 Mass. 540; s. p. Finch *v.* Toledo Bd. of Education, 30 Ohio St. 37. See and compare Miles *v.* Worcester, 154 Mass. 511; Wahrmann *v.* New York Board of Education, 111 N. Y. App. Div. 345, aff'd 187 N. Y. 331; Bassett *v.* Fish (defective school-house floor), 75 N. Y. 303; s. c. below, 12 Hun (N. Y.), 209; and Donovan *v.* Board of Education, 85 N. Y. 117; *ante*, § 1638, note; *infra*, § 1642, note. As to liability for defective school-houses, see *post*, § 1658. *Unsafe court-house.* *Supra*, § 1640, and note; Thomps. Neg., chaps. xv., xvi.

Where the plaintiff received a *personal injury by the falling of a portion of the brick and plastering in a room occupied by a* CITY *as a common-council room*, it was held that if the dangerous condition of the premises at the time of the accident was the result of causes beyond the control of the city authorities, and the injury happened before the lapse of a reasonable time to restore them to a safe condition, the city would not be liable. But although the original cause might have been inevitable accident, yet if the city authorities continued to use the building for public meetings of the council, and failed to repair the premises in a reasonable time, and the injury happened in consequence of such neglect, while the plaintiff was in exercise of due care, the city would be liable to him. Chicago *v.* O'Brennan, 65 Ill. 160. See *infra*, §§ 1642–1646. A city is not liable in damages for injuries inflicted upon a person by the *fall of a market-house* caused by a wind storm of unprecedented force and violence. Flori *v.* St. Louis, 69 Mo. 341. The general liability of municipalities for *injuries caused by falling substances on streets and public places* is discussed below.

[1] *Implied liability of New England town for torts:* In Rhobidas *v.* Concord, 70 N. H. 90, 109, 110, *Peaslee*, J., after specifying the cases in which towns are not subject to an implied or common-law liability (see *ante*, § 1639), said: "In no case, has non-liability been put on the broad ground that there is no common-law liability

§ 1642 (965). **Same Subject; Hill v. Boston.** — The question of *the implied liability of a municipal corporation for the neglect of a public duty resulting in special damage to an individual* has at a later date undergone, in the Supreme Judicial Court of Massachusetts, the most thorough examination to which, perhaps, it had ever been subjected.[1] The opinion of Mr. Chief Justice Gray, for learned

of a municipal corporation. On the other hand, there are numerous cases wherein towns were held to answer for their acts without any statutory liability, either expressly or impliedly imposed. *Quantum meruit* has been maintained to recover for building a highway where the plaintiff had failed to perform a special contract. Wadleigh *v.* Sutton, 6 N. H. 15; Davis *v.* Barrington, 30 N. H. 517. So where a town let a house for a term of years and the tenant made repairs, which were to be in lieu of rent, and was subsequently evicted before the end of the term, he was entitled to recover the value of the repairs to the town. Smith *v.* Newcastle, 48 N. H. 70. If a town so constructs a highway as to cause a nuisance on the property of an abutter, the town is liable. Gilman *v.* Laconia, 55 N. H. 130; Cole *v.* Gilford, 63 N. H. 60. The same rule applies to the construction of sewers; Vale Mills *v.* Nassau, 63 N. H. 136; Nutt *v.* Manchester, 58 N. H. 226; to a failure to properly care for highways after they are built, Parker *v.* Nashua, 59 N. H. 402; and to cases where the improper construction was not authorized, but has been paid for and the benefit accepted; Carpenter *v.* Nashua, 58 N. H. 37. Where the work of maintaining sewers is voluntarily undertaken, the town is liable for injuries to private property resulting from negligence in such work. Rowe *v.* Portsmouth, 56 N. H. 291. The court has also sustained actions against towns for the obstruction of a private way, Willey *v.* Portsmouth, 64 N. H. 214; for money paid to discharge a debt due from the town, Sanborn *v.* Deerfield, 2 N. H. 253; for the expenditures of a committee to purchase land for a cemetery, Eastman *v.* Hampstead, 66 N. H. 195; for labor performed and materials furnished in the construction of waterworks, Leavitt *v.* Dover, 67 N. H. 94; and for the expenses of a committee before the legislature, Rider *v.* Portsmouth, 67 N. H. 298; Bachelder *v.* Epping, 28 N. H. 354. If towns were mere divisions of the State, and could not be sued without authority from the legislature, many of these actions would have failed. . . . So far as the questions involved in this branch of the law have been considered, the decisions seem to recognize *three classes of cases in which towns are liable for torts at common law:* (1) For negligent acts (even in the discharge of imposed duties) which interfere with the rights of others, provided such rights do not depend upon the imposed duty; Gilman *v.* Laconia, 55 N. H. 130; Carpenter *v.* Nashua, 58 N. H. 37; Parker *v.* Nashua, 59 N. H. 402; Willey *v.* Portsmouth, 64 N. H. 214. (2) For their acts concerning property not employed in a public use; Clark *v.* Manchester, 62 N. H. 577. (3) Where duties of a public nature are voluntarily assumed; Rowe *v.* Portsmouth, 56 N. H. 291."

[1] Hill *v.* Boston, 122 Mass. 344, followed in Tindley *v.* Salem, 137 Mass. 171, where the Massachusetts decisions are classified by *C. Allen*, J.; Wixon *v.* Newport, 13 R. I. 454, where a city was held not to be liable for a defect in heating a public school building whereby a pupil was injured, the duty of the city being a *public*, and not a *corporate* duty. But see Miles *v.* Worcester, 154 Mass. 511; Clark *v.* Nicholasville (Ky.), 87 S. W. Rep. 300; Brown *v.* New York, 32 N. Y. Misc. 571; Blair *v.* Granger, 24 R. I. 17; Folk *v.* Milwaukee, 108 Wis. 359. See also Wahrmann *v.* New York Board of Education, 111 N. Y. App. Div. 345. *Ante*, §§ 1638, note, 1641; *post*, §§ 1667, and note, 1687, 1688. See Daniels *v.* Racine, 98 Wis. 649, 651, discussing the origin and nature of municipal liability and referring to the text. In Johnson *v.* Somerville, 195 Mass. 370, *Loring*, J., reviews at great length the principles governing the responsibility of municipal corporations in *Massachusetts* for the acts of its officers and employees and examines and states the decisions of

research, for the analysis of the leading judgments on the subject in England and America, and critical observations upon them, is so intrinsically valuable that it will be studied by all who desire to trace the history of the law on this point, and to know its exact condition. The case was this: The plaintiff, *a child eight years of age, attending a public school provided by the city of Boston, was injured by reason of the unsafe condition of the staircase in the school-house,* and for the special damage thus sustained an action of tort was brought against the city. No statute gave or denied, in terms, the right of action in such a case. The charter of the city contained no provision in respect of schools or school-houses; but a *general statute* applicable throughout the Commonwealth, made it the imperative duty of all cities and towns to provide and maintain school-houses. It was held, conceding the negligence of the city in respect to the condition of the staircase, that the action could not be sustained.

§ 1643 (965 *a*). **Same Subject; Principle of the Decision; Ground of Liability stated.** — The *principle of the decision* was stated to be that, according to the well-settled law of Massachusetts, no private action, unless authorized by express statute, can be maintained against a town or city for the neglect of a public duty imposed upon it as the agent of the public, by general laws for the benefit of the public, and from the performance of which the corporation receives no profit or special advantage. Whether the result would have been different if the duty in question had been imposed on the city by a *special charter* was not, of course, decided, but the reasoning is evidently against any distinction based upon the particular mode in which such a duty is prescribed. Whether the neglected duty involves a liability depends, in the judgment of the court, upon the nature of the duty; that is to say, whether it is imposed for the pecuniary profit or other special advantage of the city, — if so, the city is liable; or whether it is a duty imposed upon the city as a public instrumentality of the State, without pecuniary or other special advantage to the city, — if so, the city is not liable. After a critical examination, in the same case, of the decisions in England on the *subject of the implied liability of municipal corporations to civil actions for neglect of duty,* the doctrine they establish is thus stated: "The result of the English authorities is, that when a duty is imposed upon a municipal corporation

that State on that subject. As to of defective school-houses, see *post*, the general rule of liability in respect § 1658.

for the benefit of the public, without any consideration or emolument received by the corporation, it is only where the duty is a new one, and is such as is ordinarily performed by trading corporations, that an intention to give a private action for a neglect in its performance is to be presumed." [1] And the decisions in this country which hold otherwise (notably those in reference to defective highways) are considered by the eminent judge who delivered the opinion of the court as not founded on sound principles. That this general view of the restricted liability of municipal corporations is sound there can be little doubt; but what duties are imposed for the exclusive benefit of the public, and what powers are given and what duties are enjoined for the special emolument or benefit of the municipality, and which may, therefore, be regarded as the basis of an implied civil liability, if their exercise or performance is neglected to the injury of individuals, are questions which have given rise, as we shall see in the course of this chapter, to conflicting judgments.

§ 1644. **Governmental Functions; Immunity from Liability denied in Admiralty.** — The Supreme Court of the United States has held that the doctrine that when a municipal corporation exercises a purely governmental function no liability attaches to it for torts or for the negligent acts of the officers or agents it employs therein, *has no application in the courts of the United States sitting in admiralty*, when they have jurisdiction of the subject-matter of the action and of the parties, *in personam*. In the case in which it was so held, a steam fire-boat belonging to the city of New York, while endeavoring to extinguish a fire, negligently collided with and injured the libellant's vessel which was moored at a slip. The city contended that it was not responsible for the negligence of its officers in the exercise in a public or governmental function, such as extinguishing a fire,[2] but the court refused to recognize that contention on the ground that the maritime law afforded no justification for it. The Supreme Court recognized the fact that the local law of the State of New York, in the waters of which State the cause

[1] Hill *v.* Boston, 122 Mass. 344, *supra*, *per Gray*, C. J., *infra*, § 1667, where the leading English decisions are succinctly stated. Hill *v.* Boston, followed in Tindley *v.* Salem, 137 Mass. 171; McNeil *v.* Boston, 178 Mass. 326; Johnson *v.* Somerville, 195 Mass. 370; commented on, Shearm. & Red. Neg. (4th ed.) § 268, note, and reprinted in 2 Thomps. Neg., chap. xvi. *Post*, §§ 1667, 1713, 1714; *ante*, § 1638, and cases cited in note; § 1639 and note; § 1641, and note. Ulrich *v.* St. Louis, 112 Mo. 138, 143, citing text.

[2] See on this subject *ante*, § 1340; *post*, § 1660.

of action arose, afforded no redress for the tort, but it held that the local decisions of one or more States, or the rules of law enforced therein, could not abrogate the maritime law, and could not deprive the individual of a right of recovery for a maritime wrong which, under the general principles of the admiralty law, he possessed. It reviewed the authorities and reached the conclusion that under the maritime law, there was no exemption from liability founded upon the fact that the vessel at fault was in the performance of a governmental duty at the time.[1]

[1] Workman *v.* New York City, 179 U. S. 552, rev'g 67 Fed. Rep. 347, s. c. 63 Fed. Rep. 298. In this case the libel was *in personam* by the owner of the damaged vessel against the city of New York. The vessel of the city at fault was not seized in admiralty, and hence the case was not embarrassed by considerations growing out of the seizure of property of a municipality devoted to public use. The opinion of the court was delivered by Mr. *Justice* (now *Chief Justice*) *White*, who examined the decisions, and after saying that the maritime law was paramount and did not, usually at least, yield to any local law, pointed out that the municipal corporation had the capacity to sue and to be sued, and it followed that there was no limitation taking such corporations out of the reach of process of a court of admiralty, as such courts, within the limits of their jurisdiction, may reach persons having a general capacity to stand in judgment. He recognized the fact that it had been held that where admiralty process had been set in action against a municipal corporation, public policy restrained a seizure of property used for public purposes by such corporation. He said, however, that this was but the application of the exception as to the mode of execution of a judgment or decree against such a corporation, and pointed out that its existence in all cases in the admiralty law had been denied. After reviewing the decisions in admiralty as to the liability of sovereign powers for the torts of their vessels and the jurisdiction of the courts of admiralty of causes of action arising therefrom, he said: "It results that in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty where the court has jurisdiction. This being so, it follows that as the municipal corporation of the city of New York, unlike a sovereign, was subject to the jurisdiction of the court, the claimed exemption from liability asserted in the case at bar, because of the public nature of the service upon which the fire-boat was engaged, — even if such claim for the purposes of the case be conceded — was without foundation in the maritime law, and therefore afforded no reason for denying redress in a court of admiralty for the wrong which the courts below both found to have been committed." Five Justices (*Fuller*, C. J., *Harlan*, *Brown*, *White* and *McKenna*, JJ.,) concurred, while four Justices (*Gray*, *Brewer*, *Shiras* and *Peckham*, JJ.,) dissented. In the dissenting opinion Mr. Justice *Gray* pointed out that the decisions of the State courts were unanimous in holding that there was no liability on the part of municipal corporations for the negligence or torts of fire department officers, whilst engaged in extinguishing fires, and asserted that the principle conferring immunity from liability therefor, was not a mere rule of local law, but was the application of a general principle of jurisprudence. See, further, as to the *liability of municipal corporations in admiralty*. Thompson Navigation Co. *v.* Chicago, 79 Fed. Rep. 984; The Major Reybold, 111 Fed. Rep. 414; United States *v.* Port of Portland, 147 Fed. Rep. 865. Although much diversity of opinion is to be found as to what duties will be considered as governmental in the sense which exempts municipal corporations from liability for torts in the performance of these duties, we believe that the decisions of the United States

§ 1645 (966). **Implied Liability of Municipal Corporations proper for Misfeasance and Nonfeasance; Its Limits.** — As respects *municipal corporations proper*, whether specially chartered or voluntarily organizing under general acts of the character before alluded to,[1] it is, we think, universally considered, even in the absence of a statute giving the action, that *they are liable for acts of misfeasance* positively injurious to individuals, done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties; and it is the almost, but not quite, uniform doctrine of the courts, that they are also liable where the wrong resulting in an injury to others consists in a *mere neglect or omission to perform an absolute and perfect* (as distinguished from a legislative, discretionary, *quasi* judicial, or imperfect) *corporate duty*, owing by the corporation to the plaintiff, or in the performance of which he is specially interested.[2] But there is, as elsewhere stated, not a little diversity of opinion as to what duties are *corporate* duties, and when officers, though appointed or elected by the corporation, are to be regarded as the officers of the corporation, and not of the State or of the general public.[3] And especially have the courts been much perplexed respecting the *principle* upon which to rest the distinction, so generally taken, by which what is termed a *quasi* corporation, though possessing full corporate capacity and a corporate purse, is not *impliedly liable* for acts of misfeasance or neglect of public duty on the part of its officers and agents, while for the same or a similar wrong there is such a liability resting on municipal or chartered corporations.[4] *But the dis-*

Courts in admiralty are the only cases which deny the existence of the general principle. The exception to the doctrine, thus recognized, is, of necessity, of but a limited application in the case of municipalities and probably is of no extensive practical importance.

[1] *Ante*, §§ 61, 70, 175.

[2] Aiken *v.* Columbus, 167 Ind. 139, 143, quoting and approving the text; Ihk *v.* Duluth, 58 Minn. 182, citing text. *Post*, § 1665, and cases cited; §§ 1737–1747. The text cited and applied; Helena *v.* Thompson, 29 Ark. 569, 573; Broom Commentaries Com. Law, 651, 671; Galveston *v.* Posnainsky, 62 Tex. 118; Martinsville *v.* Shirley, 84 Ind. 546. In Chicago *v.* Chicago & W. I. R. R. Co., 105 Ill. 73, *Sheldon*, J., said, "We recognize the doctrine to be, that the unauthorized acts of municipal officers are regarded as the acts of the corporation, provided the acts are performed by that branch of the municipal government which is invested with jurisdiction to act for the corporation upon the subject to which the particular act relates."

[3] *Supra*, §§ 109, 1630, 1634, 1638–1641; *infra*, 1655–1665; text cited, Hannon *v.* St. Louis County, 62 Mo. 313, 319. See Johnson *v.* Somerville, 195 Mass. 370.

[4] A city is not liable for misfeasance for extending the bounds of a street, so as to bring an existing nuisance within the limits of such street. McCutcheon *v.* Homer, 43 Mich. 483; Larkin *v.* Saginaw, 11 Mich. 88; Pontiac *v.* Carter, 32 Mich. 164; Detroit *v.* Beekman, 34 Mich. 125; Lansing *v.* Toolan, 37 Mich. 152; Detroit *v.* Blackeby, 21 Mich. 84.

tinction, whatever its grounds, or precise boundaries, or difficulties in its application, is well established; and the latter class of corporations is considered to be impliedly liable (unless the legislation negatives such liability) for wrongful acts done in what is termed their *private* or *corporate character*, and from which they derive some special or immediate advantage or emolument, but not as to such acts done in their *public capacity*, as governing agencies of the State, in the discharge of duties imposed for the public or general (not corporate) benefit.[1]

[1] See cases cited *ante*, § 109; *supra*, §§ 1630, 1634, 1638–1646; *infra*, §§ 1655, 1665, 1687, 1688, 1690, 1691, 1708, 1714, 1717, 1741. Brown's Adm'r *v.* Guyandotte, 34 W. Va. 299, 300, quoting text; Funke *v.* St. Louis, 122 Mo. 132, 140, citing text. See also Oliver *v.* Worcester, 102 Mass. 489, 499; Richmond *v.* Long's Adm., 17 Gratt. (Va.) 375 (1867); Petersburg *v.* Applegarth, 28 Gratt. (Va.) 321; Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 189, *per Strong*, J. These cases all refer to the case of Bailey *v.* New York, 3 Hill (N. Y.), 531, and to the distinction taken by *Nelson*, C. J., between the public and private capacity of municipal corporations. The distinction is maintained in *New York*. Maxmilian *v.* New York, 62 N. Y. 160, where the subject is fully discussed by *Folger*, J.; and in *Missouri*, Hannon *v.* St. Louis County, 62 Mo. 313; and in *Rhode Island*, Aldrich *v.* Tripp, 11 R. I. 141; see also Crossett *v.* Janesville, 28 Wis. 420; and in *Texas*, Galveston *v.* Posnainsky, 62 Tex. 118, where the distinction between the liability of *quasi* corporations and municipal corporations is considered at some length. Galveston *v.* Barbour, 62 Tex. 172; Stockwell *v.* Rutland, 75 Vt. 76; Simpson *v.* Whatcom, 33 Wash. 392. Text cited and approved, Helena *v.* Thompson, 29 Ark. 569.

In *South Carolina* the rule is that a municipal corporation is not liable to be sued in an action of tort for nonfeasance or misfeasance of its officers in regard to their public duties, unless expressly made so liable by statute. Gibbes *v.* Beaufort, 20 S. Car. 213 (an action for damages, caused by the establishment of a ferry to the injury of one already existing under the authority of the legislature). But where, in the same State, the plaintiff brought suit against a city, praying that it be required to deliver to him certain stock which it, through its officers, had illegally transferred, or to account for the same, it was held that the action was *ex contractu*, and that such a suit would lie against it. Chapman *v.* Charleston, 28 S. Car. 373.

Patents for Inventions: Municipal corporations are liable to the patentee of an invention if they infringe his invention in the course of the execution of corporate powers and duties. Ransom *v.* New York (infringing patent for fire engines), 1 Fisher Pat. Cas. 254, 274; Bliss *v.* Brooklyn, 4 Fisher Pat. Cas. 596. In this case the city was held liable to the patentee for an improvement in *hose couplings* used by it without his authority. Munson *v.* New York, 3 Fed. Rep. 338. See also American Nic. Pav. Co. *v.* Elizabeth City, 4 Fisher Pat. Cas. 189, 197, *per Strong*, J.; Allen *v.* Brooklyn, *Ib.* 598; but in *Ohio*, it was decided by Mr. District Judge *Leavitt*, in Jacobs *v.* Hamilton County, 4 Fisher Pat. Cas. 81, following Hamilton County *v.* Mighels, 7 Ohio St. 109 (cited *ante*, § 34, note), that a *county* was not liable to the patentee for an infringement of his patent in the construction of a county jail. Counties held to be corporations and liable for infringements of patents. May *v.* Mercer County, 30 Fed. Rep. 247; May *v.* Logan County, 30 Fed. Rep. 250. A city corporation is *not liable for an infringement where the work was done by contractors*, and the patentee or his exclusive licensee had authorized such contractors to proceed to execute their contract with the city; and it was held that the owner of the patent could not authorize the contractors to use the patented article or process, and reserve the right to proceed against the city to recover damages for an infringement of the patent thus occurring. Bigelow *v.* Louisville (U. S. Cir. Court,

§ 1646 (967). **Same Subject.**— Not only is *the distinction just mentioned well established*, but, as practically applied in the reported judgments of the courts, it has tended in our judgment to promote justice and to secure individual rights. This liability on the part of municipal corporations springs, as we think, from the particular *nature of the duty enjoined*, which must relate to the local or special interests of the municipality, and be imperative, and not discretionary, legislative, or judicial, and *from the means given for its performance*, which must be ample, or such as were considered to be so by the legislature, and not from the supposed circumstance that they received and accepted their charters or grants of powers and franchises *upon an implied contract* with the State that they would discharge their corporate duties, and that this contract enures to the benefit of every individual interested in its performance.[1] Unlike municipal corporations created by royal charters, which cannot be imposed or altered without the consent of the corporators, except, indeed, by Parliament,[2] our American corporations, in all their parts and functions, general and special, are mere emanations or creations of the sovereignty of the State, which confers and changes their powers at its will. There is in fact or in law no relation of *contract* between them and the State; and the notion that in any accurate sense the State makes a contract with a municipality, when conferring powers, either for the general or local advantage, seems to be purely ideal.[3]

§ 1647 (968). **Rule of Respondeat Superior as applied to Municipal Corporations; Ultra Vires.** — The rule of law is a general one, that *the superior or employer must answer civilly for the negligence or want of skill of his agent or servant* in the course or line of his employment, by which another, who is free from contributory fault, is injured. Municipal corporations, under the conditions

1869, before *Ballard*, J.), 3 Fisher Pat. Cas. 602; *ante*, §§ 803, 805. Where counties are liable for infringement of patents they will not be held liable if the county authorities do not know that the contractors had used the patent without authority from the patentee. May *v.* Juneau County, 30 Fed. Rep. 241.

A city is liable for damages done to a vessel temporarily moored at a wharf where the city is entitled and accustomed to charge wharfage for its use. Petersburgh *v.* Applegarth, 28 Gratt. (Va.) 321; *ante*, § 274.

[1] This is the *rationale* of the doctrine of the cases as stated by *Selden*, J., in Weet *v.* Brockport, 16 N. Y. 161, 173, note, and it is the one adopted by Mr. Justice Cooley in his work on Constitutional Limitations, 247, 248, and in many reported cases. Its soundness is ably combated by Mr. Justice *Campbell*, in Detroit *v.* Blackeby, 21 Mich. 84. See Detroit *v.* Beekman, 34 Mich. 125; Tolan *v.* Lansing, 38 Mich. 315, affirming Detroit *v.* Beekman, supra.

[2] *Ante*, § 50.

[3] *Ante*, §§ 55, 69, 90, 92, 109.

herein stated, fall within the operation of this rule of law, and are liable, accordingly, to civil actions for damages when the requisite elements of liability coexist. To create such a liability, it is fundamentally necessary that the act done which is injurious to others must be *within the scope of the corporate powers* as prescribed by charter or positive enactment (the extent of which powers all persons are bound, at their peril, to know); in other words, it must not be *ultra vires* in the sense that it is not *within* the power or authority of the corporation to act in reference to it under any circumstances.[1] If the act complained of *necessarily lies wholly outside* of the general or special powers of the corporation as conferred in its charter or by statute, the corporation can in no event be liable to an action for damages, whether it directly commanded the performance of the act or whether it be done by its officers without its express command; for a corporation cannot, of course, be impliedly liable to a greater extent than it could make itself by express corporate vote or action.[2] But if the wrongful act be not in this sense

[1] The Major Reybold, 111 Fed. Rep. 414; Davoust *v.* Alameda, 149 Cal. 69; Chicago *v.* Norton Milling Co., 196 Ill. 580; Henderson *v.* Clayton (Ky.), 57 S. W. Rep. 1; Clayton *v.* Henderson, 103 Ky. 228, 236, quoting text; Hoggard *v.* Monroe, 51 La. An. 683; Boye *v.* Albert Lea, 93 Minn. 121; Stealey *v.* Kansas City, 179 Mo. 400; Gardner *v.* St. Joseph, 96 Mo. App. 657; Tomlin *v.* Hildreth, 65 N. J. L. 438; Valentine *v.* Englewood, 76 N. J. L. 509, citing text; Speir *v.* Brooklyn, 139 N. Y. 6, citing text; Scott *v.* New York, 27 N. Y. App. Div. 240; Love *v.* Raleigh, 116 N. Car. 296; Barger *v.* Hickory, 130 N. Car. 550; Wallace *v.* Norman, 9 Okla. 339, 349, quoting text; Betham *v.* Philadelphia, 196 Pa. 302, 310, quoting text; *ante*, §§ 791, 1610, 1630; Broom Commentaries Com. Law, 560. Mr. Wood devotes chap. xvii. of his work on Master and Servant to the subject of municipal liability for the acts of servants of the corporation. In *Missouri* the rule has been stated to be that a municipal "corporation is liable for the acts of its agents, injurious to others, when the act is in its nature lawful and authorized, but done in an unlawful manner or in an unauthorized place, but it is not liable for injurious and tortious acts, which are, in their nature, unlawful or prohibited." Worley *v.* Columbia, 88 Mo. 106 (false imprisonment); Brown *v.* Cape Girardeau, 90 Mo. 377 (malicious prosecution); and see Wakefield *v.* Newport, 60 N. H. 374 (injury caused by negligence in removing a flagstaff not owned by the city and which it was not its duty to remove). "The celebration of a holiday, when undertaken by a city exclusively for the gratuitous amusement, entertainment, or instruction of the public, under authority of the general law, . . . does not render the city liable to an action by an individual who has sustained a personal injury through negligence in carrying out the celebration." Tindley *v.* Salem, 137 Mass. 171.

A city which knowingly permitted a regularly appointed bridge-tender to employ other persons to do his work held liable for the negligence of the persons so employed, although they were paid by the bridge-tender and not by the city. Gathman *v.* Chicago, 236 Ill. 9. As to right of a municipal *employee* to recover where he was injured by the *negligent act of a fellow-servant*, see Gathman *v.* Chicago, 236 Ill. 9; Higbie *v.* New York Board of Education, 122 N. Y. App. Div. 483.

[2] Healdsburg Elect. L. & P. Co. *v.* Healdsburg, 5 Cal. App. 558; Lloyd *v.* Columbus, 90 Ga. 20; Gray *v.* Griffin, 111 Ga. 361; Roughton *v.* Atlanta, 113 Ga. 948; Chicago *v.* Hannon, 115 Ill. App. 183; Browning *v.* Owen County, 44 Ind. 11, 13, citing text;

ultra vires, it may be the foundation of an action of tort against the corporation, either when it was done by its officers under its previous direct authority, or has been ratified or adopted, expressly or impliedly, by it, or when it was done by the officers, agents, or servants of the corporation, in the execution of *corporate powers* or the performance of *corporate duties* of a ministerial nature, and was done so negligently or unskilfully as to injure others, in which case the corporation is liable for the carelessness or want of skill of its officers or immediate servants or agents in the course of their authorized employment, without express adoption or ratifying act.[1] Such are the general principles of our jurisprudence, concerning which there is no disagreement.[2] But when we come to their application, considerable differences of opinion will be found to exist as to what acts are, and what are not, *ultra vires*, and what powers and duties are, within the meaning of the rule, as stated, *corporate* powers and duties; for if the duty, though devolved by law upon an officer elected or appointed by the corporation, is not a *corporate*

Brunswick Gas Light Co. *v.* Brunswick, 92 Me. 493; Vaile *v.* Independence, 116 Mo. 333; Wabaska El. Co. *v.* Wymore, 60 Neb. 199; Tilford *v.* New York, 1 N. Y. App. Div. 199; Reynolds *v.* Board of Education, 33 N. Y. App. Div. 88; Marth *v.* Kingfisher, 22 Okla. 602, 611, quoting text; Wallace *v.* Norman, 9 Okla. 339, quoting text; Betham *v.* Philadelphia, 196 Pa. 302, 306, 310, quoting text; Wilson *v.* Mitchell, 17 S. Dak. 515; Royce *v.* Salt Lake City, 15 Utah, 401; Duncan *v.* Lynchburg, 2 Va. Dec. 700, quoting text; Kempster *v.* Milwaukee, 103 Wis. 421. As to implied liability, see *ante*, §§ 791, 793, 799, 1615. Index, tit. *Implied Contract.*

[1] Duncan *v.* Lynchburgh, 2 Va. Dec. 700, quoting text.

[2] *Post*, §§ 1651, 1654, 1655–1665, 1675, 1708–1717, 1737–1747; *ante*, § 1648. See also Thayer *v.* Boston, 19 Pick. (Mass.) 511, where the subject of the *liability* of a municipal corporation *for the unauthorized acts of its officers is discussed by Shaw*, C. J. Anthony *v.* Adams, 1 Met. (Mass.) 284; Baker *v.* Boston, 12 Pick. 184; Perley *v.* Georgetown, 7 Gray, 464; Deane *v.* Randolph, 132 Mass. 475; Howell *v.* Buffalo, 15 N. Y. 512; Baltimore *v.* Eschbach, 18 Md. 276; State *v.* Kirkley, 29 Md. 85, 110; Harvey *v.* Rochester, 35 Barb. (N. Y.) 177; Leman *v.* New York, 5 Bosw. (N. Y.) 414; Philadelphia, W. & B. R. R. Co. *v.* Quigley (private corporation held responsible for libel), 21 How. (U. S.) 202; Cooper *v.* Atlanta, 53 Ga. 638, citing text; Chicago *v.* McGraw, 75 Ill. 566, 570; Sewall *v.* St. Paul, 20 Minn. 511, 524; Aldrich *v.* Tripp, 11 R. I. 141; Moore *v.* New York, 73 N. Y. 238, approving text; Haag *v.* Vanderburgh County, 60 Ind. 511, approving text; Smith *v.* Rochester, 76 N. Y. 506; Collins *v.* Macon, 69 Ga. 542; Kleopfert *v.* Minneapolis, 93 Minn. 118; Barger *v.* Hickory, 130 N. Car. 550; Stephenville *v.* Bower (Tex. Civ. App.), 68 S. W. Rep. 833.

The common council passed an ordinance directing certain work to be done, but in violation of the charter the proper officers failed to give prior notice as required. The contractor, in good faith having performed the work, brought an action against the city on the contract, when it set up this irregularity to defeat a recovery. It was held, the contractor having acted in good faith and relying on the regularity of the proceedings, that the city, having received and accepted the benefit, was estopped from denying the regularity of the proceedings in that respect. See Wade *v.* Brantford, 19 Up. Can. Q. B. 207; Moore *v.* New York, 73 N. Y. 238. Index — *Implied Assumpsit.*

duty, the officers of the corporation, in performing it, do not act for the corporation, and hence the corporation is not responsible (unless so expressly declared by statute) for the omission to perform it or for the manner in which it is performed.[1]

§ 1648 (969). **Same Subject; Ultra Vires Acts.** — These general principles may be illustrated and enforced by a reference to some of the adjudicated cases; and first, the proposition that as a rule there is *no corporate liability when the act complained of is one wholly and manifestly under all circumstances outside of the charter* or constituent act of the corporation, or some valid legislative enactment applicable to it.[2] We have heretofore seen that contracts *ultra vires*, in the sense just explained, impose in general no corporate liability directly upon the contract;[3] and for the like reasons, the same general doctrine applies to like *ultra vires* acts other than contracts, whether performed by the municipal council, or under its direction, or by its officers in the execution of their supposed powers or duties. The principle that a municipal corporation is bound by the acts of its officers only when within the charter or possible scope of their general powers, and that acts which in their very nature are wholly and necessarily, *under all circumstances*, outside of the powers of the corporation, or of the officers appointed to act for it, and therefore must be known to all persons to be so, are void as respects the corporation, is vital; and the opposite doctrine has no support in reason, and very little, if any, in the judgments of the courts. The principle just mentioned is exemplified in an interesting manner in a case[4] where the authorities of the

[1] *Supra*, §§ 1630, 1634, 1641; *infra*, §§ 1655–1665, 1737–1747.

The city of *New Haven*, under power given by its charter, *appointed an inspector of stationary steam boilers within the city*, and passed a by-law imposing a penalty on any person who should use such a boiler without first having it tested by the inspector. It was held that the city, in making the appointment, was in the discharge of a public and not a private duty, that the duties of the inspector were public duties, and consequently that the city was not liable for damage resulting from the negligence of the inspector in the discharge of his duties. Mead *v.* New Haven, 40 Conn. 72.

[2] Cavanagh *v.* Boston, 139 Mass. 426, which was an action against the city for damages caused by the unauthorized erection under void votes of a dam upon plaintiff's property without his consent, for the purpose of abating a nuisance on adjoining land, and in which the city was held not to be liable. Text quoted as containing the true rule: Leeds *v.* Richmond, 102 Ind. 372; Denver *v.* Bayer, 7 Colo. 113; Idaho Springs *v.* Woodward, 10 Colo. 104; Same *v.* Filteau, *Ib.* 105; Denver *v.* Dean, *Ib.* 375; Denver Circle R. Co. *v.* Nestor, *Ib.* 403; Bluthenthal *v.* Headland, 132 Ala. 249, 251, citing text; Royce *v.* Salt Lake City, 15 Utah, 401, 408, citing text.

[3] *Ante*, §§ 791, 1610, 1611, 1630, 1647. There may be, as we have seen in previous sections, an *implied liability* under certain circumstances in respect of the *consideration* actually received and retained under the *ultra vires* contract. Index — *Ultra Vires*.

[4] Albany *v.* Cunliff, 2 N. Y. 165,

city of Albany assumed to build a private bridge across the basin to a pier in the Hudson River. The only authority for the performance of the work was an *unconstitutional statute*. The bridge fell in consequence solely of the negligent and improper manner in which it had been constructed by the city. It was decided by the Court of Appeals, reversing the judgment of the Supreme Court, that the corporation was not liable to an action for damages at the suit of a person injured by the accident.

§ 1649 (969 *a*). **Same Subject; Author's Comments and Suggestions.** — In the two preceding sections we have used the word *ultra vires* in the sense of meaning an act which both intrinsically and in its external aspects is, under all circumstances, wholly and necessarily beyond the possible scope of the chartered powers of the municipality. The propositions we have there stated rest upon this basis, and are not intended as necessarily applying to acts which may be called *ultra vires* in a looser sense. It is nowhere denied that a *contract ultra vires*, as above defined, does not as such bind the municipality. Whatever liability a municipality may come under in respect thereto, arises not upon the contract, but by way of estoppel, and chiefly in respect of the consideration received thereunder. As to *torts* or *wrongful acts* not resting upon contract, but which are *ultra vires* in the sense above explained, we do not see on what principle they can create an implied liability on the part of the municipality. If they may, of what use are the limitations of the chartered corporate powers? Certainly the rules laid down in the text are in accordance with the almost if not universal doc-

reversing s. c. 2 Barb. (N. Y.) 190; Browning *v.* Owen County, 44 Ind. 11, 13; Haag *v.* Vanderburgh County, 60 Ind. 511, citing and approving text. Also Smith *v.* Rochester, 76 N. Y. 506; Shelby County *v.* Deprez, 87 Ind. 509; Kleopfert *v.* Minneapolis, 93 Minn. 118; Fox *v.* Philadelphia, 208 Pa. 127.

A case in *Illinois* may here appropriately be noticed, which, in connection with the one referred to in the text, will illustrate the *principle* on which the liability of the corporation depends. By statute, a city was authorized "to construct an *embankment and plank-road*" across a certain bottom, and under this authority constructed a *pile bridge* across the bottom in so careless a manner that the horse of plaintiff, when rightfully upon the way, fell through and was killed. When sued for this injury, the defence of the city was, that it was only authorized to build an embankment and plank-road, and that in building the pile bridge it *exceeded its authority;* and hence it was not the act of the city, but only of its officers, and therefore the city was not responsible for the injury. But the court held, inasmuch as the city was authorized to construct a road at the place where it constructed this road, that its failure to construct it in the designated mode only made its liability the more plain, distinguishing the case from one where the officers of the city should, *without authority*, construct such a work in another jurisdiction. Pekin *v.* Newell, 26 Ill. 320; Chicago *v.* Turner, 80 Ill. 419.

trine of the courts, and are, we think, sound. It is not meant, however, to affirm that the non-liability of a municipality in tort for acts that are wholly and necessarily *ultra vires*, is precisely commensurate with and under no circumstances greater than its liability in respect of contracts thus *ultra vires*. But if there be such enlarged liability the cases which are supposed to assert it are few in number, exceptional in their nature, and, if they are well decided, other sufficient grounds of judgment will probably be found to exist.[1] At all events the author confesses his inability, upon the decisions as they stand, to formulate a statement of the conditions and principles which determine and fix such liability. It is useless, if not dangerous, to generalize upon the subject. It is far safer and more in accordance with the genius of our jurisprudence to deal with such cases as they arise. On such a sea we can sail with safety only so long as we keep the shore line and the lights of the actual adjudications in plain sight.

§ 1650 (970). **Same Subject; Illustrative Cases.** — So, upon the foregoing principles, where the *selectmen of a town caused a dam to be erected* (an act the town was not under any circumstances authorized by law to do) which flooded the plaintiff's land, the town was held not liable for the injuries resulting therefrom.[2] So a city corporation has no legal power to call a *meeting of the citizens to consider political or philanthropic purposes;* and if it does so even by ordinance of its common council, and a person at a meeting thus assembled is injured by the *discharge of a cannon* fired by persons present, the corporation is not liable.[3] So, in another case, the in-

[1] See Cohen *v.* New York, 113 N. Y. 532, noticed *ante*, § 1630; Stanley *v.* Davenport, 54 Iowa, 463, referred to, *ante*, § 1248, note (compare Stange *v.* Hill & W. D. S. R. Co., 54 Iowa, 669). These and like cases (*post*, § 1703) are not necessarily in conflict with the doctrines of the text, and the judgments when against the municipality can rest upon what may be called the municipality's neglect of its highway or street duties. See *infra*, § 1654, and note.

[2] Anthony *v.* Adams, 1 Met. (Mass.) 284. Approved, Walling *v.* Shreveport, 5 La. An. 660; Seele *v.* Deering, 79 Me. 343; Idaho Springs *v.* Woodward, 10 Colo. 104; Idaho Springs *v.* Filteau, 10 Colo. 105; Cavanagh *v.* Boston, 139 Mass. 426, noted *ante*, §1648, note; *post*, § 1731.

[3] Boyland *v.* New York, 1 Sandf. 27. Same principle, Boom *v.* Utica, 2 Barb. (N. Y.) 104. See, further, as to fireworks and exhibitions in the public streets, *post*, § 1703. *Trespass by agent where corporation had no power involves no corporate liability.* Cuyler *v.* Rochester, 12 Wend. (N. Y.) 165; Swift *v.* Williamsburg, 24 Barb. (N. Y.) 427; Starr *v.* Rochester, 6 Wend. (N. Y.) 564; Morrison *v.* Lawrence (injury by city fireworks), 98 Mass. 219; Boyland *v.* New York, *supra*, approved, and a city was held not liable for an injury caused by the explosion of powder between anvils at a place within the city which killed the plaintiff's intestate while passing that place upon one of the streets. Campbell's Adm. *v.* Montgomery, 53 Ala. 527; Haag *v.* Vanderburgh County, 60 Ind.

corporating act *prohibited the trustees of a village corporation from laying out any street* so as to run over the site of any building the expense of removing which should exceed one hundred dollars. The object of this prohibition was considered to be to protect the taxpayers, as well as for the benefit of the owners of buildings. The trustees, in violation of the express prohibition, laid out a street in the site of which there was a building, the expense of moving which would exceed the sum named. In an action brought against the corporation by the land-owner whose property was taken for the street, it was decided by the Supreme Court of New York that the whole proceeding was a nullity, and that the corporation was not estopped to set up the want of jurisdiction in defence, notwithstanding the property of the plaintiff had actually been taken.[1]

511, approving text. City council called out fire department to take part in a centennial parade, and the hose-carts were carelessly run over the plaintiff; the city held not to be liable, as the service was not corporate or authorized by law. Smith *v.* Rochester, 76 N. Y. 506.

[1] Cuyler *v.* Rochester, 12 Wend. (N. Y.) 165. The statutory prohibition is the turning point of this case upon which its soundness must, as it seems to us, rest. Browning *v.* Owen County, 44 Ind. 11; McCarthy *v.* Boston, 135 Mass. 197; *supra*, § 1630, and note; *infra*, § 1649, and note.

That acts ultra vires, though done colore officii, impose no corporate liability: See Baltimore *v.* Eschbach, 18 Md. 276; *Ib.* 284; State *v.* Kirkley, 29 Md. 85, 111; Horn *v.* Baltimore, 30 Md. 218, approving Howell *v.* Buffalo, 15 N. Y. 512; Cole *v.* Nashville, 4 Sneed (Tenn.), 162, cited *ante*, § 1630, note. Where a city clerk fraudulently increased the face value of warrants after they were issued, the city is not liable. Chandler *v.* Bay St. Louis, 57 Miss. 327; s. p. Sutton *v.* Carroll County Pol. Bd., 41 Miss. 236; Sherman *v.* Granada, 51 Miss. 186; New York & B. Lumber Co. *v.* Brooklyn, 71 N. Y. 580; Mitchell *v.* Rockland, 52 Me. 118, reaffirming s. c. 45 Me. 496; 41 Me. 363, where the health officers of a town, without authority of law, took possession of the plaintiff's vessel, and in the process of fumigation, set it on fire, and the town was held not liable. Similar principle. Barbour *v.* Ellsworth, 6 Me. 294; Brown *v.* Vinalhaven, 65 Me. 402; *post*, §§ 1649, 1661; Donnelly *v.* Tripp, 12 R. I. 97; Pierce *v.* Same, 13 R. I. 181; Cooney *v.* Hartland, 95 Ill. 516. A town held liable for a trespass committed by *de facto* officers. Clark *v.* Easton, 146 Mass. 43. Further as to acts of *de facto* officers: see Index — tit. *Acts*; *Officer*. Trammell *v.* Russellville, 34 Ark. 105, where a town was held not liable in an action for *false imprisonment*, either by reason of having adopted an illegal ordinance, or because its mayor issued a warrant of arrest under the ordinance, or because the marshal made the arrest.

A city is liable for trespass upon the lands of others, Hickerson *v.* Mexico, 58 Mo. 61; Hunt *v.* Booneville, 65 Mo. 620, but only, as was held in the case last cited, for single damages, the statute as to treble damages not being considered applicable to the case presented. The drift of the opinion of *Hough*, J., is against the applicability of the statute to municipal corporations, but it is open to be applied to a case where the trespass was committed by the municipality in bad faith or wilfully. *Post*, §§ 1740–1745. Where a city officer, while improving a street, committed a trespass upon private property, — by taking earth therefrom, — without authority to do so, it was held that he alone was liable and not the city. Rowland *v.* Gallatin, 75 Mo. 134. If a city officer, while removing obstructions from a street, enters upon private property under a mistaken belief that the land

§ 1651 (971). **Cases where Implied Corporate Liability exists for Wrongful Acts.** — Cases such as those just mentioned are to be *distinguished from others* which resemble them in the circumstance of relating to wrongful acts, but which arise out of matters or transactions *within the general powers* of the corporation, and in respect of which there may be a corporate liability. Thus, if in exercising its power to open or improve streets, or to make drains and sewers, the agents or officers of a municipal corporation, under its authority or direction, *commit a trespass upon, or take possession of, private property*, without complying with the charter or statute, the corporation is liable in damages therefor.[1] In such cases, also, an action will lie

is a public way, the city is not liable for the trespass. Manners *v.* Haverhill, 135 Mass. 165. *Infra*, § 1651.

[1] Conniff *v.* San Francisco, 67 Cal. 45; Langley *v.* Augusta, 118 Ga. 590; Allen *v.* Decatur, 24 Ill. 332 (trespass); Platter *v.* Seymour, 86 Ind. 323; Walling *v.* Shreveport, 5 La. An. 660; Hawks *v.* Charlemont, 107 Mass. 414; Ipswich Mills *v.* Essex County, 108 Mass. 363; Hill *v.* Boston, 122 Mass. 344; Ætna Mills *v.* Waltham, 126 Mass. 122; Gordon *v.* Taunton, 126 Mass. 349; Bailey *v.* Woburn, 126 Mass. 416; Waldron *v.* Haverhill, 143 Mass. 582; Hildreth *v.* Lowell, 11 Gray (Mass.), 345; Anthony *v.* Adams, 1 Met. (Mass.) 284, 287; Thayer *v.* Boston, 19 Pick. (Mass.) 511, 516; Sheldon *v.* Kalamazoo, 24 Mich. 383 (in which the corporation was held liable for a tort committed by direction of its council upon private property); Ashley *v.* Port Huron, 35 Mich. 296; Sewall *v.* St. Paul, 20 Minn. 511, 524, citing text; Soulard *v.* St. Louis, 36 Mo. 546; Hunt *v.* Booneville, 65 Mo. 620; Dooley *v.* Kansas City, 82 Mo. 444 (where a city authorized to *purchase* property beyond its limits for a pest house was held liable for trespass in having seized private property for that purpose without the consent of the owner), *post*, §§ 1740–1745, and cases; Allison *v.* Richmond, 51 Mo. App. 133; Clay *v.* Board, 85 Mo. App. 237; Tegeler *v.* Kansas City, 95 Mo. App. 162; Lee *v.* Sandy Hill, 40 N. Y. 442 (where a corporate liability was asserted for the *torts of the highway officers* in encroaching upon *the plaintiff's property* by direction of the governing body of the corporation, under the erroneous supposition that it was part of the street. *Mason*, J., approves of the rule as stated by *Shaw*, C. J., in Thayer *v.* Boston, 19 Pick. (Mass.) 511, *supra*); Buffalo & H. Turnp. Co. *v.* Buffalo, 58 N. Y. 639; Stoddard *v.* Saratoga Springs, 127 N. Y. 261, 268, citing text; Seeley *v.* Amsterdam, 54 N. Y. App. Div. 9; Brink *v.* Dunmore, 174 Pa. 395; O'Donnell *v.* White, 24 R. I. 483; Hathaway *v.* Osborne, 25 R. I. 249; San Antonio *v.* Mackey, 14 Tex. Civ. App. 210; Galveston *v.* Brown (Tex. Civ. App.), 67 S. W. Rep. 156; Crossett *v.* Janesville, 28 Wis. 420; Whyler *v.* Bingham Rural Dist., L. R. [1901] 1 Q. B. 45. *Infra*, §§ 1653, 1655, 1740–1745, and cases.

Until a street has been opened and compensation paid to the owner, the city has no more right to the bed of the street than any other stranger would have; and the intrusion by the city upon such property is as much a trespass as if committed by an individual. Thus if a city make improvements in front of the lot of a riparian owner without his consent, they belong to the owner in front of whose lot they are made. Baltimore *v.* St. Agnes Hospital, 48 Md. 419; Casey *v.* Inloes, 1 Gill (Md.), 510. So where the charter of a borough gave the warden and burgesses authority to order the removal of all encroachments upon any public highway of the borough, and, upon the order not being obeyed, to cause them to be removed, the warden, acting officially, and under a vote passed by the warden and burgesses, caused a fence of a person along the line of the highway to be removed, the owner not obeying an order previously made for its removal. The fence was in good faith supposed by the warden and burgesses to be an

against a city corporation by the owner of land through which its agents have unlawfully made a sewer,[1] or for trees destroyed and injuries done by them.[2] A case in Louisiana, which was several times before the courts in that State, was decided upon the same principle. The mayor of a city tortiously, and in defiance of an injunction, proceeded at the head of a force of laborers and demolished a portion of the plaintiff's house, for the *supposed reason that it was on public ground.* The city corporation ratified the act by defending it. On the first appeal the court doubted whether the corporation could be made liable for the wrongful acts charged against its officers, especially as these were alleged to have been done by them wilfully and maliciously. On the second appeal it was held, that although the acts of the mayor were done without the previous order of the city council, yet the corporation, by reason of its subsequent ratification, was liable, and the plaintiff recovered.[3]

encroachment, but was not so in fact. In an action of trespass brought by the owner of the fence against the borough, it was held, —

(1) That was the grant of power, though to the warden and burgesses, was in reality to the borough. (2) That the power to remove encroachments was a power asked for and obtained by the borough for its own advantage and not for the benefit of the public. (3) That in the removal of encroachments it was therefore exercising a privilege, not discharging a governmental duty. (4) That the borough was liable for the acts of the warden. Weed *v.* Greenwich, 45 Conn. 170.

In Soulard *v.* St. Louis, 36 Mo. 546, *supra*, where *a street was opened upon land without condemnation*, the court held that an action might be maintained by the owner; that he might recover as damages the value of the land appropriated, which, when paid, would, the court was inclined to think, work, *ipso facto*, a dedication thereof to the city.

Municipal corporations are limited to the exercise of powers conferred by charter or statute, and they are not liable for the acts of their officers under an ordinance which was wholly beyond their power to pass. Field *v.* Des Moines, 39 Iowa, 575. But for acts causing injury to private property committed by employees of a city in performing a work which is *within the general powers* of the city, though not specifically conferred, — as, in this case, building a sewer under its general power over highways, — the city will be liable in damages. Leeds *v.* Richmond, 103 Ind. 372. Contractors who made an excavation in a street *without proper authority*, held *personally* liable to an owner of adjoining property. Larned *v.* Briscoe, 62 Mich. 393.

The doctrine that a city is liable for injuries caused by the negligent manner in which public work is performed by its servants does not extend to cases of defective legislation; as, for instance, to a failure to pass an ordinance for the condemnation and dedication, as a street, of land upon which work has been done, under the designation "street" in a special tax bill. Carroll *v.* St. Louis, 4 Mo. App. 191. In Sprague *v.* Tripp, 13 R. I. 38, the city owned, by purchase, lots upon a private way, and, by its highway commissioners, removed gravel therefrom and from the way, for use in repairing other streets, until the way became impassible. In an action by an owner of other land upon the private way, it was held that the commissioners were the agents of the city for whose acts in making the way useless the city was liable.

[1] Hildreth *v.* Lowell, 11 Gray (Mass.), 345; Leeds *v.* Richmond, 102 Ind. 372.

[2] Walling *v.* Shreveport, 5 La. An. 660; Ludlow *v.* Mackintosh (Ky.), 53 S. W. Rep. 524.

[3] McGary *v.* Lafayette, 12 Rob.

§ 1652 (972). **Same Subject; Wrongful Acts done Colore Officii.** — *Prima facie*, a municipal corporation *is not liable for the trespass and wrongful acts of its officers, though done colore officii;* but it will clearly be liable therefor where the act, if not wholly *ultra vires* in the sense before explained, was expressly authorized by the governing body of the corporation, or where, without special authority, it was done by its officers in the scope of their duties and employment, and has been ratified by the corporation.[1] Accordingly, a municipal corporation is *not liable for the illegal seizure of the plaintiff's property* by one of its officers, *for an alleged violation of its ordinances*, when, in fact, no such violation took place, and the corporation had not previously authorized the act, or subsequently ratified it by receiving the proceeds of the sale of the property seized, or in some other manner.[2] If, however, the corporation, by its authorized action, *adopts the wrongful acts* of its officers, done in the line of official duty, it will be liable therefor, however it might be in the absence of such ratification. Therefore, where the officers of a city illegally seized the personal property of the plaintiff, and detained it,

(La.) 668. On re-hearing, *Ib.* 674; s. c. again, 4 La. An. 440. Approved, Wilde *v.* New Orleans, 12 La. An. 15. See also Lee *v.* Sandy Hill, 40 N. Y. 442, *supra*, § 1651, note; Hunt *v.* Boston, 183 Mass. 303; *ante*, §§ 307, 777, note; s. p. and discussing liability of municipal corporations to *exemplary damages*, Hunt *v.* Booneville, 65 Mo. 620. As to exemplary damages, see Chicago *v.* Langlass, 52 Ill. 256; Chicago *v.* Kelly, 69 Ill. 475; Ehrgott *v.* New York, 96 N. Y. 264. A non-resident merchant, whose property had been seized for a tax assessed under an invalid municipal ordinance, after the mayor and council had, with malicious intent to prevent his competing with resident merchants, passed a resolution declaring him by name to be within the ordinance, — was held to have a right of action against the city for the tort. Gould *v.* Atlanta, 60 Ga. 164.

[1] Clayton *v.* Henderson, 103 Ky. 228, 236, quoting text; *supra*, §§ 1647, 1648; Thayer *v.* Boston, 19 Pick. (Mass.) 511, 516, where the rule, as stated by *Shaw*, C. J., makes the corporation, without ratification, liable, also, for the acts of its officers "done *bona fide*, in pursuance of a general authority to act for the city on the subject to which they relate." Approved by *Mason*, J., Lee *v.* Sandy Hill, 40 N. Y. 442, 449; followed in Buffalo & H. Turnp. Co. *v.* Buffalo, 58 N. Y. 639. Compare Perley *v.* Georgetown, 7 Gray (Mass.), 464, cited *infra*, and statement of rule by *Metcalf*, J.; Moore *v.* Fitchburg R. Corp., 4 Gray (Mass.), 465, 467; Howell *v.* Buffalo, 15 N. Y. 512, 519. Note remarks of *Denio*, C. J., p. 521; *supra*, § 1650, and note; Angell & Ames, § 311. See Munk *v.* Watertown, 67 Hun (N. Y.), 261; Noble *v.* Aasen, 10 N. Dak. 264; Horton *v.* Newell, 17 R. I. 571; Parks *v.* Greenville, 44 S. Car. 168; Ysleta *v.* Babbitt, 8 Tex. Civ. App. 432.

[2] Fox *v.* Northern Liberties, 3 Watts & S. (Pa.) 103; Everson *v.* Syracuse, 100 N. Y. 577; Corsicana *v.* White, 57 Tex. 382; Murray *v.* Omaha, 66 Neb. 279; Tyler *v.* Revere, 183 Mass. 98; O'Donnell *v.* White, 24 R. I. 483; *infra*, § 1656. So it was held that a city was not liable in tort for the act of its treasurer acting in good faith in the execution of his tax warrant, in seizing and selling the chattels of one person for the delinquent taxes of another. Wallace *v.* Menasha, 48 Wis. 79, citing text. But where an officer seized and sold property to pay a *void special assessment* for benefits in opening a street, the city was held liable. Durkee *v.* Kenosha, 59 Wis. 123, distinguishing Wallace *v.* Menasha, *supra*.

whereupon the plaintiff brought suit against the city to recover the property, and the city filed an answer which involved a ratification of the acts of the officers in question, and an admission that they were the acts of the city, and the city was defeated in the suit, it was held liable for the damage done to the plaintiff by the illegal seizure and detention of his property.[1] On the principle that a town is not liable for the trespasses or illegal acts of its officers or agents, unless such acts were done under its authority previously conferred, or have subsequently been ratified by it, it was held in Massachusetts that if a *town collector*, without being authorized, commits a person to prison for not paying a tax, since abated, though illegally included in his warrant, the town is not responsible, in an action of tort, for false imprisonment.[2]

§ 1653 (973). **Same Subject; Trespass for Illegal Seizure of Property under Void Assessment.** — A municipal corporation *may be liable as respects wrongful and void acts*, where these are within the scope of the general powers of the corporation, and where the enforcement of such acts by its officers under its authority has been compulsory, resulting in injury to individuals.[3] Falling within this principle is the liability of the corporation to refund void taxes and

[1] Wilde *v.* New Orleans, 12 La. An. 15, following McGary *v.* Lafayette, 4 La. An. 440; Johnson *v.* Municipality, 5 La. An. 100. In another case in the same State it was held that though property be, in the first instance, lawfully seized for the violation of an ordinance, yet if the corporate authorities *fail to pursue the requisite steps* in advertising and disposing of the property seized, the act of seizure by the officer becomes a *trespass ab initio*, for which the corporation, it was decided, might be liable to restore the property or pay its value. Baumgard *v.* New Orleans, 9 La. 119. See also Hunt *v.* Booneville, 65 Mo. 620; Langley *v.* Augusta, 118 Ga. 590; Brown *v.* Webster City, 115 Iowa, 511; Donnelly *v.* Tripp, Treas., 12 R. I. 97; O'Donnell *v.* White, 24 R. I. 483; Commercial Power Co. *v.* Tacoma, 20 Wash. 288; Bunker *v.* Hudson, 122 Wis. 43.

[2] Perley *v.* Georgetown, 7 Gray (Mass.), 464. Afterwards paying the collector's fees for serving the warrant, and the jailer's charges, were held not to ratify the arrest, it not appearing that they were so intended. Trescott *v.* Waterloo, 26 Fed. Rep. 592. In New York, see Lorillard *v.* Monroe, 11 N. Y. 392; Bank of Commonwealth *v.* New York, 43 N. Y. 184. See also Tyler *v.* Revere, 183 Mass. 98; Willoughby *v.* Allen, 25 R. I. 531; Galveston *v.* Brown (Tex. Civ. App.), 67 S. W. Rep. 156. But the *treasurer of a town corporation* is clearly its officer and agent, for whose acts, within the scope of his power, it is liable. Tucker *v.* Rochester, 7 Wend. (N. Y.) 254; cited 2 Denio (N. Y.), 473, and see cases there referred to. But it is not liable for money placed in his hands by individuals or received by him other than in the line of his official duties. Tolman *v.* Marlborough, 3 N. H. 57, 59.

The previous personal and unauthorized act of a public officer will not estop him from acting in his public capacity as he may deem the public good to require. Day *v.* Green, 4 Cush. (Mass.) 433; Dill *v.* Wareham, 7 Met. (Mass.) 438.

[3] McGraw *v.* Marion, 98 Ky. 673, 680, quoting text.

assessments compulsorily collected for its own benefit.[1] So, where a municipal corporation made a *void assessment* upon the plaintiff for a street improvement, and its officers seized his property (bank bills) to pay it, the majority of the Court of Appeals of New York held, and we think properly, that since the assessment was made for a purpose within the general powers of the corporation (though the particular assessment was illegal) the corporation was liable to the plaintiff in a common-law action for the trespass committed by its officers in seizing his property.[2]

§ 1654 (973 *a*). **Where Municipality engages in Ultra Vires Undertakings.** — If a municipal corporation without charter or statute authority buys or provides the plant for *engaging in the business of distilling spirits* and does engage therein, and makes fraudulent returns under the United States revenue laws, in not reporting the full quantity of spirits produced; and the United States thereupon assesses upon the corporation as a distiller a gallon tax upon spirits actually produced in excess of the amount reported, and the city pays such tax under protest and compulsorily (to avoid a threatened seizure and sale of its property), it cannot recover back from the United States the amount thus paid, on the ground that its action in carrying on the business of distilling is *ultra vires* its powers.[3]

[1] *Supra*, § 1615, and cases cited. See Masters *v.* Bowling Green, 101 Fed. Rep. 101.

[2] Howell *v.* Buffalo, 15 N. Y. 512; *Denio*, C. J., and *Bowen*, J., dissented. The chief judge, in his dissenting opinion, expressed his inability to see how the assessment could be *void*, and yet be a corporate act, and impose a corporate liability. The majority opinion can, we think, be sustained on the principle stated in the text. Bennett *v.* Buffalo, 17 N. Y. 383, 386, corrects the report of Howell *v.* Buffalo, so as to show that *Comstock*, J., agreed with the majority of the court as to the liability of the corporation. Bank of Commonwealth *v.* New York, 43 N. Y. 184; Williams *v.* Dunkirk (tort of village trustees), 3 Lansing (N. Y.), 44.

[3] Salt Lake City *v.* Hollister, 118 U. S. 256. The rule that corporations are liable for the wrongful acts of their agents and officers in the course of the corporate business, is, says the court, in the case just cited, applicable to municipal corporations, but is to be applied with greater care. Mr. Justice *Miller*, speaking on this point, says: "While it may be true that the rule we have been discussing may require a more careful scrutiny in its application to municipal corporations than to corporations for pecuniary profit, we do not agree that they are wholly exempt from liability for wrongful acts done, with all the evidences of their being acts of the corporation, to the injury of others, or in evasion of legal obligations to the State or the public. . . . The question of the liability of corporations on contracts which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle [from the liability *ex delicto*]. In such case the party dealing with the corporation is under no obligation to enter into the contract. No force, or restraint, or fraud is practised on him. The powers of the corporation are matters of public law open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement. It is to this class of cases that most of the authori-

§ 1655 (974). **Respondeat Superior, when Applicable and when not.** — It may be observed, in the next place, that when it is sought to render a municipal corporation liable for the *act of servants or agents, a cardinal inquiry is, whether they are the servants or agents of the corporation.* If the corporation appoints or elects them, can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of *corporate* powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and *the maxim of respondeat superior applies.*[1] But if, on the other hand, they are elected or appointed by the corporation, in obedience to the statute, to perform a *public service,* not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers

ies cited by appellant belong, — cases where the corporations have been sued on contracts which they have successfully resisted because they were *ultra vires.* But even in this class of cases, the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts, to obtain justice by recovery of the property or the money specifically, or as money had and received to their use. Thomas *v.* West Jersey R. R. Co., 101 U. S. 70, 71; Louisiana *v.* Wood, 102 U. S. 294; Chapman *v.* Douglas County, 107 U. S. 348, 355." See Index, tit. *Implied Contracts; Ultra Vires.*

The opinion of the court in this novel case (Salt Lake City *v.* Hollister) seems to assert the proposition that the city, although acting *ultra vires* in the strongest sense of that expression, *i. e.,* in respect of a matter *manifestly and necessarily* outside of the scope of its powers either general or special, would be liable in tort, although perhaps not in contract, for the acts of its agents and servants in the course of such unauthorized business. But the action, viz., to recover back taxes actually though involuntarily paid, being equitable in its nature (*ante,* § 1616 *et seq.*), the judgment of the court, which, on the special facts, was unquestionably sound (for the tax was a tax upon property and was justly due), need not necessarily rest upon so broad a basis as the one above indicated, and the observations of the court in the opinion must be limited accordingly. If not thus limited and if the court is to be understood as laying down the broad principle that the city would be liable in the conduct of such business to the same extent as if the business was *infra vires* (for example, that it would be liable in damages to the manager of the distillery for a negligent injury to him happening in the course of the business), it would be, as it seems to us, an extension of the doctrine of liability of municipal corporations for *ultra vires* acts beyond the limits heretofore and generally recognized, since such extended liability would appear to rest upon a supposed estoppel created by the mere fact of conducting an *ultra vires* business, and this in the face of the limitations imposed by the charter of the city upon its corporate powers. Such a view, if sound as respects private corporations, would seem not to be so as respects municipal corporations, whose powers are defined and limited for the express purpose of protecting the inhabitants from just such liability. Cases within the apparent or possible powers of the municipality, where the other party acted in good faith and had no reasonable means of protecting himself from loss or damage, may stand upon different grounds. *Supra,* §§ 1638 *et seq.,* 1649.

[1] Wishart *v.* Brandon, 4 Manitoba, 453, 458, quoting text.

of the government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impiedly liable, but as independent public or State officers with such powers and duties as the statute confers upon them, and *the doctrine of respondeat superior is not applicable.*[1] It will thus be seen, on general prin-

[1] Kansas City *v.* Lemen, 12 U. S. App. 640; Veraguth *v.* Denver, 19 Colo. App. 473; Daly *v.* New Haven, 69 Conn. 644; Colwell *v.* Waterbury, 74 Conn. 568; Chicago *v.* Norton Milling Co., 196 Ill. 580; Tollefson *v.* Ottawa, 228 Ill. 134, 136, citing text; Brinkmeyer *v.* Evansville, 29 Ind. 187; Dooley *v.* Sullivan, 112 Ind. 451; Ogg *v.* Lansing, 35 Iowa, 495; Millard *v.* Webster City, 113 Iowa, 220; Taylor *v.* Owensboro, 98 Ky. 271, 277, quoting text; Dudley *v.* Flemingsburg (Ky.), 72 S. W. Rep. 327; New Orleans *v.* Kerr, 50 La. An. 413; Bowden *v.* Rockland, 96 Me. 129; Boehm *v.* Baltimore, 61 Md. 259; Baltimore *v.* O'Neill, 63 Md. 336; Morrison *v.* Lawrence, 98 Mass. 219; Howard *v.* Worcester, 153 Mass. 426; Fox *v.* Chelsea, 171 Mass. 297; Lynch *v.* Springfield, 174 Mass. 430; McGinnis *v.* Medway, 176 Mass. 67; Murphy *v.* Needham, 176 Mass. 422; Walcott *v.* Swampscott (surveyor of highways), 1 Allen (Mass.), 101; *per Bigelow*, C. J.; Buttrick *v.* Lowell (assault by police officer), 1 Allen (Mass.), 172; Kimball *v.* Boston, 1 Allen (Mass.), 417; Child *v.* Boston (sewers), 4 Allen (Mass.), 41, 52; Griggs *v.* Foote, 4 Allen (Mass.), 195, 197; Hafford *v.* New Bedford, 16 Gray (Mass.), 297; White *v.* Phillipston, 10 Met. (Mass.) 108; Bryant *v.* St. Paul, 33 Minn 289 (city not liable for negligence by a *board of health* which was constituted a separate body by the city charter); Snider *v.* St. Paul, 51 Minn. 466; Hall *v.* Austin, 73 Minn. 134; Boye *v.* Albert Lea, 74 Minn. 230; Kleopfert *v.* Minneapolis, 90 Minn. 158; Hannon *v.* St. Louis County, 62 Mo. 313; Bullmaster *v.* St. Joseph, 70 Mo. App. 60; Gordon *v.* Omaha, 71 Neb. 570; Rhobidas *v.* Concord, 70 N. H. 90, 111, citing text; Hall *v.* Concord, 71 N. H. 367; Tomlin *v.* Hildreth, 65 N. J. L. 438; Valentine *v.* Englewood, 76 N. J. L. 509, citing text; Maxmilian *v.* New York, 62 N. Y. 160; Missano *v.* New York, 160 N. Y. 123; Quill *v.* New York, 36 N. Y. App. Div. 476; Doty *v.* Port Jervis, 23 N. Y. Misc. 313; Davidson *v.* New York, 24 N. Y. Misc. 560; New York *v.* Bailey (Croton Dam Case), 2 Denio (N. Y.), 433, 477, and authorities cited by *Hand*, Senator (this is one of the leading cases on the subject discussed in the text and is referred to, *infra*); Fisher *v.* Newbern, 140 N. Car. 506; Neil *v.* Barron, 7 Ohio N. P. 84; Wagner *v.* Portland, 40 Oreg. 389; Aldrich *v.* Tripp, 11 R. I. 141; O'Rourke *v.* Sioux Falls, 4 S. Dak. 47, 51; Everill *v.* Swan, 17 Utah, 514, citing text; Russell *v.* Tacoma, 8 Wash. 156; Simpson *v.* Whatcom, 33 Wash. 392; Bartlett *v.* Clarksburg, 45 W. Va. 393; Mulcairns *v.* Janesville, 67 Wis. 24; State *v.* McNay, 90 Wis. 104; East Fremantle *v.* Annois, 71 Law J. P. C. 39; *infra*, §§ 1656, 1660, 1664, 1668, 1741–1747; *supra*, §§ 1634, 1639. But see Rhobidas *v.* Concord, 70 N. H. 90. See also McCarthy *v.* Boston (injury to laborer in employ of city officer while felling a tree belonging to an abutter upon the street), 135 Mass. 197; Sullivan *v.* Holyoke (explosion of naphtha in building occupied by a city officer), 135 Mass. 273. Highway surveyor held not an agent of a town in repairing a street, and town held not liable for an injury caused by his negligence in using a derrick. Pratt *v.* Weymouth, 147 Mass. 245. *Infra*, § 1673.

Thus, in *New York*, the mayor and aldermen, in making an *order for the destruction of a building* pursuant to the statute (2 R. L. 1831, p. 368, § 81), were considered to act *not as the officers or agents of the corporation, but as magistrates or public officers*, designated by their official names by the legislature for the execution of a public duty. Russell *v.* New York, 2 Denio (N. Y.), 461, opinion of *Sherman*, Senator, at p. 473, and of *Porter*, Senator, at p. 481. The case was distinguished from that of Bailey *v.* New York, 2 Denio (N. Y.), 443, aff'g s. c. 3 Hill

ciples, it is necessary, in order to make a municipal corporation impliedly liable on the maxim of *respondeat superior* for the wrong-

(N. Y.), 531, in relation to the Croton aqueduct, where, on the ground that the corporation had an interest in the grant, held property under it, and passed ordinances in relation to the execution of the work, it was held liable for the acts and neglect of the *water commissioners* in relation to the work, though they were appointed by the governor and the senate; *supra*, §§ 1633, 1634; *infra*, § 1668.

Departments of City Government. The board of revision and correction of assessments lists for city of New York, held to be independent public and not corporate officers, and city not responsible for their negligences. Tone *v.* New York, 70 N. Y. 157. In Ham *v.* New York, 70 N. Y. 459, the text is referred to, and the principle applied to the *department of public instruction in the city of New York*, which, though formally constituted part of the city government, *is charged with public, as distinguished from corporate, duties*, and as *it*, and not the city, has the sole control of subordinates and servants, the city is not liable for their neglect, although the mayor appoints the commissioners. Swift *v.* New York, 83 N. Y. 528. *Infra*, § 1661. So as to *board of commissioners of public charities and corrections.* Maxmilian *v.* New York, 62 N. Y. 160; s. p. Haight *v.* New York, 24 Fed. Rep. 93. Cases where the department is auxiliary only are to be distinguished. Ehrgott *v.* New York, 96 N. Y. 264, noted *infra;* Shearm. & Red. Neg., §§ 295, 296, and cases. See also Campbell's Adm. *v.* Montgomery (negligent execution of police duties), 53 Ala. 527. The same principle was applied to an act providing that the city council should *cause certain docks to be built for the benefit of individuals at the expense of the city*, but such expense to be assessed upon the property; it was held that the duty was a *State* and not *corporate* duty, and that the city was not liable in a private action for damages. New York & B. Lumber Co. *v.* Brooklyn, 71 N. Y. 580, where the general principles relating to the subject are stated by *Church*, C. J. Under the act of 1873, amended 1874, annexing territory to the city of New York and placing the streets within it under the exclusive control of the *department of public parks*, the commissioners of that department were held to act as agents of the city in an action for injuries caused by a defective street. Ehrgott *v.* New York, 96 N. Y. 264; Shearm. & Red. Neg., § 296, and cases.

On the point discussed in the text, the case of Barnes *v.* District of Columbia, 91 U. S. 540, may be usefully consulted. The immediate question was whether the *District of Columbia was liable to an action by a traveller for an injury sustained by reason of a defect in a street in the city of Washington.* The act of Congress of February 21, 1871, made the District of Columbia a "municipal corporation," with power to contract, have a seal, sue and be sued, and exercise other powers of a municipal corporation; vested the executive power in a governor appointed by the President, and the legislative power in a legislative assembly, consisting of a council and a house of delegates; established a *board of public works*, consisting of the governor and four other persons *appointed by the President;* and contained these provisions: "The board of public works shall have entire control of, and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys, and sewers of the city, and all other works which may be intrusted to their charge by the legislative assembly or Congress. They shall disburse upon their warrant all moneys appropriated by the United States or the District of Columbia, or collected from property-holders, in pursuance of law, for the improvement of streets, avenues, alleys, and sewers, and roads and bridges; and shall assess, in such manner as shall be prescribed by law, upon the property adjoining and to be specially benefited by the improvements authorized by law and made by them, a reasonable proportion of the cost of the improvement, not exceeding one-third of such cost, which sum shall be collected as all other taxes are collected." U. S. St. February 21, 1871, § 37. It was contended that the District of Columbia was not liable as a municipal corporation, because the board of public works was not a department, or subordinate agency of the municipality called the District of Columbia, but

ful act or neglect of an officer, that it be shown that the officer was *its* officer, either generally or as respects the particular wrong complained of, and not an independent public or State officer; and, also, that the wrong was done by such officer while in the legitimate exercise of some duty of a *corporate* nature which was devolved on him by law or by the direction or authority of the corporation.[1]

an independent federal commission. A majority of the court, however, held *that the board was an agent of the corporation*, for whose acts or negligence the corporation was liable. Note comments of *Gray*, C. J., on this point in Hill *v.* Boston, 122 Mass. 344, 372. The decision of the court in Barnes *v.* District of Columbia, 91 U. S. 540, *supra* re-affirmed and applied. District of Columbia *v.* Woodbury, 136 U. S. 450. See also District of Columbia *v.* McElligott, 117 U. S. 621; Brown *v.* District of Columbia, 127 U. S. 579, 586; Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1. See, generally, Powers *v.* Council Bluffs, 50 Iowa, 197; Rowell *v.* Williams, 29 Iowa, 210; Van Pelt *v.* Davenport, 42 Iowa, 308; Damour *v.* Lyons, 44 Iowa, 276; Osborne *v.* Detroit, 32 Fed. Rep. 36. A city is not liable for the consequences of a violation of its ordinances by its mayor or council any more than it would be if the illegal act were done by a private person. Ball *v.* Town of Woodbine, 61 Iowa, 83 (injury by fireworks).

In *Indiana* it has been held that the rule applicable to private corporations that the master is not liable for injuries caused by the negligence of a co-servant, cannot be applied to the officers and agents of municipal corporations, especially when they are acting in different departments of the municipal government. Turner *v.* Indianapolis, 96 Ind. 51.

As to the personal liability of public officers or agents, created by statute, for official acts and neglect, see Nowell *v.* Wright, 3 Allen (Mass.), 166, and cases cited; *ante*, §§ 433–444, 1517, 1575.

[1] Same authorities. *Infra*, §§ 1656, 1665.

Respondeat superior; Corporations, when liable and when not, for the torts of their officers. Grumbine *v.* Washington, 2 McArthur (D. C.), 578; Denver *v.* Peterson, 5 Colo. App. 41; Daly *v.* New Haven, 69 Conn. 644; Platt *v.* Waterbury, 72 Conn. 531; Hinde *v.* Wabash Nav. Co., 15 Ill. 73; Foster *v.* Chicago, 197 Ill. 264; Taylor *v.* Owensboro, 98 Ky. 271, 277, quoting text; Pollock's Admr. *v.* Louisville, 13 Bush. (Ky.) 221; Stewart *v.* New Orleans, 9 La. An. 461; Bennett *v.* New Orleans, 14 La. An. 120; Small *v.* Danville, 51 Me. 359 (distinguished from Thayer *v.* Boston, 19 Pick. (Mass.) 511); Mitchell *v.* Rockland, 52 Me. 118 (approved Brown *v.* Vinalhaven, 65 Me. 402); Gilpatrick *v.* Biddeford, 86 Me. 534; Bowden *v.* Rockland, 96 Me. 129; Morrison *v.* Lawrence, 98 Mass. 219; Fisher *v.* Boston, 104 Mass. 87; Stoddard *v.* Winchester, 157 Mass. 567; Coughlan *v.* Cambridge, 166 Mass. 268; Butman *v.* Newton, 179 Mass. 1; Rome *v.* Worcester, 188 Mass. 307; Hilsdorf *v.* St. Louis, 45 Mo. 94; Rhobidas *v.* Concord, 70 N. H. 90; Missano *v.* New York, 160 N. Y. 123; Mahon *v.* New York, 10 N. Y. Misc. 664; Bishop *v.* New York, 21 N. Y. Misc. 598; McGuinness *v.* Allison Realty Co., 46 N. Y. Misc. 8; Boyland *v.* New York, 1 Sandf. (N. Y.) 27; Fisher *v.* Newbern, 140 N. Car. 506; Caspary *v.* Portland, 19 Oreg. 496; Alcorn v. Philadelphia (city surveyor), 44 Pa. St. 348; Reilly *v.* Philadelphia (when contractor for local improvement is the agent of the city), 60 Pa. St. 467; Norristown *v.* Fitzpatrick, 94 Pa. St. 121; Conelly *v.* Nashville, 100 Tenn. 262; Givens *v.* Paris, 5 Tex. Civ. App. 705; Lyman *v.* White River Br. Co., 2 Aiken (Vt.), 255; Thomas *v.* Grafton, 34 W. Va. 282; Kuehn *v.* Milwaukee, 92 Wis. 263.

Where a city, *acting within its general powers*, contracts for the grading of a public street, and in accordance with the conditions of the contract and the law prescribing the same, the work is done under the immediate supervision of certain officers, whose official duty it is to superintend the work, and the damages result, not from any negligence or wrongdoing of the contractors, but from the performance of the work in the manner required by the contract, *the contractors are the agents*

§ 1656 (975). **Police Department; Liability of City for Acts of Police Officers.** — Agreeably to the principles just mentioned, *police officers appointed by a city are not its agents or servants* in such a sense as to render it responsible for their unlawful or negligent acts in the discharge of their public duties as policemen;[1] and, accordingly, a

of the city, and the city is liable for such damages. Sewall *v.* St. Paul, 20 Minn. 511; Hilliard *v.* Richardson, 3 Gray (Mass.), 349. Approved and distinguished in Chicago *v.* Robbins, 2 Black. (U. S.) 418, 428; Ready *v.* Tuskaloosa (acts of city marshal), 6 Ala. 327; Cowley *v.* Sunderland, 6 H. & N. 565; Hewison *v.* New Haven, 37 Conn. 475; Sheldon *v.* Kalamazoo, 24 Mich. 383. A *right to annul or suspend the contract*, and an obligation on the contractor to discharge workmen disobeying a city officer, will not constitute the contractor the agent of the city so as to make it liable for injuries sustained by an individual, by the negligent prosecution of the work, — as by *careless blasting*. Blumb *v.* Kansas City, 84 Mo. 112.

Article 16, section 8, *Constitution of Pennsylvania*, 1874, was not designed to change the effect of corporate contracts, but to impose on those having the right of eminent domain a liability for consequential damages, from which they had been previously exempt. Applying these principles, it was held that if a railroad company contracts with an *independent contractor* for the construction of its railroad, it is not liable for damages resulting from the negligence of the contractor. Edmundson *v.* P. M. & Y. R. Co., 111 Pa. St. 316. See Index, tit. *Contractor*. Where a board of public works assumed without legal right to change the grade of a street and entered into a contract with contractors for that purpose, it was held that they as well as the contractors were liable in trespass for damages sustained by the owners of abutting property caused by changing the grade. Larned *v.* Briscoe, 62 Mich. 393; *infra*, § 1676 *et seq.*

Respondeat superior applies to a city making public improvements where it retains the supervision, charge, and control of the work. Chicago *v.* Joney (deepening canal for benefit of city), 60 Ill. 383; Chicago *v.* Dermody (injuries by fall of the roof of city hall), 61 Ill. 431.

The *New York and Brooklyn Bridge belongs to the two cities of New York and Brooklyn*, and the trustees thereof, and their employees are the agents and servants of the two cities, for whose negligence the cities are liable. Walsh *v.* New York, 107 N. Y. 220; Walsh *v.* New York, 41 Hun (N. Y.), 299; 107 N. Y. 220. See Hannon *v.* Agnew, 96 N. Y. 439; Walsh *v.* Bridge Trustees, 96 N. Y. 429. Index — *Bridge; City Purposes*.

Where the *mayor* of a city in excess of his powers made an arrangement with a person to *remove carcasses*, and that person threw them into the river, and thereby injured the plaintiff's property, it was held that the city was not liable, since the mayor was not in this matter the servant or agent of the city, and the principle of *respondeat superior* did not apply. Cumberland *v.* Willison, 50 Md. 138. The office of treasurer or comptroller is a continuous office, and in a case where the city is liable for the wrongful acts of its officers the court is not bound to regard a change of incumbents, as the city is under an obligation to protect its officers against personal harm, by furnishing the money necessary to relieve them. People *v.* Comptroller, 77 N. Y. 45.

[1] Gray *v.* Griffin, 111 Ga. 361; Culver *v.* Streator, 130 Ill. 238; Craig *v.* Charleston, 180 Ill. 164, s. c. 78 Ill. App. 312; Chicago *v.* Williams, 182 Ill. 135; Tollefson *v.* Ottawa, 228 Ill. 134, 136; Robertson *v.* Marion, 97 Ill. App. 332; Lahner *v.* Williams, 112 Iowa, 428; Peters *v.* Lindsborg, 40 Kan. 654; Caldwell *v.* Prunelle, 57 Kan. 511; Taylor *v.* Owensboro, 98 Ky. 271, 277, quoting text; Louisville Park Com'rs *v.* Prinz, 127 Ky. 460, 473; Bean *v.* Middlesboro (Ky.), 57 S. W. Rep. 478; Sherman *v.* Vermillion, 51 La. An. 880; Hathaway *v.* Everett, 205 Mass. 246; Butler *v.* Moberly, 131 Mo. App. 172; Barree *v.* Cape Girardeau, 132 Mo. App. 182; Woodhull *v.* New York, 150 N. Y. 450, noted *infra;* Wilcox *v.* Rochester, 190 N. Y. 137, 144, citing text; Clayman *v.* New

city is not liable for an *assault and battery* committed by its police officers, though done in an attempt to enforce an ordinance of the city;[1] or for *an arrest* made by them which is illegal for want of a warrant, or for other cause;[2] or for their *unlawful acts of violence,*

York, 117 N. Y. App. Div 565; McIlhenney *v.* Wilmington, 127 N. Car. 146; Metz *v.* Asheville, 1[illegible]0 N. Car. 748, 750, citing text; [illegible]ham *v.* Philadelphia, 196 Pa. St. [illegible] Miller *v.* Hastings, 25 Pa. Super. Ct. 569; Kelley *v.* Cook, 21 R. I. 29; O'Rourke *v.* Sioux Falls, 4 S. Dak. 47, 51, citing text; Whitfield *v.* Paris, 84 Tex. 431, citing text; McFadin *v.* San Antonio, 22 Tex. Civ. App. 140; Stinnett *v.* Sherman (Tex. Civ. App.), 43 S. W. Rep. 847; Royce *v.* Salt Lake City, 15 Utah, 401, 407, citing text; Everill *v.* Swan, 17 Utah, 514, citing text; Simpson *v.* Whatcom, 33 Wash. 392; Randles *v.* Waukesha County, 96 Wis. 629; McCleave *v.* Moncton, 35 N. B. (Can.) 296; and see cases cited *infra* in notes to this section.

[1] Bowditch *v.* Boston, 101 U. S. 16; Odell *v.* Schroeder, 58 Ill. 353; Lafayette *v.* Timberlake, 88 Ind. 330; Ogg *v.* Lansing, 35 Iowa, 495; Caldwell *v.* Boone, 51 Iowa, 687; Prather *v.* Lexington, 13 B. Mon. (Ky.) 559; Buttrick *v.* Lowell, 1 Allen (Mass.), 172; Kimball *v.* Boston, 1 Allen (Mass.), 417; Hafford *v.* New Bedford, 16 Gray (Mass.), 297; Worley *v.* Columbia, 88 Mo. 106; Norristown *v.* Fitzpatrick, 94 Pa. St. 121; Burch *v.* Hardwicke, 30 Gratt. (Va.) 24; *ante,* §§ 97, 103, 797; *supra,* § 1652. See also Atwater *v.* Baltimore, 31 Md. 462, in which it was held that the city was not liable for the neglect of the *board of police commissioners,* who are not appointed by or responsible to the corporation; distinguished from Marriott *v.* Baltimore, 9 Md. 160. In Elliott *v.* Philadelphia, 75 Pa. St. 347, *the city was held not liable for a horse negligently killed by a police officer,* who had arrested the driver for violating the ordinance of the city in respect of rapid driving, distinguishing Philadelphia *v.* Gilmartin, 71 Pa. St. 140. Nor is the city liable for not furnishing a police force adequate to the emergency. Hannon *v.* Agnew, 96 N. Y. 439; Dewey *v.* Detroit, 15 Mich. 307. Shearm. & Red. Neg. (4th ed.) 260, and cases. A municipal ordinance forbidding the *running of dogs at large is a police regulation,* and the municipality is not responsible for the acts of one employed by it to enforce the ordinance. Culver *v.* Streator, 130 Ill. 238.

[2] Kansas City *v.* Lemen, 57 Fed. Rep. 905; Grumbine *v.* Washington, 2 McArthur (D. C.), 578; Ready *v.* Tuskaloosa, 6 Ala. 327; Dargan *v.* Mobile, 31 Ala. 469; Cook *v.* Macon, 54 Ga. 460; Cranston *v.* Augusta, 61 Ga. 572; Harris *v.* Atlanta, 62 Ga. 290; McElroy *v.* Albany, 65 Ga. 387; Attaway *v.* Cartersville, 68 Ga. 740; Laurel *v.* Blue, 1 Ind. App. 128; Vaughtman *v.* Waterloo, 14 Ind. App. 649; Peters *v.* Lindsborg, 40 Kan. 654; Caldwell *v.* Prunelle, 57 Kan. 511; Taylor *v.* Owensboro, 98 Ky. 271, 277, quoting text; Pollock's Adm. *v.* Louisville, 13 Bush (Ky.), 221; Greenwood *v.* Louisville, 13 Bush (Ky.), 226; Gullikson *v.* McDonald, 62 Minn. 278; Ulrich *v.* St. Louis, 112 Mo. 138, 144, citing text; Woodhull *v.* New York City, 150 N. Y. 450, rev'g 76 Hun (N. Y.), 390; Coley *v.* Statesville, 121 N. Car. 301, citing text; Alvord *v.* Richmond, 3 Ohio N. P. 136; Rusher *v.* Dallas, 83 Tex. 151, citing text; Royce *v.* Salt Lake City, 15 Utah, 401; Richmond *v.* Long's Adm., 17 Gratt. (Va.) 375; Wishart *v.* Brandon, 4 Manitoba, 453. *Ante,* §§ 1626–1630.

Power of city to indemnify owners of property destroyed to preserve the public peace. Jones *v.* Richmond, 18 Gratt. (Va.) 517; *ante,* § 681, note; Shearm. & Red. Neg. (4th ed.) §§ 260, note, 358. The fact that a *license is granted by city officers for a bear-show* will not make the city liable for damages resulting from the negligence of its police officers in not preventing the show from being held in the street. Little *v.* Madison, 49 Wis. 605; *ante,* § 1630, and note. This subject is discussed further on in connection with *liability for unsafe streets. Post,* § 1703. See Little *v.* Madison, 42 Wis. 643; Schultz *v.* Milwaukee, 49 Wis. 254; Cole *v.* Newburyport, 129 Mass. 594; Pesterfield *v.* Vickers, 3 Coldw. (Tenn.) 205, approving Buttrick *v.* Lowell, 1 Allen (Mass.), 172; *supra. Ante,* § 1248, note.

A city is not liable for the act of the

whereby, in the exercise of their duty of suppressing an unlawful assemblage of slaves, the plaintiff's slave was killed.[1] So, on the same principle, a person who suffers a personal injury *while aiding the police officers* of a city, at their request, in arresting disturbers of the public peace under a valid ordinance, has no remedy against the city.[2] The *police regulations* of a city are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city is not liable therefor, for the acts of its officers in attempting to enforce such regulations,[3] although the ordinance

recorder in wrongfully refusing bail, the remedy in such cases must be sought against the officers personally. Pesterfield *v.* Vickers, 3 Coldw. (Tenn.) 205; Ready *v.* Tuskaloosa (city marshal), 6 Ala. 327; Bowditch *v.* Boston, 101 U. S. 16. Nor is it liable for a *wrongful arrest* and imprisonment by police officers under an ordinance, or for the taking *and detention of property* by such officers from the person so arrested. Stedman *v.* San Francisco, 63 Cal. 193. *Ante*, § 1368 *et seq.*

Although the *cars on the Brooklyn Bridge* were operated by the trustees of the Brooklyn Bridge, the municipal corporations of New York and Brooklyn are not liable for the *acts of a bridge policeman* appointed by the trustees of the bridge when such acts are done in the public character of a policeman and are not within the scope of any employment as an agent or servant of the municipalities. So held where the policeman arrested a passenger, claiming that the passenger struck him. Woodhull *v.* New York City, 150 N. Y. 450; rev'g 76 Hun (N. Y.), 390. A city is not liable for the *unlawful impounding of an animal running at large* by the act of the city's officers. Gregg *v.* Hatcher (Ark.), 125 S. W. Rep. 1007.

[1] Stewart *v.* New Orleans, 9 La. An. 461; s. p. in similar action, Dargan *v.* Mobile (slave negligently killed by an officer of the city guard in attempting to arrest him for a breach of its ordinances, city held not liable), 31 Ala. 469. The opinion of *Walker*, J., is well considered. Compare Johnson *v.* Municipality, 5 La. An. 100, in which the corporation was held liable for the neglect of duty on the part of *the keeper of the police jail*, resulting in the death of the plaintiff's slave. The decision is upon the ground that the keeper was the agent of the corporation, and that it was liable for his acts and defaults in the discharge of his duties; but *quære*, and see comments of *Walker*, J., in Dargan *v.* Mobile, 31 Ala. 469, 477; Campbell *v.* Montgomery, 53 Ala. 527; Richmond *v.* Long's Adm., 17 Gratt. (Va.) 375, approving Stewart *v.* New Orleans and Dargan *v.* Mobile, above cited; Nisbet *v.* Atlanta, 97 Ga. 650. *Ante*, § 103. Liability of city for *loss of slave* put to work *in city chain-gang*. Clague *v.* New Orleans, 13 La. An. 275. The city is *not* liable for *property destroyed by the police* without orders from the municipal authorities. Harman *v.* Lynchburg, 33 Gratt. (Va.) 37.

[2] Cobb *v.* Portland, 55 Me. 381; Sutton *v.* Carroll County Pol. Bd., 41 Miss. 236. There is on the same principle no municipal liability for *negligence of inspectors of steam boilers appointed by a city* (Mead *v.* New Haven, 40 Conn. 72); compare Lafayette *v.* Allen, 81 Ind. 166, cited *infra;* or for negligence of *ambulance driver*, the duty being public, not corporate. Maxmilian *v.* New York, 62 N. Y. 160; Ogg *v.* Lansing (negligence of *health-officers* of a city), 35 Iowa, 495; Pollock *v.* Louisville, 13 Bush (Ky.), 221; Haight *v.* New York, 24 Fed. Rep. 93. As to liability of the city, where it is the owner of a police station building, for the negligence of a policeman in leaving open trap-door leading from the sidewalk into the police station. Carrington *v.* St. Louis, 89 Mo. 208. Compare *post*, § 1661, note; and see *post*, § 1671 *et seq.*

[3] Odell *v.* Schroeder, 58 Ill. 353; Ogg *v.* Lansing, 35 Iowa, 495; Caldwell *v.* Boone, 51 Iowa, 687; Prather *v.* Lexington, 13 B. Mon. (Ky.) 559; McKay *v.* Buffalo, 74 N. Y. 619 (carelessly wounding plaintiff); Elliott *v.* Philadelphia, 75 Pa. St. 347. It has also been held that the municipality

imposing such regulation may be unconstitutional or void for any reason.[1]

Upon similar principles, the *city is not liable to prisoners* and others detained in the prisons, workhouses and correctional institutions of the municipality, for injuries sustained by reason of the *defective, unsanitary or insufficient* nature of the place of detention or the negligence or carelessness of the officers in charge.[2] The same principle has also been applied to relieve the city from *liability for negligence in the maintenance of a police station,* although the injured person was a mechanic in the employ of a firm of con-

will not be made liable by *ratifying* the torts of police officers. Odell *v.* Schroeder, 58 Ill. 353; Caldwell *v.* Boone, 51 Iowa, 687. But in *Tennessee,* the court has held that the rule which protects a municipal corporation from liability for the personal conduct of its police officers does not apply if the officer's act had the sanction of the city authorities. So held in an action of trespass to recover damages from the city for the act of a policeman in tearing down a fence. Johnson City *v.* Wolf, 103 Tenn. 277. City held not to be liable for the wrongful act of the mayor and police in closing an exhibition with intent to injure and oppress the owner. Kansas City *v.* Lemen, 57 Fed. Rep. 905.

The *building department* of New York city performs a public service in which the city has no private or corporate interest and its negligence in approving defective building plans does not render the city liable. Stubley *v.* Allison Realty Co., 124 N. Y. App. Div. 162.

[1] Clark *v.* Atlantic City, 180 Fed. Rep. 598; Franks *v.* Holly Grove (Ark.), 124 S. W. Rep. 514; Bond *v.* Royston, 130 Ga. 646; Hall *v.* Dunn, 52 Oreg. 475.

[2] McAuliffe *v.* Victor, 15 Colo. App. 337; Wilson *v.* Macon, 88 Ga. 455; Gray *v.* Griffin, 111 Ga. 361; La Clef *v.* Concordia, 41 Kan. 323; New Kiowa *v.* Craven, 46 Kan. 114; Jones *v.* Corbin (Ky.), 98 S. W. Rep. 1002; Curran *v.* Boston, 151 Mass. 505 (workhouse); Gullikson *v.* McDonald, 62 Minn. 278; Ulrich *v.* St. Louis, 112 Mo. 138 (prisoner in workhouse injured by vicious mule); Eddy *v.* Ellicottville, 35 N. Y. App. Div. 256 (death of prisoner from pneumonia contracted by reason of defective and exposed condition of jail); Bell *v.* Cincinnati, 80 Ohio St. 1 (workhouse guard injured by explosion in quarry while supervising work of inmates); Rose *v.* Toledo, 24 Ohio Cir. Ct. R. 540 (workhouse); Kelley *v.* Cook, 21 R. I. 29; Green *v.* Muskingum County, 23 Ohio Cir. Ct. R. 43 (workhouse); Davis *v.* Knoxville, 90 Tenn. 599; Brown's Adm'rs *v.* Guyandotte, 34 W. Va. 299 (jail burned through negligence of officers); Shaw *v.* Charleston, 57 W. Va. 433; *Contra:* Edwards *v.* Pocahontas, 47 Fed. Rep. 268; Shields *v.* Durham, 118 N. Car. 450, s. c. 116 N. Car. 394. City held not liable for tortious or negligent acts of officers whereby person engaged in breaking stone in working out a fine was injured. Jackson *v.* Owingsville (Ky.), 121 S. W. Rep. 672. City held not liable for negligence of foreman of chain gang whereby convict working on streets was injured. Nisbet *v.* Atlanta, 97 Ga. 650.

An *industrial school and asylum* to which minors convicted of crime are committed by the magistrates is, so far as such persons are concerned, a *governmental agency* for their care, and is entitled to the same immunity from liability for damages arising from negligence as the State itself and all its municipal divisions. Hence, no liability results for failure of the managers to instruct a minor committed thereto in the management and operation of a machine, or to warn him that it was dangerous, or to post rules or regulations as to its use. Corbett *v.* St. Vincent's Industrial School, 177 N. Y. 16, aff'g 79 N. Y. App. Div. 334.

City held not liable for trespass by police officers upon private property resulting in injury to such property, while such officers were searching a river for a dead body. Gillmor *v.* Salt Lake City, 32 Utah, 180.

tractors employed to repair the roof of the police station, and he was injured by the negligence of a police telegraph operator in leaving the door to an elevator shaft open.[1] The municipal corporation in all these and the like cases represents the State or the public; the police officers are not the servants of the corporation; the principle of *respondeat superior* does not therefore apply, and the corporation is not liable unless by virtue of a statute expressly creating the liability.

§ 1657. **City Hall and Public Buildings.** — It has been held that the *maintenance of a city hall* for the use of the city officers and employees as well as for the transaction of the city's business, *is the exercise of a governmental function,* and that the city cannot impliedly be held liable for negligence on the part of its officers and agents in maintaining and repairing the city hall or in controlling and managing the same.[2] But the liability of the city has been sustained

[1] In Wilcox *v.* Rochester, 190 N. Y. 137, rev'g 114 N. Y. App. Div. 734, *Willard Bartlett,* J., who delivered the opinion of the court, after reviewing the principles governing the liability of a city for the acts of its police officers, said: "The suggestion is made that inasmuch as the alleged negligence in the present action was not the omission of a police officer or member of the police force assuming to act as such, but was done by an employee of the city engaged in the maintenance of a police station, the rule which denies the application of the doctrine of *respondeat superior* to the torts or negligent acts of police officers does not apply. This proposition simply brings us back to the question whether the safe and proper maintenance of a police station building is not an appropriate, not to say necessary, element in the maintenance of a police force; and if it is, whether it is not the exercise of a public governmental function. I have already indicated that I think these questions must be answered in the affirmative." But in Carrington *v.* St. Louis, 89 Mo. 208, where the plaintiff sued the city of St. Louis for injuries sustained by falling against certain iron trap doors over a cellar-way in a sidewalk in the city of St. Louis, it appeared that the doors covered a cellar-way opening into a building used and occupied by the police commissioners as a police station and that one of the members of the police force opened the doors, painted them, propped them open with a stick, and left them in that position to dry. The court held that, under the circumstances, the member of the police force through whose acts the cellar-way was left open, was the agent of the city, and that the city was liable for his acts as a breach of its duty to keep the streets and sidewalks in a reasonably safe condition for persons traveling thereon.

[2] Schwalk's Adm'r *v.* Louisville, 135 Ky. 570 (negligent operation of elevator); Kelley *v.* Boston, 186 Mass. 165, noted *infra* (injuries by throwing snow and ice from roof); Snider *v.* St. Paul, 51 Minn. 466 (negligent operation of elevator); Moest *v.* Buffalo, 116 N. Y. App. Div. 657, aff'd 193 N. Y. 615 (negligent operation of elevator). As to liability of *town* for defective *town-house,* see *ante,* § 1641; Larrabee *v.* Peabody, 128 Mass. 561. As to liability of *county* for negligent omission to light and guard dangerous openings, see *ante,* § 1640. But in Lowe *v.* Salt Lake City, 13 Utah, 91, the city was held liable for injuries sustained by the plaintiff through falling into an unguarded hatchway in the rear of the city hall. Index — *County; Public Buildings.* The fact that a part of a city hall building is used by the water, sewer and other departments of the city, does not

where the city has rented out the city hall building or some considerable part thereof, and the person injured had come to the building to transact business with the city's tenants.[1]

§ 1658. **Liability for Maintenance and Repair of School Buildings, etc.** — When a municipal corporation is charged by charter or statute with *the duty of erecting and maintaining public schools* for the education of the children of the municipality, the weight of authority is to the effect that in the exercise of the power so conferred it performs a public or governmental duty and not a special corporate or administrative duty as distinguished from a State or public duty, and it is not impliedly liable for the wrongful acts and negligence of its officers or agents in maintaining and repairing school buildings.[2] In the case of school districts, boards of education and other *quasi* corporations created for the limited purpose of directing and controlling school matters, exemption from liability, in some jurisdictions at least, is placed upon the two-fold ground (first) that these bodies are only *quasi* corporations and (second) that they perform only a public and governmental duty and do not act in a private or corporate capacity in erecting and maintaining school buildings.[3] But in New York these principles do

render the city liable for negligence in its maintenance. Kelley *v.* Boston, 186 Mass. 165.

[1] Oliver *v.* Worcester, 102 Mass. 489; Worden *v.* New Bedford, 131 Mass. 23; Little *v.* Holyoke, 177 Mass. 114.

[2] Hill *v.* Boston, 122 Mass. 344, noted *supra* (leading case on the subject); Kuinare *v.* Chicago, 171 Ill. 332 (injuries to workman); Ernst *v.* West Covington, 116 Ky. 850; Clark *v.* Nicholasville (Ky.), 87 S. W. Rep. 300; Bigelow *v.* Randolph, 14 Gray (Mass.), 541 (pupil falling into dangerous excavation); Sullivan *v.* Boston, 126 Mass. 540 (icy path in school-house yard); Howard *v.* Worcester, 153 Mass. 426 (blasting rock while excavating foundation of school building, traveller on highway injured); Wixon *v.* Newport, 13 R. I. 454 (defect in heating building, pupil injured); Folk *v.* Milwaukee, 108 Wis. 359 (death of pupil by escaping sewer gas). In McNeil *v.* Boston, 178 Mass. 326, the city was held not liable for a *defect in a stair of a school building*, causing an injury to a citizen while entering to vote, the school-house being used as a polling place. But in *Massachusetts*, it has also been held that the principle that the city is not liable for acts done solely for the public use *cannot be extended to justify a private nuisance*, and hence, if the city in adapting a lot of land for school purposes builds and maintains a retaining wall on the boundary of the school lot and the wall falls upon the adjoining lot and remains there, it becomes a nuisance for which the city is liable. Miles *v.* Worcester, 154 Mass. 511. See also Wood *v.* Mitchell Ind. School Dist., 44 Iowa, 27. In *Pennsylvania* the courts have sustained the liability of the city for a nuisance on the ground of its *ownership of a school building* and have held that although the city is not liable for failure to keep the building in repair, yet if the city be the owner of the building and permits a nuisance to exist thereon to the injury of an adjoining owner, the city is liable to the adjoining owner in damages. Briegel *v.* Philadelphia, 135 Pa. 451 (distinguishing Ford *v.* Kendall School District, 121 Pa. 543). As to the liability of a municipal corporation as a *property owner*, see *infra*, § 1671.

[3] Freel *v.* Crawfordsville School City, 142 Ind. 27 (laborer making

not appear to be fully adhered to. If the city or board of education does not have the control of the school buildings in such sense that it has the power to keep them in repair, it is not liable for the acts of the officials upon whom that duty is imposed by statute.[1] But if the statute imposes upon the board of education or other officials the duty of maintaining and keeping in repair the school buildings, and by reason of the neglect or default of the board of education or other official upon whom the duty is imposed, a scholar or other person lawfully upon the premises is injured, then the board of education or other official is liable for its negligent acts.[2]

repairs); Lane *v.* District Township, 58 Iowa, 462; Weddle *v.* Frederick County School Commissioners, 94 Md. 334; Whitehead *v.* Detroit Board of Education, 139 Mich. 490 (painter working on school building injured by insufficient appliances); Bank *v.* Brainerd School District, 49 Minn. 106; McClure Bros. *v.* Tipton School District, 79 Mo. App. 80; Diehm *v.* Cincinnati, 25 Ohio St. 305; Finch *v.* Toledo Board of Education, 30 Ohio St. 37 (pupil falling into unprotected well); Ford *v.* Kendall School District, 121 Pa. 543; Erie School District *v.* Fuess, 98 Pa. 600; Index — *County; Public Buildings; Quasi Corporations; Schools.*

[1] Brown *v.* New York, 32 N. Y. Misc. 571; Terry *v.* New York, 8 Bosw. (N. Y.) 594; Treadwell *v.* New York, 1 Daly (N. Y.), 123. The board of education of New York city is an independent corporation and not an agency of the city. Gunnison *v.* New York Board of Education, 176 N. Y. 11. Hence, the city is not liable for the negligence of the board of education. Ham *v.* New York City, 70 N. Y. 459.

[2] Higbie *v.* New York Board of Education, 122 N. Y. App. Div. 483, noted *infra* (cleaner in public school injured). In Bassett *v.* Fish, 75 N. Y. 303, it appears to have been held that in the case of a *quasi* corporation such as the trustees of an ordinary school district, no liability attaches to the *quasi* corporation for the negligence of the trustees, but the liability is the liability of the trustees as individuals. If, however, the board of education of a district is created a body corporate, and the power of erecting, maintaining and repairing school buildings is in terms given by the statute to the corporate body, then the corporate body is responsible for the failure to maintain the school buildings in repair. So, too, it has been held that although the board of education of New York city was not charged with the duty of erecting and repairing schools, that duty being imposed upon other city departments, yet where it was vested with the management and control of public schools in other respects and had the full power to close them, so that if there was any neglect with reference to such closing it must be that of the school board, and a pupil was injured by *the fall of a defective ceiling* of which the board had notice, it was held that the board of education was liable to the pupil for its negligence in allowing the school building to be occupied by pupils after it had knowledge of the unsafe condition of the building and ceiling. Wahrmann *v.* New York Board of Education, 187 N. Y. 331, aff'g 111 N. Y. App. Div. 345.

The rule of *respondeat superior* does not apply to the relation existing between the board of education of a union free school district and an "attendance officer" appointed by the board pursuant to statute, and the board is not liable for the act of such "attendance officer" in wrongfully arresting a scholar. Reynolds *v.* Little Falls Union Free School District, 33 N. Y. App. Div. 88; Rhall *v.* New York Board of Education, 40 N. Y. App. Div. 412. These decisions may be distinguished from the other New York cases upon the ground that the "attendance officers" were exercising a police function in compelling the attendance of children. As to liability for the performance of police duties, see *ante*, § 1656. In Higbie *v.* New York Board of Education, 122 N. Y. App. Div. 483, it was held that

§ 1659. **Park Department; Liability of City for Negligence in Maintenance of Public Parks.** — Under the same principles, the courts of some jurisdictions have held that a city or other municipal corporation, in the *care and maintenance of public parks* for the benefit of the inhabitants, acts in a governmental or public capacity in the performance of a duty for the benefit of the public, and in such case is *not* impliedly liable for the negligence of its officers or agents who are intrusted with the maintenance of the parks.[1] It has also been held in Massachusetts where the rule just

the doctrine of *respondeat superior* applies to the board of education of New York, and that that board is liable to a cleaner in a public school for injuries received through the negligence of the board or its agents. Where the care of school buildings was not intrusted to the board of education but to the ward trustees who were authorized to make repairs, it was held that the ward trustees were not the agents of the board, but independent public officers, and that the board was not liable for their negligence. Donovan *v.* New York Board of Education, 85 N. Y. 117.

In *Pennsylvania* it is held that an action will not lie against a city although it may have the legal title to the school buildings, for injuries to a pupil caused by defects in the buildings, if the control of the buildings and the duty to maintain them are intrusted to a board of education appointed or created pursuant to statute. Rosenblit *v.* Philadelphia, 28 Pa. Super. Ct. 587 (distinguishing Powers *v.* Philadelphia, 18 Pa. Super. Ct. 621); McCullough *v.* Philadelphia, 32 Pa. Super. Ct. 109. See also Board of Public Education *v.* Ransley, 209 Pa. 51, which holds that the school system of the city of Philadelphia is wholly under the control of the board of public education, except in the one matter of raising funds for school purposes. See also Shuter *v.* Philadelphia, 3 Phila. (Pa.) 228. *Infra*, § 1671 as to liability of a city in its capacity of a *property owner*.

[1] In Louisville Park Com'rs *v.* Prinz, 127 Ky. 460, an action was brought by plaintiff to recover damages for injuries sustained by the *negligence* of the employees of the board of park commissioners of Louisville *in the operation of a steam roller* used by the board. In deciding the case, the court disposed of it upon the same basis as if the board of park commissioners were a municipal corporation charged with the duty of maintaining the parks, saying on this subject: "In disposing of the same we will treat it as if the parks were managed and controlled by the city, without the intervention of the subsidiary corporation, styled a board of park commissioners, because, if the city would be liable, so would the board of park commissioners, as it is merely an agency of the city created by law to exercise supervision and control over the parks." So considering the case, the decision of the court was that the board of park commissioners was not liable for the torts of its employees. *Carroll*, J., who delivered the opinion of the court, said: "The right of the city to support public parks by taxation is rested upon the ground that the municipal authorities are charged with the duty of maintaining the public health, and that parks where exercises and recreations can be indulged in, and pure and clean air breathed, contribute largely to the health of the community. Viewing this matter from this standpoint, the parks of the city occupy towards it and its inhabitants the same relation as do hospitals and other public institutions useful and necessary in the preservation of the health, safety and morals of the people. And although there is conflict in the authorities, the decided weight of the adjudged cases favors the view that neither municipal corporations nor bodies such as appellant, when exercising exclusively public functions enjoined by law for the benefit of the general public, are liable to suit for the personal tort or negligence of an agent, servant or employee." The learned Justice discussed the reasons for this ruling, examined and discussed

stated is adopted, that the paths in a public park are not streets or highways opened and dedicated for public use within the mean-

the decisions and concluded: "From the cases written by this court, it may safely be said that in matters pertaining to the conduct of the charitable, reformatory, penal and other public institutions, such as parks, supported by taxation, an action will not lie against the municipal or other corporation or body that manages and controls them, for the tort or negligence of the agents or servants in their employment."

Where plaintiff in *Massachusetts* sued to recover damages from a town for injuries sustained on a *path in the public common* on the ground that the path had been allowed to become dangerous and out of repair, and it appeared that the common had been conveyed to the town upon the condition that it should "forever be kept open as and for a common for the use of the inhabitants of the town," the court held that the paths were not laid out as public ways and the town was not liable under the statutes respecting highways or town ways for any defect or want of repair which might exist in them; and also that the town could not be held liable upon the ground that it negligently suffered a dangerous place to exist in the park and failed to give proper notice to persons using the park by its invitation or license. Clark *v.* Waltham, 128 Mass. 567. *Morton*, J., said: "It holds the park not for its own profit or emolument, but for the direct and immediate use of the public. If it can be said that there is any duty in the town to construct paths over it, or to keep such paths in repair, it is a corporate duty, imposed upon it as the representative and agent of the public and for the public benefit; for a breach of such a duty a private action cannot be maintained against a town or city, unless such action is given by statute." So in Steele *v.* Boston, 128 Mass. 583, it was held that the city of Boston was not liable for an injury caused to a person on Boston Common by coming into collision with a sled on one of the paths therein, upon which the *city had permitted boys and men to coast in the winter season*, and which the city had fitted for that purpose by building a bridge across it at an intersecting path, and by turning water upon it to freeze and render it slippery. *Morton*, J., said: "There was no evidence offered that the foot paths on the common have ever been laid out as highways or town ways. The city holds the common for the public benefit and not for its emolument or as a source of revenue, and has constructed and kept in repair these paths as a part of the Common for the comfort and recreation of the public, and not as a part of its system of highways or streets. It is not liable under the statutes for any defect or want of repair in them."

In Blair *v.* Granger, 24 R. I. 17, the plaintiff brought an action against the city of Providence to recover damages for personal injuries sustained by the plaintiff while driving through a public park of the city, his horse being frightened by the *negligent use and operation of a steam roller*, which was being used to construct or repair one of the drives in the park. The court held that there was not sufficient evidence to show that the driveway, where the plaintiff was injured, was a highway for the maintenance and repair of which the municipality was liable, and it also held that, upon the facts of the case, the city seemed to have been in the exercise of a governmental power and engaged in the performance of a public service, and that it was not liable for the negligence or carelessness of its officers, agents or employees in charge of the roller. *Rogers*, J., who delivered the opinion of the court, said: "The city of Providence, for aught that appears, seems to have been in the discharge of a governmental power, engaged in the performance of a public service, in which it had no particular interest, and from which it derived no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community; that the members of the park department, like those of the fire department, although appointed by the city corporation, are not, when acting in the discharge of their duties,

ing of a statute imposing liability upon the city for negligence in maintaining streets or highways, and that damages cannot be recovered under the statute from the city for injuries sustained through the negligence of the city in maintaining the paths.[1] But these views have not been uniformly accepted, and in other jurisdictions it has been held that a municipal corporation, in maintaining a public park, *is liable* for its negligence and carelessness, and for the negligence and carelessness of officers and agents, which result in injury to persons lawfully using the park.[2]

servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as public officers, or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city, unless expressly given; and hence the maxim *respondeat superior* has no application. Purely incidental profit in the management of the park, where it is not managed merely in the nature of a business, does not constitute such a special benefit or advantage as to make the city liable in the absence of a statute. In the lack of any evidence to show that the city had any particular interest or derived special benefit or advantage in its corporate capacity from this park, we think the nonsuit was well granted on that branch of the case."

In Russell *v.* Tacoma, 8 Wash. 156, it was held that where the city is not the owner of the lands constituting the park and has no interest therein, except a license or privilege of keeping it for use as a park, the city exercises a power conferred upon it for the public good and not for private or special corporate advantage, and hence it is not impliedly liable for the acts or omissions of its officers in that behalf. Where the plaintiffs were walking on the grass in a public park in *violation of an ordinance*, and while so doing, fell into a trench, it was held that the plaintiffs could not recover. Sheehan *v.* Boston, 171 Mass. 296. *Holmes*, J., remarked: "The plaintiffs were obliged to show their own breach of the law in order to recover."

[1] Oliver *v.* Worcester, 102 Mass. 489; Clark *v.* Waltham, 128 Mass. 567, noted *supra;* McKay *v.* Reading, 184 Mass. 140, 142. But see *contra.* Weber *v.* Harrisburg, 216 Pa. 117.

[2] Carey *v.* Kansas City, 187 Mo. 715; Barthold *v.* Philadelphia, 154 Pa. 109; Weber *v.* Harrisburg, 216 Pa. 117. See also Rhine *v.* Philadelphia, 24 Pa. Super. Ct. 564. In Denver *v.* Spencer, 34 Colo. 270, where the plaintiff sued to recover damages for personal injuries sustained from the *fall of a stand or platform* erected in one of the city parks and intended to be occupied by persons for furnishing entertainment for people resorting to the park, it was held that the city was liable for the negligence of its park commissioners in constructing the stand or platform. In Silverman *v.* New York, 114 N. Y. Supp. 59, the plaintiff was seated upon a *bench in one of the public parks.* A wagon employed by the park department in the removal of rubbish and driven by an employee of the department, approached from a direction opposite to that in which the plaintiff was facing. It passed over his foot, injuring it. It was held that the driver was at the time of the injury a servant of the city, and that the city was liable for his negligence. In Mahon *v.* New York, 10 N. Y. Misc. 664, where the plaintiff sued for damages for breach of a contract for certain work, the court held that the park commissioners were the officers and agents of the municipality in the care and management of its corporate property, and that for their acts the city is responsible. City held liable for negligence in the maintenance and repair of public streets, although the control and maintenance thereof were intrusted by statute to the board of park commissioners. Ehrgott *v.* New York, 96 N. Y. 264. See also to the same effect, Burridge *v.* Detroit, 117 Mich. 557.

A *boulevard* held to be a street or highway and the city liable for inju-

§ 1660 (976). **Liability for Negligence and for Wrongful Acts of Firemen.** — In the absence of express statute creating the liability, municipal corporations *are not liable* to property owners or to travellers in the city streets or to other persons for injuries occasioned by reason of negligence in using or keeping in repair the fire-engines owned by them.[1] So, although a municipal corpora-

ries sustained by the plaintiff through failure to keep the sidewalk thereof in repair, although more than the usual space was devoted to lawn for park purposes. Burridge *v.* Detroit, 117 Mich. 557. In State *v.* Schweickardt, 109 Mo. 496, a case which involved the power of the city to lease a portion of a public park for the sale of intoxicating liquors, the court held that the management of the park must be regarded as a matter of purely local concern, not in a political capacity, but in a *quasi* private capacity, in which the municipal authorities act for the exclusive benefit of the corporation.

In Gartland *v.* New York Zoölogical Society, 135 N. Y. App. Div. 163, the defendant, a society which by statute and contract with the city, was given the power and privilege of maintaining a zoölogical garden in one of the public parks of New York city, was held to be liable for injuries sustained by the employee of a contractor through the negligence of the employees of the Zoölogical Society. It was, among other things, contended by the defendant that it was a mere trustee for a public purpose and was not liable for the negligent act, if any, which resulted in the injury to the plaintiff; that it was a governmental agency acting for the municipality and entitled to the same immunities from liability for damages as was conceded to the city itself and to all its municipal divisions. The court held that the defendant was not a governmental agency and was liable. *Clark*, J., said: "The building in which the accident occurred is upon land of the city used for a public park, and prior to the contract under which the defendant corporation now controls it, it was under the jurisdiction and management of the department of parks. But the city is responsible for torts committed by many of its agents, and for negligence in the maintenance of its property. It is not responsible for the torts of the police, Woodhull *v.* New York, 150 N. Y. 450; but it is responsible for the torts of its employees in the street-cleaning department, Missano *v.* New York, 160 N. Y. 123. In the one case the police are engaged in a governmental function; in the other the street cleaners are performing a duty put upon the city to keep its streets clean, 'in the exercise of which it is a legal individual as distinguished from its governmental functions when it acts as a sovereign.' Its duty in regard to the condition of its streets and its parks and public places is not governmental so that it is relieved from responsibility for negligence. This was settled, so far as the department of parks is concerned by Ehrgott *v.* New York, 96 N. Y. 264. Branches of the public service which have been held by the courts to exercise governmental functions are: The fire department, Springfield Fire Ins. Co. *v.* Keeseville, 148 N. Y. 46; the charities and corrections department, Maxmilian *v.* New York, 62 N. Y. 160, and the police department, Woodhull *v.* New York, 150 N. Y. 450. But there is no governmental duty put upon the municipality to provide parks and pleasure grounds, and collections of wild animals or fish, or paintings, or books, except in the large sense that a great city may with propriety consider the æsthetic and not be confined to the practical."

[1] Howard *v.* San Francisco, 51 Cal. 52; Jewett *v.* New Haven, 38 Conn. 368; Torbush *v.* Norwich, 38 Conn. 225; Simon *v.* Atlanta, 67 Ga. 618 (rope stretched across street by fire department); Wilcox *v.* Chicago, 107 Ill. 334 (collision with hook and ladder), quoting and approving text; Ogg *v.* Lansing, 35 Iowa, 495; Saunders *v.* Ft. Madison, 111 Iowa, 102; Greenwood *v.* Louisville, 13 Bush (Ky.), 226; Davis *v.* Lebanon, 108 Ky. 688; Louisville Park Com'rs *v.* Prinz, 127 Ky. 460, 473; Burrill *v.* Augusta, 78 Me. 118 (horse frightened by escaping steam from engine left in street);

tion has charter power to extinguish fires, to establish a fire department, to appoint and remove its officers, and to make regulations in respect to their government and the management of fires, *it is not liable for the negligence of firemen appointed and paid by it*, who, when engaged in their line of duty upon an alarm of fire, ran over the plaintiff, in drawing a hose-reel belonging to the city, on their way to the fire;[1] nor for injuries to the plaintiff, caused by the bursting of the hose of one of the engines of the corporation, through the negligence of a member of the fire department;[2] nor for like negligence, whereby sparks from the fire-engine of the corporation

Bigelow *v.* Randolph, 14 Gray (Mass.), 541; Grube *v.* St. Paul, 34 Minn. 402; Alexander *v.* Vicksburg, 68 Miss. 564; McKenna *v.* St. Louis, 6 Mo. App. 320; Klein *v.* Missouri Pac. R. Co., 114 Mo. App. 89; Gillespie *v.* Lincoln, 35 Neb. 34; Edgerly *v.* Concord, 59 N. H. 78 (negligent testing of hydrant); Wild *v.* Paterson, 47 N. J. L. 406 (defect in brake of engine); Smith *v.* Rochester, 76 N. Y. 506; O'Meara *v.* New York, 1 Daly (N. Y.), 425, citing text; Peterson *v.* Wilmington, 130 N. Car. 76; Wheeler *v.* Cincinnati, 19 Ohio St. 19; Frederick *v.* Columbus, 58 Ohio St. 538; Elliott *v.* Philadelphia, 75 Pa. 347; Blankenship *v.* Sherman, 33 Tex. Civ. App. 507; Cunningham *v.* Seattle, 40 Wash. 59; Hayes *v.* Oshkosh, 33 Wis. 314; Manske *v.* Milwaukee, 123 Wis. 172. But see Wagner *v.* Portland, 40 Oreg. 389.

City held not to be liable for the negligence of officers of a fire department unless made so by express statute, or for an act directly ordered by the corporation. Burrill *v.* Augusta, 78 Me. 118; s. p. Grube *v.* St. Paul, 34 Minn. 402. For an instructive view of the principle involved in such cases, see Maxmilian *v.* New York, 62 N. Y. 160; approved and followed by *Brown*, J., in Haight *v.* New York, 24 Fed. Rep. 93; Greenwood *v.* Louisville, 13 Bush, 226; Pollock *v.* Louisville, 13 Bush, 221; *ante*, §§ 97, 103; Shearm. & Red. Neg., § 265, and cases; 2 Thomps. Neg. 735. On the principle that the maintenance of a fire department is a public duty, or governmental function, it has been held that a city is not liable to a fireman who was injured in the performance of his duties through the negligence of the city in *failing to provide safe equipment*. Long *v.* Birmingham, 161 Ala. 427. A city is not liable for the negligence of its fire department in *maintaining signal wires which fell* and injured plaintiff. Gaetjens *v.* New York, 132 N. Y. App. Div. 394. Where certain persons were injured by the *act of an employee* of the fire department, whose duties consisted solely in procuring and delivering a supply of coal for the use of the fire department, it was held that the city was not liable. Manske *v.* Milwaukee, 123 Wis. 172.

An extreme example of the application of the principle that the maintenance of a fire department is a public function, in connection with which the city is not responsible for the acts or negligence of its officers or employees, is to be found in the case of Paterson *v.* Erie R. Co., 78 N. J. L. 592; 75 Atl. Rep. 922. In this case the city brought an action against the railroad company to recover damages for injuries to a fire engine caused by a collision with a locomotive of the defendant at a railroad crossing. The Court of Errors and Appeals held that the rule *respondeat superior* does not apply as between the city and the members of its fire department, and hence that the negligence of a fireman in charge of the fire engine contributing to the accident did not preclude the city from recovering from the railroad company the damages to its fire engine. The soundness of this decision is perhaps not beyond question or debate.

[1] Hafford *v.* New Bedford, 16 Gray (Mass.), 297.

[2] Fisher *v.* Boston, 104 Mass. 87; distinguished from Oliver *v.* Worcester, 102 Mass. 489; Maxmilian *v.* New York, 62 N. Y. 160; Peaty *v.* New York, 33 N. Y. Misc. 231; Frederick *v.* Columbus, 58 Ohio, 538.

caused the plaintiff's property to be burned.[1] The exemption from liability in these and the like cases is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed, employed, and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable; but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, without being expressly given; the maxim of *respondeat superior* has, therefore, no application.[2] Nor is such a corporation liable to the owner of property destroyed or damaged by fire in consequence of its *neglect to provide suitable engines* or fire apparatus, or to provide and keep in repair public cisterns, or for *failing to provide an adequate supply of water* to extinguish fires when it has undertaken to provide a water supply. A liability on the part of the corporation was sought to be sustained, upon the ground of the neglect of a *corporate* duty, but the court considered that powers of this nature conferred upon municipal corporations were legislative and governmental, and excluded the notion of implied responsibility to individuals, based on neglect or nonfeasance, and distinguished such cases from those in which the duty is purely ministerial.[3]

[1] Hayes *v.* Oshkosh, 33 Wis. 314; Kelly *v.* Cook, 21 R. I. 29; Irvine *v.* Chattanooga, 101 Tenn. 291.

[2] *Per Bigelow*, C. J., in Hafford *v.* New Bedford, 16 Gray (Mass.), 297, *supra;* Hayes *v.* Oshkosh, 33 Wis. 314; *supra*, § 957; Maxmilian *v.* New York, 62 N. Y. 160; McCrowell *v.* Bristol, 5 Lea (Tenn.), 685; Thomas *v.* Findlay, 6 Ohio Cir. Ct. R. 241; Kies *v.* Erie, 135 Pa. 144; Lilly *v.* Scranton (Pa.), 2 Lacka. Leg. N. 175; Dodge *v.* Granger, 17 R. I. 664; Shanewerk *v.* Ft. Worth, 11 Tex. Civ. App. 271; Lawson *v.* Seattle, 6 Wash. 184; Lynch *v.* North Yakima, 37 Wash. 657; Dunston *v.* New York, 91 N. Y. App. Div. 355; Manske *v.* Milwaukee, 123 Wis. 172, citing text; Welsh *v.* Rutland, 56 Vt. 228 (negligence in thawing out a hydrant causing ice in a street, by a fall upon which plaintiff was injured); Burrill *v.* Augusta, 78 Me. 118 (horse frightened by steam from an engine negligently left in the street); Baltimore *v.* O'Neill, 63 Md. 336, where the rule was applied to a case in which a discharged employee of the fire department sued for his salary accruing thereafter, the court holding that the city was not responsible for the act of the fire commissioners in discharging him. But if a member of the fire department be injured on his way to a fire, by a street which the city has negligently left in an unsafe condition, he may have his action the same as any one else. Turner *v.* Indianapolis, 96 Ind. 51. Whether member of fire department can recover against a city for personal injuries caused by an unsafe engine, see Lafayette *v.* Allen, 81 Ind. 166, where such a recovery was had, the liability of the city seemingly being assumed; *post*, § 1667.

[3] A full discussion and citation of the authorities on the question of the liability of a city or public service corporation for destruction of property of citizens and inhabitants by fire through failure or *neglect to furnish a sufficient supply of water* for fire pro-

§ 1661 (977). **Health Department; Liability for Negligence and for Torts of Health Officers.** — The power or even duty on the part of a municipal corporation to make *provision for the public health and for the care of the sick and destitute,* appertains to it in its governmental or public, and not in its corporate, or as it is sometimes called, private capacity.[1] And therefore where a city, under its charter, and the general law of the State enacted to prevent the spread of contagious diseases, *establishes a hospital,* it is not responsible to persons injured by reason of the misconduct of its agents and employees therein;[2] and, accordingly, the city of Richmond was

tection, will be found under the chapter on "Public Utilities," *ante,* § 1340.

[1] Love *v.* Atlanta, 95 Ga. 129; Wyatt *v.* Rome, 105 Ga. 312; Tollefson *v.* Ottawa, 228 Ill. 134; Green *v.* Eden, 24 Ind. App. 583; Williams *v.* Indianapolis, 26 Ind. App. 628; Lexington *v.* Batson's Adm'r, 118 Ky. 489; Having *v.* Covington (Ky.), 78 S. W. Rep. 431; Twyman's Adm'r *v.* Frankfort, 117 Ky. 518; Mitchell *v.* Rockland, 52 Me. 118; Webb *v.* Detroit Board of Health, 116 Mich. 516; Murray *v.* Grass Lake, 125 Mich. 2; Nicholson *v.* Detroit, 129 Mich. 246; Gilboy *v.* Detroit, 115 Mich. 121; Bryant *v.* St. Paul, 33 Minn. 289; Valentine *v.* Englewood, 76 N. J. L. 509; Prime *v.* Yonkers, 192 N. Y. 105; Bamber *v.* Rochester, 26 Hun (N. Y.), 587; Eddy *v.* Ellicottville, 35 N. Y. App. Div. 256; White *v.* San Antonio, 94 Tex. 313; s. c. (Tex. Civ. App.), 57 S. W. Rep. 858, citing text; Bates *v.* Houston, 14 Tex. Civ. App. 287, 289; Ostrom *v.* San Antonio (Tex. Civ. App.), 60 S. W. Rep. 591; Lowe *v.* Conroy, 120 Wis. 151. But see Deaconess Home & Hosp. *v.* Boutjes, 104 Ill. App. 484. Construction of *New Jersey* statute declaring that the members of boards of health shall not be subject to suit, unless upon proof that they acted without reasonable and probable cause to believe that the alleged disease was in fact prejudicial and hazardous to the public health. See Valentine *v.* Englewood, 76 N. J. L. 509.

[2] Tollefson *v.* Ottawa, 228 Ill. 134, s. c. 129 Ill. App. 139; Twyman's Adm'r *v.* Frankfort, 117 Ky. 518, citing text; Lexington *v.* Batson's Adm'r, 118 Ky. 489; Leavell *v.* Western Kentucky Asylum, 122 Ky. 213, 217, quoting text; Benton *v.* Boston City Hospital, 140 Mass. 13 (person injured by unsafe condition of stairs); Murtaugh *v.* Louis, 44 Mo. 479 (non-paying patient).

In locating a *small-pox hospital* boards of health exercise discretion confided to them as public officers, and a board of health is under no liability for negligence in the exercise of this discretion, whereby adjoining property is damaged. Barry *v.* Smith, 191 Mass. 78. But compare Haag *v.* Vanderburgh County, 60 Ind. 511, where the county was held liable *for creating a nuisance* in establishing a pest-house near plaintiff's residence. A city is not liable for the *negligent management of its pest-house,* in consequence whereof persons residing in the vicinity contract small-pox. Evans *v.* Kankakee, 231 Ill. 223; s. c. 132 Ill. App. 488. County held not liable in damages to an inmate of its hospital for *unskilful treatment* of the resident physician. Sherbourne *v.* Yuba County, 21 Cal. 113; Summers *v.* Daviess County, 103 Ind. 262. City *not liable for unlawful act of health committee* or other officers in taking possession of a house and using it for a small-pox hospital, without the consent of the owner and without legal authority. So held because the tort was committed by the city's officers in the performance of a public duty. Lynde *v.* Rockland, 66 Me. 309. *County board of health* held to be corporate body and vested by statute with function of a public nature and not impliedly liable in an action of tort for damages in the performance of official duty. Forbes *v.* Escambia County Board of Health, 28 Fla. 26.

The *same principle* of non-liability (in the absence of statute giving an action) *applies to trustees of public charities and to incorporated charitable institutions* maintained as public chari-

ld *not to be liable for the loss of a slave admitted to the hospital of the rporation* to be treated for the small-pox, and whom the servants

s and not for gain and profit. Her-'s Hospital Feoffees *v.* Ross, 2 ark & Fin. 507. Governors of a blic hospital held not liable to a tient for negligence of member of spital staff. Hillyer *v.* St. Bartholo-ew's Hospital, L. R. [1909] 2 K. B. 0. In McDonald *v.* Massachusetts neral Hospital, 120 Mass. 432, the spital, an incorporated charitable stitution, was held not to be liable damages to a patient for the negli-nce of the attending surgeon, the istees having used due care in his ection. See also Powers *v.* Massa-usetts Hom. Hospital, 109 Fed. Rep. 4; Hearns *v.* Waterbury Hospital, Conn. 98; Benton *v.* Boston City spital, 140 Mass. 13; Downes *v.* arper Hospital, 101 Mich. 555.

In Hordern *v.* Salvation Army, 199 Y. 233, rev'g 131 N. Y. App. Div. 0, it is held that the beneficiary of a aritable trust may not hold the cor-ration administering the trust liable the neglect of its servants, but is immunity does not affect the hts of those who are not such bene-iaries. Hence, a person employed a charitable corporation to perform rk upon its premises, may recover injuries resulting from the negli-nce of the corporation. *Cullen*, C. J., o delivered the opinion of the court, scussed the liability of hospitals and her charitable trusts, and pointed t where the doctrine obtains that eir immunity from liability is univer-l, *i. e.*, that immunity protects them m liability for torts in a question th all persons notwithstanding the aracter of their relation to the ciety, it is rested on the proposition at the funds of the corporation are e subject of a charitable trust, and at to suffer a judgment to be recov-d against a corporation and to bject its property to the judgment uld be an illegal diversion and ste of the trust estate. He said at this doctrine has been asserted the following cases: Parks *v.* North-stern University, 218 Ill. 381, 385; illiamson *v.* Louisville Industrial hool, 95 Ky. 251; Perry *v.* House Refuge, 63 Md. 20; Adams *v.* Uni-rsity Hospital, 122 Mo. App. 675; re Ins. Patrol *v.* Boyd, 120 Pa. St. 624; Abston *v.* Waldon Academy, 118 Tenn. 24. The learned Chief Judge pointed out that in *Massachusetts* the exemption of certain hospitals from liability seemed, by the opinions of the Supreme Court, to have been based rather on the theory that those institutions were governmental instrumentalities, than on their character as public charities, though they were recognized as such. Citing McDonald *v.* Massachusetts General Hospital, 120 Mass. 432; Benton *v.* Boston City Hospital, 140 Mass. 13. At the same time the Supreme Court of Massachusetts has held a religious corporation liable to a workman engaged in painting the ceiling of a church, for defective staging, Mulchey *v.* Methodist Religious Society, 125 Mass. 487; and a similar society liable to a person invited on the premises, for their defective condition, Davis *v.* Central Congregational Society, 129 Mass. 367; and still another liable to a traveller on the highway for having suffered snow to fall upon him from the roof of the church. Smethurst *v.* Barton Sq. Ind. Cong. Church, 148 Mass. 261. But in Farrigan *v.* Pevear, 193 Mass. 147, the same court held that the trustees of an incorporated charity for the education and maintenance of indigent boys were not liable for injuries caused by their servants, if they used proper care in their selection, distinguishing the Davis and Smethurst cases, *supra*. But in some other jurisdictions, the immunity of charitable corporations for the torts of their trustees or servants has been made dependent on the relation the plaintiff bore to the corporation. In *New York* it is unquestionably the law that the *beneficiary* of a charitable trust may not hold the corporation liable for the negligence of its servants. Collins *v.* New York Post Graduate Medical School, 59 N. Y. App. Div. 63; Joel *v.* Woman's Hospital, 89 Hun (N. Y.), 73. See also Pryor *v.* Manhattan Eye & Ear Hospital, 15 N. Y. Supp. 621; Haas *v.* Missionary Society, 6 N. Y. Misc. 281. It is also the law in *New York* that there is a similar immunity from liability in the case of a *charitable institution* of a *quasi-penal character*, as against an inmate committed to it

of the city in charge of the hospital negligently suffered, when delirious, to escape, wander off, and die.[1] Within these principles, *the enforcement of quarantine, and other health regulations*, is a public function, and the city is not liable for the negligence or tortious conduct of its officers and agents in connection therewith.[2] Hence the municipality is not impliedly liable for the act of its board of health, or other officers, in negligently permitting persons suffering from a contagious disease to spread the contagion.[3] Upon

for punishment or reformation. Corbett *v.* St. Vincent's Industrial School, 177 N. Y. 16. That decision proceeded on the ground that the defendant was engaged in the performance of a governmental duty for the benefit of the State in respect to persons committed to its custody and possessed the same immunity as the State. On the other hand, in Church of Ascension *v.* Buckhart, 3 Hill (N. Y.), 193, a recovery against a religious corporation by a person injured by the falling of a church wall was upheld. In Blaechinska *v.* Howard Mission, 56 Hun (N. Y.), 322 (rev'd 130 N. Y. 497, but on another point), a recovery was had against a charitable organization for the maintenance of a vault under the sidewalk with a defective cover. In other States the doctrine of total immunity has been rejected. Hewett *v.* Woman's Hospital Aid Association, 73 N. H. 556 (recovery by a nurse for failure to warn her against the presence of a contagious disease upheld); Bruce *v.* Central M. E. Church, 147 Mich. 230 (church held liable to workman for defective scaffolding).

Town held not liable for the unlawful and unauthorized act of the *board of health* in taking possession of a dwelling house without the consent of the owner and using the same as a hospital for a person found therein who was infected with a contagious disease and too sick to be removed. The act of the board of health was held to be entirely without authority. Spring *v.* Hyde Park, 137 Mass. 554.

Where the *statute declared it to be unlawful* to maintain any pest-house within the corporate limits of any city, or within the distance of one mile from the boundary thereof, and that any municipal officer violating the provisions of the act should be guilty of a misdemeanor, it was held that the city *was liable* for the illegal establishment and maintenance of a pest-house near plaintiff's residence whereby she was infected with small-pox. Clayton *v.* Henderson, 103 Ky. 228. But compare Arnold *v.* Stanford, 113 Ky. 852. Members of a board of health and other city officers *held liable under statute* providing that an action for damages on account of injuries causing death may be brought when the death of any person is caused by the wrongful act, negligence, unskilfulness or default of another, where it appeared that the defendants caused the removal of a person afflicted with small-pox and in so doing failed to exercise the care and precautions the circumstances demanded and death resulted. Aaron *v.* Broiles, 64 Tex. 316. But *quære* as to the construction and application of the statute to the case in hand.

[1] Richmond *v.* Long's Adm'r, 17 Gratt. (Va.) 375; approves Dargan *v.* Mobile, 31 Ala. 469; Stewart *v.* New Orleans, 9 La. An. 461; and goes on the ground that the duty here was public, and not private, and hence the city not liable for acts and defaults of its officers; and it was itself approved and followed in a similar case, in *Missouri*, Murtaugh *v.* St. Louis, 44 Mo. 479, in which it was held that the city was not liable to a non-paying patient in its hospital for injuries caused by the *neglect or misconduct of the hospital officers or servants*.

[2] Mitchell *v.* Rockland, 41 Me. 363, s. c. 45 Me. 496; s. c. 52 Me. 118; Valentine *v.* Englewood, 76 N. J. L. 509; White *v.* San Antonio, 94 Tex. 313; Bates *v.* Houston, 14 Tex. Civ. App. 287, 289. Duties imposed and powers conferred upon selectmen of town by statute when persons were infected by small-pox held to be imposed and conferred upon the selectmen, and not upon the town as a corporation; and the town held not liable for the acts or default of the selectmen. White *v.* Marshfield, 48 Vt. 20.

[3] In Ogg *v.* Lansing, 35 Iowa, 595,

similar principles, where the officers or employees of the city, acting for the protection of the public health, destroy private property to prevent the spread of contagion, there is no liability on the part of the city for the property so destroyed, in the absence of a statute directing that compensation shall be made.[1] So where a city corporation was, by statute, required to appoint *commissioners of public charities* to take care of paupers, destitute children, &c., it was held that the duties thus devolved upon the city were public and not corporate; that the commissioners were not the agents or servants of the city, but of the public; and, consequently, that the city corporation was not liable, on the principle of *respondeat superior*, for a negligent injury caused by an employee of the commissioners in driving an ambulance-wagon belonging to the city.[2]

§ 1662. **Street Cleaning; Removal of Ashes and Garbage.** — A diversity in opinion appears in the decisions as to the liability of a

on the principle that in discharging its legislative functions, a city is not liable for defective execution of its ordinances or for the negligence or nonfeasance of its officers and agents (*ante*, §§ 1626, 1627), it was held that a city was not liable to a civil action by a person injured by reason of its *neglect to take proper precautions to prevent the spread of small-pox*, or for the failure of its officers to notify the plaintiff, who was requested by them to assist in removing the corpse of a person who had died of this disease, of the dangerous nature of the services required of him. In Nicholson *v.* Detroit, 129 Mich. 246, the city was held not liable to plaintiff for sickness contracted by him in tearing down a pest-house, without warning by the health officer who employed him. A *nurse employed in a small-pox hospital* established by a town, was suffered to depart without being properly disinfected, whereby the plaintiff caught the disease. It was held that the town was not liable. Brown *v.* Vinalhaven, 65 Me. 402. A *well person was wrongfully carried to a small-pox hospital* where he contracted the disease. It was held that there was no liability. Barbour *v.* Ellsworth, 67 Me. 294. Where the board of health of a city negligently permitted a person who had been exposed to small-pox to become a boarder in a house, whereby the contagion was spread, it was held that the city was not liable. Gilboy *v.* Detroit, 115 Mich. 121. City held not liable for act of policeman in taking person exposed to small-pox into a house occupied by fire department, thereby exposing the employees to contagion. Lynch *v.* North Yakima, 37 Wash. 657.

[1] Perry *v.* Oregon, 139 Ill. App. 606; Louisa County *v.* Yancey, 109 Va. 229. As to power to demolish buildings when the public welfare and safety demand it, see *ante*, § 1632.

[2] Maxmilian *v.* New York, 62 N. Y. 160, distinguishing Jones *v.* New Haven, 34 Conn. 1; approved in Haight *v.* New York, 24 Fed. Rep. 93, where *Brown*, J., held that an action in admiralty against the city could not be maintained for damages for a collision between a schooner and a steamboat owned by the city, but in the exclusive use and control of the board of commissioners of charities and correction, and while navigated by a pilot employed by the commissioners, the reason being that that is an independent board over which the city corporation has no control, and which does not act for the use or benefit of the city in the discharge of any of its corporate functions or duties. See also *supra*, § 1655, note; Bailey *v.* New York, 2 Denio (N. Y.), 433; Conrad *v.* Ithaca Trs., 16 N. Y. 158; and citing with approval Oliver *v.* Worcester, 102 Mass. 489; Hafford *v.* New Bedford, 16 Gray (Mass.), 297; Fisher *v.* Boston, 104 Mass. 87; Eastman *v.* Meredith, 36 N. H. 284.

municipal corporation for the *negligence or torts of officers and agents* of the municipality engaged in the cleaning of streets and in the removal of ashes and garbage from private premises. In some jurisdictions these duties are regarded as governmental in their nature and any *implied liability of the city* for the negligence or torts of its employees in the performance of their duties in these matters is denied.[1] But in other jurisdictions *the contrary view is adopted* and the municipality has been held impliedly liable for the negligent acts of employees of its department of street cleaning.[2] In other cases the principle that the city acts in a private or corporate capacity and not in the performance of a governmental function in the removal of ashes and garbage from the city, has been affirmed by the courts, and the city has, by virtue thereof, been held to be liable for *creation of a nuisance in the maintenance of dumps* in the vicinity of other property.[3]

§ 1663 (978). **Fault of City Engineer.** — A municipal corporation is not responsible for the mistake or the want of care or skill of the *city surveyor or engineer*, whether appointed and removable by it or elected by the people, when he performs duties (though the performance thereof be regulated by ordinance) for or between

[1] Young *v.* Metropolitan St. R. Co., 126 Mo. App. 1; Haley *v.* Boston, 191 Mass. 291 (negligence of driver of ash-cart); Johnson *v.* Somerville, 195 Mass. 370; Condict *v.* Jersey City, 46 N. J. L. 157 (driver of ash-cart). Where the duty of keeping the streets clean was devolved by *charter upon the board of health of the city*, it was held that the functions of the board of health were governmental, and that a private citizen could *not* recover from the city for injuries caused through the negligence of an employee. Love *v.* Atlanta, 95 Ga. 129. See also Kuehn *v.* Milwaukee, 92 Wis. 263 (garbage). *Driver of a street-sprinkling cart* held to be engaged in the performance of a governmental, and not of a mere ministerial duty, and city held not liable for his negligence in colliding with and overturning a buggy. Conelly *v.* Nashville, 100 Tenn. 262. See also Savage *v.* Salem, 23 Oreg. 381.

[2] Missano *v.* New York, 160 N. Y. 123, rev'g 17 N. Y. App. Div. 536 (negligence of driver of ash-cart); Quill *v.* New York, 36 N. Y. App. Div. 476 (disapproving Bishop *v.* New York, 21 N. Y. Misc. 589, and Davidson *v.* New York, 24 N. Y. Misc. 560). In Barney Dumping-Boat Co. *v.* New York, 40 Fed. Rep. 50, the *commissioner of street cleaning of New York City* was held to be the agent of the city and not an officer of the general public, and the city was held liable for the *negligence of a tug* which was under the immediate employment of the commissioner of street cleaning.

[3] Denver *v.* Porter, 126 Fed. Rep. 288; Denver *v.* Davis, 37 Colo. 370; Ostrom *v.* San Antonio, 94 Tex. 523; Coleman *v.* Price (Tex. Civ. App.), 117 S. W. Rep. 905; Paris *v.* Jenkins (Tex. Civ. App.), 122 S. W. Rep. 411. See also as to the liability of the city for the creation of a nuisance, by the manner in which it maintained its *dumping grounds*, Shreck *v.* Coeur d'Alene, 12 Idaho, 708; Ft. Worth *v.* Crawford, 74 Tex. 404; s. c. 64 Tex. 202; Stephenville *v.* Bower, 29 Tex. Civ. App. 384. City held liable for depositing garbage in a sewer near plaintiff's residence, thus *creating a nuisance* causing sickness, and depreciating the value of the plaintiff's property. Knoxville *v.* Klasing, 111 Tenn. 134. Index — *Nuisances.*

rivate individuals, as, for example, fixing the boundary between heir lots.[1] In such case, the principle of *respondeat superior* does not pply, as it does or may when this officer acts for the corporation, r under its direction in making corporate improvements.[2]

§ 1664 (979). **Wrongful Acts and Negligence of Highway and treet Officers.** — On the same principle, treating *surveyors of highays* elected by the town as public, rather than municipal officers, New England town is not liable for an injury sustained by a person by reason of the negligence of a laborer, in the course of his mployment by the highway surveyor to aid him in the discharge f his official duty. Nor is it liable for damages occasioned by *the rongful acts of the surveyor himself* in performing his official duties.[3]

[1] Alcorn *v.* Philadelphia, 44 Pa. St. 48. *Thompson*, J., considered it as a ase of first impression, and distinuished it from those asserting cororate liability for defective streets. rie *v.* Schwingle, 22 Pa. St. 384; Dean *v.* New Milford Township, 5 Vatts & S. (Pa.) 545; Dayton *v.* 'ease, 4 Ohio St. 80, 100, *per Ranney*, ., and see *Ib.* 416; *infra*, § 1677, note; nyder *v.* Lexington (Ky.), 49 S. W. Rep. 765; Kidson *v.* Bangor, 99 Me. 39; Normile *v.* Ballard, 33 Wash. 369; IcCarty *v.* Bauer, 3 Kan. 237 (personal ction against engineer for erroneous urvey); Waller *v.* Dubuque, 69 Iowa, 41. *When personally liable. Ib. Ante*, § 433–434, note.

[2] Dayton *v.* Pease, 4 Ohio St. 80, 'here the city was held liable for njuries caused by the fall of a bridge, wing to the negligence and want of kill of the city engineer. McCarty *v.* Bauer, *supra;* Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463; *supra*, 1647; Kobs *v.* Minneapolis, 22 Minn. 59, 164; Sievers *v.* San Francisco, 115 Cal. 648; Augusta *v.* Little, 115 Ga. 24; Goldschmid *v.* New York, 14 N. Y. App. Div. 135; O'Brien *v.* New York, 15 N. Y. Supp. 520. Liability for negligence of *city engineer* in he construction of city waterworks. aylor *v.* Harrisburg, 87 Pa. St. 216.

[3] Walcott *v.* Swampscott, 1 Allen Mass.), 101; Barney *v.* Lowell, 98 Mass. 570; Hennessey *v.* New Bedord, 153 Mass. 260; Willoughby *v.* Allen, 25 R. I. 531; *supra*, § 1651, ote; Judge *v.* Meriden, 38 Conn. 90; hearm. & Red. Neg., §§ 259, 288. Compare Foreman *v.* Canterbury, Law Rep. 6 Q. B. 214. Limited powers of New England town. *Ante*, §§ 40, 41; *supra*, § 1641, note. But if a town assumes to perform the duty by its own agents, whom it directs and controls, *respondeat superior* may apply. Waldron *v.* Haverhill, 143 Mass. 582, and cases cited. And the surveyor himself is only liable in damages for wanton, malicious, or improper acts in making or repairing the highways in his district. Rowe *v.* Addison, 34 N. H. 306, 312, and cases cited. As to the individual liability of municipal officers, see *ante*, §§ 433–444.

Constables, though appointed by the town, are not its agents or servants, and the town is not liable for their default, the statute not having so provided. Hurlburt *v.* Litchfield, 1 Root (Conn.), 520. And so, in *New York, town assessors and collectors of taxes are independent public officers*, and not the agents or servants of the towns in their corporate capacity. Lorillard *v.* Monroe, 11 N. Y. 392. See Bank of Commonwealth *v.* New York, 43 N. Y. 184. Relator, an overseer of highways in a town, under direction of the commissioner of highways in that town, committed a trespass upon the premises of a person, it being believed at the time that the act was lawful. He brought action against relator for the trespass. Relator gave no notice to the town authorities, or to the town, of the action, and made no application to the electors at any town meeting, or to any of the town officers for advice as to the action, but defended it on his own motion. Judgment was recovered against him

But it would be otherwise where the working and repair of streets is treated (as in many of the States it is) as a municipal duty, and the officer in charge as a corporate, in distinction from an independent, public officer, or where the injury was negligently caused by such officer in the process of executing upon the streets an authorized *corporate* improvement or work, for then the doctrine of *respondeat superior* would apply.[1]

§ 1665 (980). **Basis of Implied Municipal Liability.** — The doctrine may be considered as established, *where a given duty is a corporate one*, that is, one which rests upon the municipality in respect of its special or local interests, and not as a public agency of the State, and *is absolute and perfect*, and not discretionary or judicial in its nature, and *is one owing to the plaintiff*, or in the performance of which he is specially interested, that *the corporation is liable in a civil action* for the damages resulting to individuals by its neglect to perform such duty, or for the want of proper care or want of reason-

in the first instance, and he took successive appeals until the case reached the Court of Appeals, in all of which he was defeated. It was held, under the legislation of New York, that, even if the trespass was committed by direction of the town authorities, plaintiff had no valid claim against the town for the expense he was subjected to by the litigation. It was further held, that the town would in no event be liable for a wrongful act committed by direction of the commissioner of highways, since no corporate duty, in *New York*, is imposed upon a town in respect to the care, superintendence, and regulation of highways within its limits, and it has in its corporate capacity no control over the highways, and highway officers are not agents of the town. People *v.* Esopus Aud., 74 N. Y. 310.

In *Vermont* towns are made liable by statute for "*default*" or "*neglect*" of *town clerks* in respect to *official* duties. Hunter *v.* Winsor ("index" or "alphabet" book), 24 Vt. 327; *Ib.* 338, 580. *What are official acts or defaults?* Lyman *v.* Edgerton, 29 Vt. 305; Jarvis *v.* Barnard, 30 Vt. 492.

[1] *Infra*, §§ 1708–1717, 1741, *et seq.*; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463; Kobs *v.* Minneapolis, 22 Minn. 159, 164; Eastman *v.* Meredith, 36 N. H. 295, *per Perley*, C. J., *obiter;* Baker *v.* Boston, 12 Pick. (Mass.) 184; Thayer *v.* Boston, 19 Pick. (Mass.) 511, 516; McCann *v.* Waltham, 163 Mass. 344; Norton *v.* New Bedford, 166 Mass. 48; *supra*, §§ 1651, 1652, note; *post*, § 1731. In Scott *v.* Manchester, 37 Eng. Law & Eq. 495 (s. c. 1 H. & N. 59), by the *negligence* of workmen employed by the *city in laying its own gaspipes* in the streets, the plaintiff's eye was injured, and the city held liable on the principle of *respondeat superior*. Affirmed on appeal, 2 H. & N. 204. Same principle, Foreman *v.* Canterbury, Law Rep. 6 Q. B. 214. *Post*, § 1668, note. So, in Delmonico *v.* New York, 1 Sandf. (N. Y.) 222, the plaintiff recovered for damages occasioned by the negligence of the defendants in constructing a sewer. There was a recovery against the city in Lloyd *v.* New York, 5 N. Y. 369, for the negligence of persons employed by the proper officers of a corporation in leaving a dangerous hole in the street over night, in the process of repairing the public sewers; s. p. Grimes *v.* Keene, 52 N. H. 330; Bathurst *v.* MacPherson, L. R. 4 App. Cases, 256; *infra*, §§ 1739–1747, as to sewers; *supra*, § 1626. The adjudged cases differ, as elsewhere shown, as to what are public, and what corporate, undertakings; but the *principle* on which the liability turns is the one stated in the text.

able skill of its officers or servants acting under its direction or authority in the execution of such a duty; and, with the qualifications stated, it is liable, on the same principles and to the same extent, as an individual or private corporation would be under like circumstances.[1] For illustration, if a city neglects its *ministerial duty to cause its sewers* to be kept free from obstructions, to the injury of a person who has an interest in the performance of that duty, it is liable, as we shall see, to an action for the damages thereby occasioned.[2] So, if a *city owns a wharf or pier* and receives wharfage or profit therefrom, it is liable, like an individual or private corporation, for injuries caused by a failure to keep it in proper condition

[1] Lloyd *v.* New York, 5 N. Y. 369; McCullough *v.* Brooklyn, 23 Wend. 458; Clayburgh *v.* Chicago (refusal to collect assessment), 25 Ill. 535. Distinguished, Saxton *v.* St. Joseph, 60 Mo. 153; Sterrett *v.* Houston, 14 Tex. 153. But was the duty here a corporate one? McLaughlin *v.* Municipality No. 2, 5 La. An. 504; Walling *v.* Shreveport, *Ib.* 660; Richmond *v.* Long's Adm., 17 Gratt. (Va.) 375; Sawyer *v.* Corse, 17 Gratt. (Va.) 230; Lacour *v.* New York, 3 Duer (N. Y.), 406; Conrad *v.* Ithaca, 16 N. Y. 158; Barton *v.* Syracuse, 36 N. Y. 54. Text cited and applied. Helena *v.* Thompson, 29 Ark. 569, 574; Orme *v.* Richmond, 79 Va. 86; Denver *v.* Dunsmore, 7 Colo. 328; Denver *v.* Dean, 10 Colo. 375; Greencastle *v.* Martin, 74 Ind. 449 (animal injured in pound); Giovanni *v.* Philadelphia, 59 Fed. Rep. 303, citing text; Vaughtmann *v.* Waterloo, 14 Ind. App. 649; Platz *v.* Cohoes, 89 N. Y. 219; Levy *v.* Salt Lake City, 3 Utah, 63; Orth *v.* Milwaukee, 59 Wis. 336; Spelman *v.* Portage, 41 Wis. 144. See especially Judge *Thompson's* collection of leading cases on Municipal Negligence, and his valuable notes. 2 Thomps. Neg., pp. 625 *et seq.*, 737. In Lafayette *v.* Allen, 81 Ind. 166 (noted *supra*, § 1660, note), an action by an employee of the fire department for injuries caused by a defective fire-engine, it was held, on the point of notice, to be sufficient on demurrer, that complaint alleged notice to the city of the unsafe condition of the engine, and that it was not necessary to allege specifically that the defect was known to some proper officer of the city. The liability of the city seemed to be assumed. *Supra*, § 1626; *infra*, §§ 1688, 1737–1747. The rule stated in the text should not, perhaps, be extended to a case where the effect of a recovery would be to charge the corporate treasury with a burden which does not belong to it, and where the person injured by the neglect to perform the duty can compel an execution of it by *mandamus* to the proper officers of the corporation. But the cases on this point are not uniform. McCullough *v.* Brooklyn, *supra; ante*, §§ 827, 1487, note; *post*, § 1681. *When duty rests upon the corporation and when upon its officers in their individual capacity. Ante*, § 247; Martin *v.* Brooklyn, 1 Hill (N. Y.), 545. Were the trustees here *independent* corporate officers? See Conrad *v.* Ithaca Trs., 16 N. Y. 158; Hickok *v.* Plattsburgh, 16 N. Y. 161. Affirmed, Weed *v.* Ballston, 76 N. Y. 329; Hartford & N. Y. S. Co. *v.* New York, 78 N. Y. 1.

It is also held in Canada that a municipal corporation may be sued for negligence in the construction of a sewer, for wrongfully obstructing a drain or water-course, or for diverting a stream of water on the plaintiff's land. Farrell *v.* London, 12 Up. Can. Q. B. 343; Reeves *v.* Toronto, 21 Up. Can. Q. B. 157; Perdue *v.* Chinquacousy Tp. Corp., 25 Up. Can. Q. B. 61. The corporation must be connected with the doing of the wrongful act. Farrell *v.* London, *supra; post*, §§ 1731–1747.

[2] *Infra*, §§ 1635, and note, 1739–1745; Franklin Wharf Co. *v.* Portland, 67 Me. 46, and note; Lloyd *v.* New York, 5 N. Y. 369; Hourigan *v.* Norwich, 77 Conn. 358; Norton *v.* New Bedford, 166 Mass. 48; Shearm. & Red. Neg. (4th ed.) § 287, and cases.

and repair.[1] So in respect to its failure to keep its *streets* in a safe condition for public use, where this is a duty resting upon it.[2]

§ 1666 (981). **Ground of Implied Liability.** — The liability of the corporation for its own negligence, or that of its servants, is especially clear and in fact indisputable, where it *has received a consideration* for the duty to be performed, or where, under permissive authority from the legislature, it voluntarily assumes and carries on a work or undertaking from which it receives tolls or derives a profit.[3]

[1] *Ante*, § 274; Skinkle *v.* Covington, 1 Bush, 617; Fennimore *v.* New Orleans, 20 La. An. 124; Seaman *v.* New York, 80 N. Y. 239; Radway *v.* Briggs, 37 N. Y. 256; Allegheny *v.* Campbell, 107 Pa. St. 530; Willey *v.* Allegheny, 118 Pa. St. 490; Bowden *v.* Kansas City, 69 Kan. 587. Liability for dangerous approach to, see Carleton *v.* Franconia Iron & S. Co., 99 Mass. 216; Pittsburg *v.* Grier, 22 Pa. St. 54; Erie *v.* Schwingle, 22 Pa. St. 384; Memphis *v.* Kimbrough, 12 Heisk. (Tenn.) 133. *Infra*, §§ 1666, note, 1668.

Plaintiff was backing up his cart to a dock owned by the city for the purpose of loading it; his horse became unmanageable and backed off the dock, and was lost. The loss was sustained by the negligence of the city in failing to have a string-piece on the dock. The absence of the string-piece was the proximate cause of the loss, and the city, being charged with the duty of keeping it there, is liable, although at the moment the horse was not obedient to the will of his owner. Kennedy *v.* New York, 73 N. Y. 365, s. P. Clark *v.* Union Ferry Co., 35 N. Y. 485; Radway *v.* Briggs, 37 N. Y. 256; McGuiness *v.* New York, 52 How. Pr. (N. Y.) 450; Swords *v.* Edgar, 59 N. Y. 28; Shearm. & Red. Neg. (4th ed.) § 285, and cases.

[2] *Infra*, § 1708 *et seq.* A city held not to be liable in damages for injuries caused by the negligence of a *fellow-workman*. McDermott *v.* Boston, 133 Mass. 349.

Coasting on public streets. For injuries suffered by one passing along or over a public street in a city, with persons "*bobbing or coasting*" on such street, the city is not liable. Schultz *v.* Milwaukee, 49 Wis. 254; Lafayette *v.* Timberlake, 88 Ind. 330; Burford *v.* Grand Rapids, 53 Mich. 98; Faulkner *v.* Aurora, 85 Ind. 130; Pierce *v.* New Bedford, 129 Mass. 534; Steel *v.* Boston, 128 Mass. 583; Dudley *v.* Flemingsburg, 115 Ky. 5; Miller *v.* Canton, 112 Mo. App. 322. While this may be a *public nuisance*, its suppression is a *police duty*, and not a duty in which a corporation, as such, has a particular interest, or from which it derives any special benefit, in its corporate capacity, and for the non-performance of such duty by its officers and agents the corporation is not liable. Hayes *v.* Oshkosh, 33 Wis. 314; Schultz *v.* Milwaukee, 49 Wis. 254; Wallace *v.* Menasha, 48 Wis. 79. See Taylor *v.* Cumberland, 64 Md. 68.

[3] Scott *v.* Manchester (carrying on gas works), 2 H. & N. 204, aff'g s. c. 1 H. & N. 59; Cowley *v.* Sunderland, 6 H. & N. 565; Pittsburg *v.* Grier, 22 Pa. St. 54; Mersey Dock Cases, 11 H. Lds. Cases, 687; Henley *v.* Lyme Regis, 2 Cl. & F. 331; Milnes *v.* Huddersfield, L. R. 10 Q. B. Div. 124, 125; Bathurst *v.* MacPherson (nuisance in highway), L. R. 4 Appeal Cases, 256; Greensboro *v.* McGibbony, 93 Ga. 672; Lorence *v.* Ellensburgh, 13 Wash. 341; Leavell *v.* Western Kentucky Asylum, 122 Ky. 213, 217, citing text; Clark *v.* Manchester, 62 N. H. 577, 579, citing text. *Infra*, § 1673, note. If a tug owned by a city is employed for profit, the city is liable for a collision caused by its fault. Giovanni *v.* Philadelphia, 59 Fed. Rep. 303. A town which accepts a statute authorizing it to lay and maintain *water pipes for the purpose of supplying the inhabitants with water*, at rates established by the town, is liable for an injury sustained by a traveller upon a highway of the town, which has been un-

§ 1667 (982). **Same Subject.** — Thus, where a street was negligently rendered unsafe by a stream of water thrown across it from a hydrant of the water-works owned by the city, and from which the *city derived the rents and profits*, which stream of water caused the plaintiff's horse, while being driven in the street, to take fright, run away, and receive injuries from which it died, the city was held liable. The employees of the water commissioners guilty of the negligence were regarded as the agents or servants of the city, and it was not material that the public was entitled to the use of the water for the extinguishment of fires.[1]

dermined by water escaping from the pipes by reason of negligence in their construction, although the circumstances are such that no action lies for a defect in the highway. The neglect was in the construction of work which the town had been authorized by special statute, voluntarily accepted, to construct and to receive the profits thereof, just as a private corporation might. For negligence in the manner of constructing such works, by which injury is caused to person or property, a town is just as liable as a private corporation or an individual. Murphy *v.* Lowell, 124 Mass. 564; Hand *v.* Brookline, 126 Mass. 324; Wilson *v.* New Bedford, 108 Mass. 261; Aldrich *v.* Tripp, 11 R. I. 141; Levy *v.* Salt Lake City, 3 Utah, 63; Grimes *v.* Keene, 52 N. H. 330, 335. See *ante*, § 1665; *infra*, §§ 1667, note, 1668 and note, 1669, 1672, note, 1673, note. *So where city supplies gas.* Scott *v.* Manchester, *supra;* Western Sav. Soc. *v.* Philadelphia, 31 Pa. St. 175; Kibele *v.* Philadelphia, 105 Pa. St. 41. A municipality owning and controlling a *wharf and charging tolls for its use* is bound to use the same care to provide appliances that an individual owner would be bound to use under like circumstances. Manhattan Transportation Co. *v.* Mayor, &c., 37 Fed. Rep. 160; Philadelphia & R. R. Co. *v.* New York, 38 Fed. Rep. 159; Pittsburgh *v.* Grier, 22 Pa. St. 54; Schoonmaker *v.* New York, 167 Fed. Rep. 975; Willey *v.* Allegheny, 118 Pa. St. 490; Allegheny *v.* Campbell (measure of duty), 107 Pa. St. 530. *Ante*, §§ 274, 1665.

The defendants, an incorporated local board, having charge of *both water supply and highways*, fixed the iron cover of a valve connected with the water main in the highway, in a proper manner. In consequence of the ordinary wear of the highway, the valve cover projected an inch above the highway. Plaintiff's horse stumbled and was injured. On the ground that it was the duty of the defendants to so manage the works under their care as not to create a nuisance to the highway, it was held that the plaintiff was entitled to recover. "The duty was cast upon the defendants to keep the artificial works which they had created [in the highway] in such a state as to prevent its causing a danger to passengers on the highway, which but for such artificial construction would not have existed." Kent *v.* Worthing Local Board, L. R. 10 Q. B. Div. 118, distinguishing Russell *v.* Men of Devon, 2 T. R. 661, 667, and Gibson *v.* Preston, L. R. 5 Q. B. 218; and following and applying White *v.* Hindley L. Bd. of H., L. R. 10 Q. B. 219, where accident caused by defective grate left in the highway, and Borough of Bathurst *v.* Macpherson, L. R. 4 App. Cases, 256, where accident caused by the defective state of a barrel drain in the highway, were held to be actionable. *Infra*, §§ 1671, 1673, note.

[1] Aldrich *v.* Tripp, Treas., 11 R. I. 141. The water commissioners were elected under an act conferring upon the city of Providence (the real defendant) certain powers to enable it to bring into the city a supply of pure water. The only point of controversy was whether the *water commissioners were the agents or servants of the city*, it appearing that they were elected and paid by the city, but derived their authority from an act of the legislature, and after their election were not, in all respects, under the control of the city. It was held that they were the agents of the city, and the case

§ 1668 (983). **Same Subject; Author's Conclusions.** — The author is of the opinion that the American cases fully support the doctrine above laid down in § 1665. Possibly the English cases have not gone quite so far. It is certain, however, that the doctrine stated in § 1666 has the uniform sanction of the American and of the English courts. It is maintained by a learned American judge that the English cases referred to in his instructive and useful opinion below given, go no further than to assert that there is an *implied* liability only where the duty imposed upon a municipality is of such a nature as is ordinarily performed by trading or private corporations, and does not exist where the duty is imposed solely for the benefit of the public, without any consideration or emolument received by the corporation.[1] However this may be, the American

was considered as falling within the principle of Bailey *v.* New York, 3 Hill (N. Y.), 531 (*post*, § 1669, note), and the class of cases to which that case belongs; and was distinguished from Buttrick *v.* Lowell, 1 Allen, 172; *ante*, § 1656; Hafford *v.* New Bedford, 16 Gray, 297; *ante*, § 1660; Wheeler *v.* Cincinnati, 19 Ohio St. 19; *ante*, § 1660, where it is held that members of the fire department are *public* and not *corporate* officers, although appointed and paid by the city corporation. See *ante*, § 1655, note; *post*, § 1672, note.

[1] *Ante*, § 1642; *post*, §§ 1673, 1674.

The leading *English decisions* on the subject of the *implied liability of municipal corporations for tortious injuries causing damage to others*, and the reasons on which they rest are thus stated by *Gray*, C. J., in his learned opinion, in Hill *v.* Boston, referred to, *ante*, § 1642:

"A municipal corporation, empowered by act of Parliament *to construct gas-works*, and to supply the gas upon such terms as might be agreed upon with the persons supplied, and to sell and dispose of the coke, and to apply the surplus profits to the improvement of the town, was held liable for a personal injury caused by the negligence of a workman employed by the corporation to lay the gas-pipes. But the reason of that decision as declared by *Cockburn*, C. J., delivering the judgment in the Exchequer Chamber, was that 'the corporation and the township derive a profit from the carrying on of the works,' or, as he afterwards said, 'the defendants were thus in the nature of a trading corporation.' Scott *v.* Manchester, 1 H. & N. 59; s. c. 2 H. & N. 204; Coe *v.* Wise, 5 B. & S. 440, 475. [*Ante*, § 1666.]

"In another case, the defendants were held liable for a personal injury suffered from the *negligent and dangerous construction of machines in washhouses* which they had been authorized by statute to erect, and for the use of which the plaintiff and other persons using the same paid them compensation. Cowley *v.* Sunderland Bor., 6 H. & N. 565.

"The House of Lords, affirming the judgments in the Exchequer Chamber and reversing the judgment of the Court of Exchequer, held that the members of the town council of Liverpool and their successors, who had been formed by acts of Parliament into a corporation by the style of The Trustees of the Liverpool Docks (Mersey Docks *v.* Gibbs, L. R. 1 H. L. 93; s. c. 11 H. L. 686, given in full in 1 Thompson on Negligence, 581), were liable for *an injury to a vessel from a bank of mud* which had been negligently suffered to remain in the docks. That case has been so often relied on by American courts, as extending the liability of municipal corporations to private action, that it is important to consider the substance of the acts of Parliament by which the corporation was created, and the grounds upon which the decision proceeded.

"The effect of those acts of Parliament, as defined by *Blackburn*, J., in delivering the opinion of the judges,

cases, especially those relating to liability in damages for defective streets, and for negligence in the performance of corporate duties of

which was approved by the House of Lords, was that the dock trustees were empowered to make and maintain docks and warehouses which were to *be open to the use of the public, paying dock rates for the use of the docks, and warehouse rates* for the use of the warehouses; the same accommodation and the same services were to be supplied to those using the docks and the warehouses respectively that would have been supplied by any ordinary dock and warehouse proprietors to their customers; powers were given to the trustees from time to time to close the docks for the purpose of cleansing and repair; the revenues were to be applied in the first instance to making and maintaining the docks, and paying all the charges and expenses incurred in carrying into execution, or under or in consequence of, the acts of Parliament, and the interest, and ultimately the principal, of a large debt secured by the dock rates; and when it was all paid off, the trustees were required to lower the rates as far as could be done, leaving sufficient for defraying all charges of management and other concerns of the docks, and of improving, repairing, and maintaining the same, and of carrying into execution the provisions of the acts of Parliament.

"In delivering judgment in the Exchequer Chamber, *Coleridge*, J., said: 'In the case of Lancaster Canal Co. *v.* Parnaby (11 A. & E. 222), the defendants would have been responsible under such circumstances if they had had a beneficial interest in the tolls when received; and we do not think the principle of that decision inapplicable because the defendants in the present case received the tolls as trustees. The duty, in our opinion, is equally cast on those who have the receipt of the tolls and the possession and management of the dock vested in them, to forbear from keeping it open for the public use of every one who chooses to navigate it on payment of the tolls, when they know it cannot be navigated without danger, whether the tolls are received for a beneficial or for a fiduciary purpose; and for the consequences of this breach of duty we think they are responsible in an action.'

"In the House of Lords, the grounds of the decision were that in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created; that corporations formed for trading and other profitable purposes, though acting without reward to themselves, yet in their very nature are substitutions on a large scale for individual enterprise, and, in the absence of anything in the statutes which create such corporations showing a contrary intention in the legislature, the true rule of construction is that the legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be coextensive with that imposed by the general law on the owners of similar works; and the House of Lords had already decided (Jones *v.* Mersey Docks, 11 H. L. Cas. 443) that the trustees of the Liverpool Docks were liable to pay poor rates as occupiers of the docks, for the very reason that they did not occupy as servants of the public or government.

"Lord Chancellor *Cranworth*, after saying that the fact that those in whom the docks were vested did not collect tolls for their own profit, but merely as trustees for the benefit of the public, made no difference in principle in respect to their liability, added: 'It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed.'

"The earliest and the most important of the modern English cases on this subject is Henley *v.* Lyme Regis, — decided successively in the Court of Common Pleas, 5 Bing. 91; 3 Mo. & P. 278; in the King's Bench, 3 B. & Ad. 77; and in the House of

an absolute or ministerial nature (as distinguished from State or public duties), have, as elsewhere shown in this work, declared and enforced against municipal corporations proper (in distinction from *quasi* corporations) a measure of liability greater than that which is thus claimed to be the limit of such liability so far as it is recognized by the existing judgments of the English courts.[1] The general result of the American cases is stated in the sections of the text above mentioned, and in those referred to in the notes to this section.

§ 1669 (984). **Liability of City of New York as Owner of Croton Water Works; New York v. Bailey.** — The city of New York, as the *owner of a dam on the Croton River*, situate upon lands the *title* to which was in the city, and being part of the works built to supply the city and its inhabitants with pure water, was, after great consideration, held liable, though the dam was constructed at the instance and expense of the city, by *water commissioners* appointed by the *State*, and not by or under the control of the city authorities, to an action for injuries sustained by a third person in consequence of the dam (which was negligently and unskilfully built) being carried away by a freshet.[2]

Lords, 2 Cl. & Fin. 331; 8 Bligh N. R. 690; 1 Bing. N. C. 222; 1 Scott, 29. This is the case which has been most often cited in this country to establish the general doctrine that a municipal corporation, required by law to construct and keep in repair highways, buildings, or public works for the benefit of the public, is liable to an action for negligence in such construction or repair, whereby the plaintiff suffers special injury. But the decision affirmed no such general doctrine. The corporation of Lyme was held liable to a private action for damages suffered by reason of its neglect to repair certain sea-walls, upon the ground that the royal charter, which had been accepted by the corporation, manifested an intention to render the corporation liable to such suits; because the charter showed that the duty to make such repairs was the condition and consideration upon which the corporation was granted certain franchises and acquitted of certain rents. This is distinctly stated in the judgment of the Court of Common Pleas, delivered by *Best*, C. J.; in that of the King's Bench, delivered by Lord *Tenterden;* and in the opinion of the judges, delivered by *Park*, J., in the House of Lords, and affirmed by the judgment of that house."

[1] *Ante*, §§ 109, 1638–1646, 1655–1667, *post*, §§ 1689, 1690, 1713, 1714, and cases cited, and comments on Hill *v.* Boston, 122 Mass. 344; Index, tit. *County; Quasi Corporations*. Negligence of Quasi Corporations, 1 Thomps. Neg., chap. xv. pp. 575–624, where the cases of Russell *v.* Men of Devon, 2 Term Rep. 661, 667, and Mersey Docks Cases, L. R. 1 H. L. Cas. 93 are reprinted in full and annotated. Negligence of Municipal Corporations, 2 Thomps. Neg., chap. xvi. pp. 625–806, where several leading American cases are reprinted and usefully annotated.

[2] New York *v.* Bailey, in Court of Errors, 2 Denio (N. Y.), 433; same case, names reversed, in Supreme Court, 3 Hill (N. Y.), 531; reprinted 2 Thomps. Neg. 652. While there was no doubt in the opinion of the Supreme Court, and comparatively little in the Court of Errors, that the city was liable, there was much diversity of

§ 1670. Public Utilities; Liability for Negligence in Constructing and Maintaining Waterworks, Gas and Electric Light Plants, &c. — We have already discussed the subject of the liability of a municipal corporation for its failure to furnish a sufficient supply of water

opinion as to the ground of the liability. The Supreme Court (3 Hill, *supra*) makes the case turn upon the question "whether the water commissioners, charged with the immediate superintendence and execution of the work, stand in the relation of agents deputed by *the city* to perform this duty." They hold that the city, by voluntarily accepting the benefits of the acts, by approving the plan of the commissioners, and by instructing them to proceed with the execution of the work, adopted and constituted the commissioners the *agents of the city;* and therefore, on the principle of *respondeat superior*, it was liable for *their* neglect and want of skill in the erection of the dam. In the Court of Errors (2 Denio, above cited), Chancellor *Walworth* doubted this basis of the defendant's liability, and said: "It is upon the ground that the dam was the property of the city corporation, and that such corporation was legally bound to see that its corporate property was not used by any one so as to become noxious to the occupiers on the river below, that the judgment [of the Supreme Court] in the case must be sustained, if it can be sustained at all. And upon that ground, though, I confess, with some hesitation, I shall assent to the affirmance of the judgment of the court below." It was affirmed by nineteen members against four; but as the most of them delivered no opinions, the exact grounds of the affirmance cannot be known. We do not doubt that Chancellor *Walworth's* position is sound, and it seems to us equally clear that the view of the Supreme Court, that the water commissioners became the agents of the city by adoption, is correct. On both grounds the liability of the city was indubitable, and would now (1911) not be seriously questioned anywhere. *Denio*, C. J., in Darlington *v.* New York, 31 N. Y. 164, 200, speaking of Bailey *v.* Mayor, says that the Court of Errors substantially repudiated the view of the Supreme Court, which affirmed the enterprise of furnishing the city with water to be a *private* work, as distinguished from an act of municipal government, and that the city was held liable on account of its legal personality, and its responsibility as such for the negligent acts of its agents and officers in the execution of their duties. See Fleming *v.* Suspension Bridge, 92 N. Y. 368, and the observations of *Hunt*, J., on this case, in Barnes *v.* District of Columbia, 91 U. S. 540, 552. It was followed in Aldrich *v.* Tripp, 11 R. I. 141; noted *ante*, § 1667, note. It is commented on by *Sargent*, J., in Wright *v.* Holbrook, 52 N. H. 120; *supra*, § 1655, note. See also Baltimore *v.* Merryman, 86 Md. 584.

In Philadelphia *v.* Collins, 68 Pa. St. 106, the city was held liable in damages to the owner of a boat for *wrongfully*, during a severe drought, *withdrawing water from the Schuylkill* to supply the Fairmount Waterworks, to such an extent as to prevent boats from navigating the river.

There is *no liability* on part of the city as owner of the Croton Aqueduct for injuries from defects in the *lateral service pipes* inserted by consumers of water into the mains. Terry *v.* New York, 8 Bosw. (N. Y.) 594; Treadwell *v.* New York, 1 Daly (N. Y.), 123. See Cowley *v.* Sunderland, 6 H. & N. 565 (noticed *supra*, § 1668, note), as to the liability of a municipal corporation for injuries caused by the unsafe condition of its property. Commissioners were appointed *to build a city hall* according to certain plans, with power to employ agents and make contracts. By one of the contracts they were to furnish, at the site of the building, centres for brick arches. They put the centres in place, and one of them, being insecurely fixed, fell and killed a laborer. The city was held liable. McCaughey *v.* Providence, 12 R. I. 449; *infra*, §§ 1671, 1672.

A city is not relieved from liability for its negligence in connection with the construction of a dam on the ground that the supplying of water is a governmental function. Southeast *v.* New York, 96 App. Div. 598, noted *infra*, § 1670.

to protect the property of the inhabitants of the city against destruction from fire.[1] We elsewhere discuss the responsibility of the city for the acts and negligence of members of its fire department in extinguishing or attempting to extinguish fires.[2] We have there pointed out that inasmuch as these are regarded as strictly governmental functions, the city is not, generally at least, liable for the negligence or wrongful acts of its officers or agents. But with these exceptions, it would seem to be the general rule that in constructing and maintaining waterworks and water mains and distributing pipes, and in constructing and maintaining a gas or electric light plant, with the usual mains and distributing pipes, or poles and wires, a city, in matters other than those above mentioned, *acts in its private and corporate capacity, and is liable for the negligence* of its officers and agents to the employees of the city and to other persons who suffer damage from such negligence.[3]

[1] *Ante*, § 1340, where the cases are collated and fully discussed. See also Terrell *v.* Louisville Water Co., 127 Ky. 77 (fire cisterns out of repair); Greenville Water Co. *v.* Beckham (Tex. Civ. App.), 118 S. W. Rep. 889.

[2] *Ante*, § 1660.

[3] See *ante*, § 1303 and cases there cited. See in addition, Hourigan *v.* Norwich, 77 Conn. 358 (city employee injured); Augusta *v.* Mackey, 113 Ga. 64; Roberts *v.* St. Mary's, 78 Kan. 707 (city employee injured); Henderson *v.* Young, 119 Ky. 224; Lynch *v.* Springfield, 174 Mass. 430 (negligence of driver of water department wagon); St. Germain *v.* Fall River, 177 Mass. 550; Dammann *v.* St. Louis, 152 Mo. 186; Bullmaster *v.* St. Joseph, 70 Mo. App. 60; Boothe *v.* Fulton, 85 Mo. App. 16; Messersmith *v.* Buffalo, 138 N. Y. App. Div. 427 (defective work of city employee in making connection with water main).

But in Brink *v.* Grand Rapids, 144 Mich. 472, it was held that where the city maintained *a fire hydrant* solely as a part of its fire system, it was not liable for injuries resulting from the plaintiff's horse taking fright while firemen were flushing the hydrant to remove obstructions in it, on the principle that where the city maintains a water plant *solely* for extinguishing fires, it performs a governmental duty and is exempt from implied liability for negligence. See also Aschoff *v.* Evansville, 34 Ind. App. 25. But where the water system is used not only for fire protection but also for *profit*, the city becomes liable for damages due to its negligence. Chicago *v.* Selz, 202 Ill. 545; Rice *v.* St. Louis, 165 Mo. 636; Dunstan *v.* New York, 91 N. Y. App. Div. 355. In some instances where the water system is used for private purposes, as well as in connection with the fire department, the city has been held liable for negligence in the former use only and free from liability in the latter. Judson *v.* Winsted, 80 Conn. 384; Piper *v.* Madison, 140 Wis. 311.

In *Pennsylvania*, it has been held that the fact that the *city used electric wires* in connection with its police and fire departments did not exempt it from liability for negligence in connection therewith. Herron *v.* Pittsburg, 204 Pa. 509; Emery *v.* Philadelphia, 208 Pa. 492.

In *Alabama*, it has been held that if the municipality has no statutory authority, either express or by necessary implication, to maintain an electric lighting plant, it is not under any liability for the negligence of its officers in connection with a lighting plant constructed and maintained by it. Posey *v.* North Birmingham, 154 Ala. 511. A city owning an electric lighting plant is not responsible to a mere licensee upon the premises where wires belonging to the city are located, for injuries sustained by that person in consequence of the defective condition of the wires. The fact that the licensee is an officer of the city does not

Thus, in the case of *municipal electric light works*, the city is under obligation to exercise reasonable care in constructing and maintaining its poles and wires in the public streets and on private property, and if any person is injured through the neglect of the city or its officers, agents, or employees in that respect, the city is liable in damages.[1] Similarly, a city is liable to travellers upon the city streets for injuries sustained by coming in contact with fallen wires which are charged with electricity. This liability has, in some cases, been sustained not only on the ground of negligence of the city in maintaining its electric light wires, but also on the ground of its neglect of its duty to maintain the streets in a safe condition.[2] Similarly, in the *case of waterworks*, it has been held that a city is liable if it negligently constructs a dam or reservoir, or neglects to keep it in sufficient repair, in consequence whereof the dam or reservoir wall gives way, damaging adjoining lands.[3] So, too, a city is liable for negli-

create any liability if he is not charged with any duty with reference to the maintenance of the electric lighting plant. Greenville *v.* Pitts, 102 Tex. 1.

[1] Posey *v.* North Birmingham, 154 Ala. 511; Richmond *v.* Lincoln, 167 Ind. 468; Henderson *v.* Young, 119 Ky. 224; Dickinson *v.* Boston, 188 Mass. 595 (falling of defective lamp post); Yazoo City *v.* Burchett, 89 Miss. 700; Bullmaster *v.* St. Joseph, 70 Mo. App. 60 (unsafe place for ctiy employee to work). The degree of care required of those using electricity should be commensurate with the danger. Palestine *v.* Siler, 225 Ill. 630, s. c. 128 Ill. App. 309. A city owning an electric lighting plant owes the duty to the owners of buildings, its servants, employees, and any one else who may have a legal right to go upon the premises, to exercise proper care in maintaining the wires on the premises. Greenville *v.* Pitts, 102 Tex. 1.

An owner of private property may recover for injuries due to a *live wire* which fell on his property from a pole in the adjacent street. Aiken *v.* Columbus, 167 Ind. 139. City held liable for negligence in failing to see that its *electric light wires* were properly insulated, in consequence whereof linemen of telephone and other companies received injuries by coming in contact therewith. Hodgins *v.* Bay City, 156 Mich. 687; Yazoo City *v.* Birchett, 89 Miss. 700; Danville *v.* Thornton, 110 Va. 541. See also Thomas *v.* Somerset (Ky.), 97 S. W. Rep. 420 (injury to servant of a consumer).

[2] Palestine *v.* Siler, 225 Ill. 630; s. c. 138 Ill. App. 309 (electric light wire in street); Twist *v.* Rochester, 37 N. Y. App. Div. 307, aff'd 165 N. Y. 619 (broken telephone wire charged from trolley wire); Fisher *v.* New Bern, 140 N. Car. 506 (broken electric light wire); Herron *v.* Pittsburg, 204 Pa. 509 (police telephone wire); Emery *v.* Philadelphia, 208 Pa. 492 (broken fire alarm wire). A city is liable for negligently allowing a *live wire* to remain in a path across private property, causing the death of one licensed to travel in such path. Davoust *v.* Alameda, 149 Cal. 69. A traveller on horseback can recover for injuries sustained from a shock due to a *sagging wire across a street*. Eaton *v.* Weiser, 12 Idaho, 544. City held liable to a trainman standing on top of a freight car who was injured by a sagging wire. Todd *v.* Crete, 79 Neb. 671. Where the city has police supervision over all wires in the city streets and their adjustment and regulation, it has been held liable for injuries to a traveller in the street, for neglect of this duty, even though the wires do not belong to the city. Mooney *v.* Luzerne, 186 Pa. 161.

[3] Bailey *v.* New York, 3 Hill (N. Y.), 531, noted *supra* (unskilfully constructed dam); New York *v.* Bailey, 2 Denio (N. Y.), 433; Southeast *v.* New York, 96 N. Y. App. Div. 598 (poorly constructed dam). In this last case, the

gence in maintaining its pipes and mains in the city streets and for the leakage resulting therefrom, flooding abutting premises and causing damage,[1] or rendering the highway unsafe.[2] So also, the city is liable for defects or obstructions in highways, both within and outside the city limits, resulting from the negligent or wrongful acts of its agents or employees in constructing or removing its pipes or mains.[3] The fact that a city has *statutory authority* to construct and maintain a pumping station or an electric light plant *does not justify* it in so constructing or maintaining it as to cause a nuisance interfering with the use of adjoining property; and if it so constructs or maintains it as to cause such nuisance, it is liable to the owner of the adjoining property in damages.[4]

court held that although in supplying water to its inhabitants a city is acting in a governmental capacity, it will nevertheless be liable for the collapse of a dam, as the property injured thereby is protected by the constitutional provision against the taking of property without just compensation. In this connection see Gordon *v.* Silver Creek, 127 N. Y. App. Div. 888, aff'd 197 N. Y. 509.

In *Minnesota*, the rule is that a party who for his own profit keeps on his premises anything not naturally belonging there, the natural tendency of which is to become a nuisance and to become mischievous if it escapes, is liable if it escapes, without proof of negligence, for all damages directly resulting therefrom. Hence a party injured by the collapse of a dam need not prove negligence of the city. Wiltse *v.* Red Wing, 99 Minn. 255.

[1] Chicago *v.* Selz, 202 Ill. 545; Dammann *v.* St. Louis, 152 Mo. 186; Rice *v.* St. Louis, 165 Mo. 636; Boothe *v.* Fulton, 85 Mo. App. 16; Jenney *v.* Brooklyn, 120 N. Y. 164; Dunstan *v.* New York, 91 N. Y. App. Div. 355; Kelsey *v.* New York, 123 N. Y. App. Div. 381; Messersmith *v.* Buffalo, 138 N. Y. App. Div. 427; Esburg Cigar Co. *v.* Portland, 34 Oreg. 282; Rumsey *v.* Philadelphia, 171 Pa. 63; Piper *v.* Madison, 140 Wis. 311.

[2] Hand *v.* Brookline, 126 Mass. 324. Water escaping from the city mains undermined and washed away the earth under a highway, causing a horse to break through and be injured. There was no defect in the highway and no omission to keep the highway in repair. The action was sustained for neglect on the part of the city in the construction of its waterworks. In Baker *v.* North East Borough, 151 Pa. 234, the court held that if the facts show a noisy escape of water from a water pipe in a manner calculated to frighten ordinarily gentle and roadworthy horses, and which does so frighten them, such facts are evidence of negligence for which the city is liable. So in Winona *v.* Botzet, 169 Fed. Rep. 321, where the city in operating its waterworks plant *used a shrill whistle* which frightened horses travelling on a bridge near by, the city was held liable for the resulting damage, on the ground that it failed to use reasonable care to keep the bridge reasonably safe for travel.

[3] Augusta *v.* Mackey, 113 Ga. 64 (injury due to negligently filled ditch outside of city limits); Fox *v.* Chelsea, 171 Mass. 297 (ditch left open). The nut of a hydrant projecting into the highway is a defect for which the city may be liable. St. Germain *v.* Fall River, 177 Mass. 550.

[4] Morton *v.* New York, 140 N. Y. 207 (noise and vibration of pumping engine); Gordon *v.* Silver Creek, 127 N. Y. App. Div. 888, aff'd 197 N. Y. 509 (smoke nuisance). In Boothe *v.* Fulton, 85 Mo. App. 16, the city maintained an electric light and water plant adjoining a private residence, and it was held liable for a nuisance created by the overflow of water and by smoke, dust, cinders, steam, vapor, and noises. A city in maintaining waterworks is responsible if it creates a malarial nuisance by damming a stream and overflowing private lands. Ennis *v.* Gilder, 32 Tex. Civ. App. 351. Where a city in conducting its waterworks takes so much water from a navigable

§ 1671 (985). **Liability as Property Owner.** — Upon similar grounds, municipal corporations *are liable for the improper management and use of their property,*[1] to the same extent and in the same manner as private corporations and natural persons.[2] Unless act-

stream so as to render the latter unnavigable, the city can be held responsible for damage resulting from the interference with shipping. Philadelphia *v.* Gilmartin, 71 Pa. 140.

But in cases of injury through flooding or otherwise, mere proof of the damage done will not in itself justify a recovery against the city; it must be shown that the city omitted a duty, that it failed to use reasonable care to see that the work was properly done. Jenney *v.* Brooklyn, 120 N. Y. 164; Kelsey *v.* New York, 123 N. Y. App. Div. 381; Baker *v.* North East Borough, 151 Pa. 234. Whether the city was liable for failure to guard the entrance into a conduit maintained by it as part of its waterworks system, and so situated as to be easily accessible and of such a nature as to be alluring to children, held under the evidence to be a question for the jury. Brown *v.* Salt Lake City, 33 Utah, 222. In Bennett *v.* Mt. Vernon, 124 Iowa, 537, the court held that the town had lawful authority to lay water mains in the street, and if in the prosecution of that enterprise it became necessary to destroy private drains, the case, in the absence of negligence, is one of *damnum absque injuria.*

[1] See *ante*, chap. xxi. on Corporate Property; Cowley *v.* Sunderland Bor., 6 H. & N. 565, noted *supra*, § 1668, note; Denver *v.* Porter, 126 Fed. Rep. 288; Moulton *v.* Scarborough, 71 Me. 267 (injury by animal on poor farm); Hannon *v.* St. Louis County, 62 Mo. 313 (county laying waterpipes on its own property), noted *infra*, § 1673; Brown *v.* Atlanta, 66 Ga. 71, where it was held that in suits for damages caused by the overflow from city waterworks the law is the same as in case of damages from mill-dams. See also Millers *v.* Augusta, 63 Ga. 772. Even under the restricted view of the liability of municipal corporations which prevails in *Massachusetts*, it is admitted that "where *a city holds and deals with property as its own*, not in the discharge of a public duty, nor for the direct and immediate use of the public, but for its own benefit, by receiving rents or otherwise, in the same way as a private owner might, it is liable, to the same extent as he would be, for negligence in the management or use of such property to the injury of others. Thayer *v.* Boston, 19 Pick. (Mass.) 511; Oliver *v.* Worcester, 102 Mass. 489.

"The distinction between acts done by a city in discharge of a public duty, and acts done for what has been called, by way of distinction, its private advantage or emolument, has been clearly pointed out by three eminent judges, while sitting in the supreme courts of their respective States, who have since acquired a wider reputation in the Supreme Court of the Union, and by the late Chief Justice of England. *Nelson*, C. J., in Bailey *v.* New York, 3 Hill (N. Y.), 531, 539; *Strong*, J., in Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 185, 189." *Per Gray*, C. J., in Hill *v.* Boston, 122 Mass. 344, 359; *supra*, §§ 1642, 1655, 1668; *ante*, § 109, and cases there cited; *post*, § 1673.

[2] Worden *v.* New Bedford, 131 Mass. 23; Perkins *v.* Lawrence, 136 Mass. 305; Waldron *v.* Haverhill, 143 Mass. 582; Mackey *v.* Vicksburg, 64 Miss. 777 (injury to child caused by falling into an excavation made by the city on private property under its control); Carrington *v.* St. Louis, 89 Mo. 208 (accident in police station); Rowland *v.* Kalamazoo, 49 Mich. 553; Pekin *v.* McMahon, 154 Ill. 141; Johnson *v.* Somerville, 195 Mass. 370; Briegel *v.* Philadelphia, 135 Pa. 451, 459, quoting text; Libby *v.* Portland, 105 Me. 370; Brown *v.* Salt Lake City, 33 Utah, 222, citing text; Clark *v.* Manchester, 62 N. H. 577, 579. City held not liable for death of child by falling into reservoir, being under no duty to a *trespasser* to make its premises safe. Ritz *v.* Wheeling, 45 W. Va. 262, 265, citing text. See also Clark *v.* Manchester, 62 N. H. 577; Grindley *v.* McKechnie, 163 Mass. 494; Clark *v.* Richmond, 83 Va. 355.

A city is not bound to improve its property acquired by it for public purposes in the absence of any statutory obligation to so do, nor is it bound to exercise any degree of care in its maintenance before improve-

ing under some valid special legislative authority, they must, like individuals, use their own so as not to injure that which belongs to another, or unjustly or improperly invade private rights. Thus they may erect a building for corporate purposes, but if in so doing they should place its foundations in such a manner as to cause water to flow back on private owners, the latter would have their action for the damage, the same as if the injury had been caused by an individual.[1] Similarly, a municipal corporation, *with control of a public common*, traversed by foot-paths on which the public may rightfully travel, is liable to a common-law action for damages caused by a *dangerous and unguarded excavation made by the corporation for its own purposes* in the ground adjoining one of the paths, to a person walking thereon, and who was at the time using due care.[2]

ment beyond the degree required of a private owner of property similarly situated. Further, as to bare licensees, a city is under no obligation either to make private property safe or keep it in a safe condition. Hence, where the city of New York acquired for park purposes a pier which had *not been opened to public use* and permitted it to remain in a dilapidated condition, the city is not liable in damages for the death of a person who disembarked thereon and fell through a hole therein before the pier had been improved and dedicated to the use for which it was acquired. Birch *v.* New York City, 190 N. Y. 397, rev'g 121 N. Y. App. Div. 395.

[1] Eastman *v.* Meredith, 36 N. H. 284, *per Perley*, C. J. Text cited and approved. Cumberland *v.* Willison, 50 Md. 138; Bailey *v.* New York, 3 Hill (N. Y.), 531, 541, *per Nelson*, C. J.; Thayer *v.* Boston, 19 Pick. (Mass.) 511; Rhodes *v.* Cleveland, 10 Ohio, 159; Lacour *v.* New York, 3 Duer (N. Y.), 406; Brower *v.* New York, 3 Barb. (N. Y.) 254; Treadwell *v.* New York, 1 Daly (N. Y.), 123; Rochester White Lead Company *v.* Rochester, 3 N. Y. 463; Harper *v.* Milwaukee, 30 Wis. 365. In Weet *v.* Brockport, 16 N. Y. 161, 172, Mr. Justice *Selden*, referring to Rochester White Lead Company *v.* Rochester, just cited, says: "The recovery rested upon the obvious principle that a municipal corporation is no more exempt from liability in case it creates a nuisance, either public or private, than an individual." *Post*, §§ 1731–1747. So on the principle in the text *where a municipal corporation, to supply itself with water*, purchased land from the plaintiff, and built thereon a reservoir, from which water percolated through the soil and injured the plaintiff's adjoining lands, the corporation is liable for the damages. Wilson *v.* New Bedford, 108 Mass. 26. So also where a town has power *to erect a market-house* it must manage and maintain it in a proper manner and with a just regard to the rights of the owners of the adjacent property. Suffolk *v.* Parker, 79 Va. 660.

Nuisances, and power of municipal corporation to prevent and abate. See *ante*, §§ 684, 688; *post*, §§ 1132, 1586; People *v.* Albany, 11 Wend. (N. Y.) 539 (no power to destroy a work [a bulkhead] *authorized by law*, because injurious to the public health); Hart *v.* Albany, 9 Wend. (N. Y.) 571, aff'g s. c. 3 Paige (N. Y.), 213; Denning *v.* Roome, 6 Wend. (N. Y.) 651; Wetmore *v.* Tracy, 14 Wend. (N. Y.) 250; Rochester *v.* Collins, 12 Barb. (N. Y.) 559; Ray *v.* Lynes (blacksmith shop), 10 Ala. 63. A municipal corporation is not liable as for misfeasance in extending the bounds of one of its streets by widening it, thereby bringing an existing nuisance within the street limits. Larkin *v.* Saginaw County, 11 Mich. 88; Pontiac *v.* Carter, 32 Mich. 164; Detroit *v.* Beekman, 34 Mich. 125; Lansing *v.* Toolan, 37 Mich. 152. Index, tit. *Nuisances*.

[2] Oliver *v.* Worcester, 102 Mass. 489, 499. The principle is tersely stated by *Hoar*, J., *Ib.* 496; and the authorities cited by *Gray*, J., *Ib.* 499. It was considered to be an act done by

So in a case in which it appeared that a city corporation was the owner of a *market-house*, the stalls of which it rented, but in front of which there was a pavement or open passage, which it seems was under the control of the city and not of its lessees; in the pavement there was a *dangerous hole in front of one of the stalls*, into which the plaintiff, while attending the market, fell and was injured. The court considered the market-house to be the private property of the corporation, that it was its duty to keep it in a safe condition, and that it was liable for any injury happening to individuals in consequence of its neglect to perform this duty.[1]

§ 1672 (985 *a*). **Same Subject; Impure Water in free Public Well in Street.** — The doctrine of the preceding section does not extend so far as to make a city liable for sickness or death caused *by drinking impure water from a free public well*, established and maintained by its authority *in one of the streets*, and in which it had placed a pump for public use, the impurity being the result of contamination from the soil through which the water percolated, and the city having no notice of its condition. No liability in such case arises upon the theory that the city has, by its acts, invited the public to use the water, and, for that reason, is bound to know its quality, and to assure its wholesomeness while it maintains the pump.[2] Whether the city would have been liable on the *ground of negligence* if it had known of the unwholesomeness of the water

the city in its *private, as distinguished from its public character*. Worden *v.* New Bedford, 131 Mass. 23; Sheehan *v.* Boston, 171 Mass. 296; Barthold *v.* Philadelphia, 154 Pa. 109; *post*, § 1717, note; § 1727, note.

[1] Savannah *v.* Cullens, 38 Ga. 334; *supra*, § 1666, and note; *post*, §§ 1717, 1727, and notes. See also O'Dwyer *v.* Northern Market Co., 24 App. D. C. 81; Barron *v.* Detroit, 94 Mich. 601; Flori *v.* St. Louis, 69 Mo. 341. A passageway from a sidewalk in a city into the basement of a building was protected by a *removable iron grating*, covered with boards, the iron-work being fitted to the opening in such a way that it could not be left in an insecure condition, except by gross carelessness. After being in this condition for forty years, during which time it had never been known to be left out of its place, the passageway was used by a stranger, who did not replace the grating properly; and *a few minutes* after the plaintiff, who was passing on the sidewalk, stepped upon it, and it gave way, and she was injured. It was held that the city was not, under the circumstances, liable. Littlefield *v.* Norwich, 40 Conn. 406; Shearm. & Red. Neg. (4th ed.) § 369.

[2] Danaher *v.* Brooklyn, 51 Hun (N. Y.), 563, aff'd 119 N. Y. 241. This novel case also decided that the uncommunicated knowledge of the health department of the city of Brooklyn was not imputable to the city, and the case was distinguished from those cases in which a city is held liable for nuisances and injuries to private property as a direct result of defective sewers, as in Seifert *v.* Brooklyn, 101 N. Y. 136 (*post*, §§ 1739, 1745), and from those in which it owns waterworks and supplies water for pay, as in Milnes *v.* Huddersfield, L. R. 10 Q. B. Div. 125; *ante*, §§ 1666, 1667, 1668, 1671, note.

and had taken no measures to prevent its use by the public was not decided; but the liability of the city in such a case on the ground that it created and maintained a public nuisance would not, as it seems to us, be at all doubtful.

§ 1673 (986). **Liability as Property Owner for Negligence.**— Where the *county* of St. Louis, having, originally without any legislative authority, *purchased property and erected thereon a county insane asylum* (which was afterwards recognized by the legislature as an asylum for the county), with a view to supply the building with water, dug on its grounds a deep trench, the sides of which, in consequence of negligently omitting properly to support them, fell in and injured one of the workmen, it was held liable for the injury, although there was no statute making counties responsible for the neglect or wrongful acts of its officers or agents.[1]

Other *illustrations of municipal liability*, on the general ground stated in the three preceding sections, are given in the note.[2]

[1] Hannon *v.* St. Louis County, 62 Mo. 313. The question arose on a demurrer to the complaint based on the ground that "a county is a political subdivision of the State, and not a body corporate either private or municipal, and therefore not liable for the *laches* or misconduct of its servants or employees," unless there is a statute creating such liability. The court held the county liable, regarding the case as within the principle of Bailey *v.* New York, 3 Hill (N. Y.), 531, 2 Denio, 433, and the doctrine of Bigelow *v.* Randolph, 14 Gray (Mass.), 541, the county having (with legislative permission, but not in consequence of a legislative command) voluntarily assumed a special duty or undertaking. The case is peculiar, and on the whole, perhaps, rightly decided, the main doubt which exists being one which arises from the character of the undertaking or duty assumed, viz., the care of the insane, which in its nature is rather public than municipal or local. See Perkins *v.* Lawrence, 136 Mass. 305; *ante*, § 1640, and note.

[2] *Post*, §§ 1717, 1727, and notes. "If a city or town," says Chief Justice *Gray* (Hill *v.* Boston, 122 Mass. 344, 358, "negligently constructs or maintains the *bridges or culverts in a highway across a navigable river or a natural water-course, so as to cause the water to flow back upon and injure the land of another*, it is liable to an action of tort, to the same extent that any corporation or individual would be liable for doing similar acts. Anthony *v.* Adams, 1 Met. (Mass.) 284, 285; Lawrence *v.* Fairhaven, 5 Gray, 110; Perry *v.* Worcester, 6 Gray, 544; Parker *v.* Lowell, 11 Gray, 353; Wheeler *v.* Worcester, 10 Allen (Mass.), 591; McGraw *v.* District of Columbia, 3 D. C. App. 405; Wilson *v.* Macon, 88 Ga. 455; Blake *v.* Pontiac, 49 Ill. App. 543; New Kiowa *v.* Craven, 46 Kan. 114; Gullikson *v.* McDonald, 62 Minn. 278; Ulrich *v.* St. Louis, 112 Mo. 138; Robertson *v.* New York, 7 N. Y. Misc. 645; Shields *v.* Durham, 118 N. Car. 450; *post*, § 1731. So if a city, by its agents, without authority of law, *makes or empties a common sewer upon the property of another to his injury*, it is liable to him in an action of tort. Merrimac River Canal Prop. *v.* Lowell, 7 Gray, 223; Hildreth *v.* Lowell, 11 Gray (Mass.), 345; Haskell *v.* New Bedford, 108 Mass. 208; 2 Thomps. Neg. 751, and cases; *post*, § 1739. But in some cases, the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it is intended, but it is the doing of a wrongful act, causing a direct injury to the property of another, outside the limits of the public work." Child *v.* Boston, 4 Allen (Mass.), 41;

Consequential Damages from Public Improvements.

§ 1674 (987). **Not Liable for Consequential Damages of Authorized Acts.** — The rule is well settled, and has, as we shall see in the course of the present chapter, very extensive application to the acts of municipal corporations, viz., that such a corporation, when it confines itself *within the limits of its power and jurisdiction, is not liable to an action for consequential damages* to private property or persons (unless it be given by special constitutional provision or by statute), where the act complained of was done by it or its officers *under and pursuant to authority conferred by a valid act of the legislature*, and there has been no want of reasonable care or want

Emery *v.* Lowell, 104 Mass. 13; Merrifield *v.* Worcester, 110 Mass. 216.

The implied liability of a city in *Massachusetts* for injuries to *private property*, caused by neglect in the *construction or repair of sewers*, is declared to rest upon the ground that the sewers, when built under permissive authority from the legislature, became the property of the city. Hill *v.* Boston, *supra; infra*, § 1742. The learned judge in Hill *v.* Boston thus refers to some recent English cases, which are regarded by him as based upon the same principle:

"An action was brought against a local board of health by a *person injured by treading upon a grating in the highway*, which had been put there to drain the water into a *common sewer*. White *v.* Hindley L. B. of H., L. R. 10 Q. B. 219. [Noted *supra*, § 1666, note.] *Blackburn*, J., referred to Gibson *v.* Preston and Parsons *v.* St. Matthew's Vestry, L. R. 3 C. P. 56, as establishing that the defendants would not be liable for non-repair of the highway; and they were held liable only as *owners of the sewer*, of which the court considered the grating to be a part, and which had been left in a dangerous condition for six months. The case was thus brought within the rule which governed the decisions in *Massachusetts*. Child *v.* Boston, 4 Allen (Mass.), 41; Emery *v.* Lowell, 104 Mass. 13." Further as to sewers and drains, *post*, §§ 1665, 1742–1746; Shearm. & Red. Neg. (4th ed.) § 287, and cases; 2 Thomps. Neg. 750, and cases.

"In another case the action was against the trustees of a turnpike road, for so negligently constructing and keeping *catchpits by the side of the road*, and cutting outlets into the adjoining land, that the water, thereby collected and poured off, flowed into and drowned the plaintiff's colliery. Whitehouse *v.* Fellowes, 10 C. B. (N. S.) 765. So where a public board authorized to construct sewers, but which in excess of its authority had made an obstruction which was a public nuisance in the bed of a navigable river, was held liable to one whose vessel suffered injury thereby. Brownlow *v.* Metropolitan Bd. of Works, 13 C. B. (N. S.) 768, and 16 C. B. (N. S.) 546. These cases fall within the principles established in *Massachusetts* (Haskell *v.* New Bedford, 108 Mass. 208, and similar decisions; S. P. Cumberland *v.* Willison, 50 Md. 138), in which, by a wrongful act, a direct injury was done to the plaintiff's property beyond the lawful limits of the public works."

Defendant city as the owner of gasworks laid down a gas main which, by reason of the rotting of a wooden plug, permitted the gas to escape into the municipal sewer. The gas found its way through this sewer into a drain connected with the plaintiff's house, in which it accumulated in great quantities, and finally exploded from ignition at the kitchen range. It was held that the city would be liable if its authorities had notice of the defect in the sewer or gas main, or might have discovered the defect by the exercise of proper and reasonable diligence. Kibele *v.* Philadelphia, 105 Pa. St. 41.

of reasonable skill in the execution of the power, although the same act, if done without legislative sanction, would be actionable.[1]

[1] Callender *v.* Marsh, 1 Pick. (Mass.) 418; North Transp. Co. of Ohio *v.* Chicago, 99 U. S. 635, noted *infra*, § 1683; Radcliff's Ex. *v.* Brooklyn, 4 N. Y. 195; Bellinger *v.* New York Cent. R. Co., 23 N. Y. 42; Pontiac *v.* Carter, 32 Mich. 164; Detroit *v.* Beckman, 34 Mich. 125; Cumberland *v.* Willison, 50 Md. 138, approving text; Rounds *v.* Mumford, 2 R. I. 154; Sprague *v.* Worcester, 13 Gray, 193; Bennett *v.* New Orleans, 14 La. An. 120; Americus *v.* Eldridge, 64 Ga. 524; Rigney *v.* Chicago, 102 Ill. 64; Snyder *v.* Rockport, 6 Ind. 237; *supra*, § 1647; Perry *v.* Worcester, 6 Gray, 544; Flagg *v.* Worcester, 13 Gray, 601, 605, *per Merrick*, J.; Koontz *v.* District of Columbia, 24 App. D. C. 59; Augusta *v.* Little, 115 Ga. 124; Chicago *v.* Webb, 102 Ill. App. 232; Home Conveyance Co. *v.* Roanoke, 91 Va. 52; British Cast Plate Co. *v.* Meredith, 4 T. R. 794; Whitehouse *v.* Fellowes, 10 C. B. (N. S.) 779; Mersey Docks Cases, 11 H. of L. C. 687, 713, 714 (noted *supra*, § 1668, note), *per Blackburn*, J., who, speaking of this subject, says: "If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful. . . . But though the legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them from *the obligation to use reasonable care* that, in making them, no unnecessary damage shall be done." The distinction is between damage resulting from authorized works, where the legislative authority is a bar to an action unless given by statute, and damage by reason of the work being negligently done, as to which the remedy of the party injured by action remains. Geddis *v.* Bann Reservoir, L. R. 3 App. Cases, 455, *per Blackburn*, J.; Brine *v.* Great Western R. Co., 2 Best & S. 402, 411, *per Crompton*, J.; Shearm. & Red. Neg. (4th ed.) § 283, collects many of the cases on this subject; 2 Thomps. Neg. 743, and cases. *Ante*, § 1145. See also Hicks *v.* Dorn, 42 N. Y. 47; *post*, §§ 1683, 1731–1747; *ante*, § 1128.

The subject of injuries arising from the negligent execution of statutory powers is treated in chap. xvi. of Addison on Torts, pp. 725, 727, where the following observations of *Watson*, B., are quoted: "Powers given by statute are not to be used to the peril of the lives or limbs of the queen's subjects. They are to be exercised reasonably, and with due care, so as not by negligence to cause dangers to others." Manley *v.* St. Helen's Canal & Ry. Co. (canal-bridge over highway), 2 H. & N. 840; Scott *v.* Manchester, 2 H. & N. 204. A city celebrating a holiday under authority of a general statute, held not liable for personal injuries resulting from the *negligent discharge of fireworks* by its servants. Tindley *v.* Salem, 137 Mass. 171 (noted *ante*, § 1647); *infra*, §§ 1684–1686, 1742–1747. See further as to displays and exhibitions by the city and others, *post*, § 1703. There is a civil liability for injuries to adjoining property arising from a railroad company not using proper caution in making openings in embankment authorized by statute. Lawrence *v.* Great Northern R. Co., 16 Q. B. 643, 653; Add. on Torts (4th Eng. ed.) 737, and cases cited. The same principle asserted by the Supreme Court of *Missouri*. McCormick *v.* Kansas City, St. J. & C. B. R. R. Co., 57 Mo. 433. *Wagner*, J., *Ib.* p. 437, seems to admit that a less stringent rule applies to municipal corporations in repairing streets. A city is not liable for damages done to real estate by the occupation of the street upon which it fronts, for a railroad, with its permission, unless the damages are such as would not have resulted if the road had been properly constructed and operated. Emerson *v.* Lexington, 69 Mo. 157; Woodruff *v.* North Bloomfield Gravel Co., 16 Fed. Rep. 25; Jennison *v.* Kirk, 98 U. S. 461; Cooley Const. Lim. (4 ed.) 253. See further, *post*, §§ 1679, 1684–1686, 1731–1747.

Where a municipal corporation possesses *the legal authority* to do an act, it is immaterial to *inquire into its motives* for doing it, and erroneous to make its liability depend upon the motives with which the act was done. Benjamin *v.* Wheeler, 8 Gray (Mass.), 409; Philadelphia *v.* Randolph, 4 Watts & S. (Pa.) 514 (stopping watercourse); Chatfield *v.* Wilson, 28 Vt. 49;

§ 1675 (988). **Same Subject.** — This *general principle is well illustrated* by an important case in Wisconsin against the city of Milwaukee, in which the plaintiff sought to recover damages sustained by reason of a *harbor improvement made by the city under special authority from the legislature.* There was no allegation that the damages were the result of negligence or want of care in making the improvement; but the recovery was sought because the effect of the improvement was to allow the waters of the lake to be driven by the wind through the canal or channel thus artificially made by the city into and upon the lots of the plaintiff in the vicinity, causing them to be washed away and rendered insecure and unfit for use. But the court decided (applying the principle above stated) that the plaintiff's action could not be maintained.[1]

infra, § 1677, note; 2 Thomps. Neg. 739, 1265; Montgomery *v.* Gilmer, 33 Ala. 116.

It was held that a *contractor under the State, in the execution of the work of enlarging a canal belonging to the State,* cannot justify the commission of trespasses upon private property. It was also held that the casting of stone and earth, as the result of a blast, from the bed of the canal upon the lands of an adjoining proprietor, where the plaintiff was lawfully at work, and which in falling injured him, was a trespass for which the contractor was liable; and it seems to have been the opinion of the learned judge who gave the judgment of the court that he was liable, although the blasting was done without negligence on his part. On this last point, *Folger*, J., after commenting on several previous cases decided in *New York*, says: "It follows, then, that the defendant [the contractor], having no right to invade the [adjoining] premises, which, for the purposes of this case, were the possession of the plaintiff, it matters not whether or no he [the defendant] made his invasion without negligence." Upon the facts found by the referee, the question of the defendant's liability, irrespective of negligence for the personal injury to the plaintiff, did not, it seems, necessarily arise. St. Peter *v.* Denison, 58 N. Y. 416, distinguishing Radcliff's Ex. *v.* Brooklyn, 4 N. Y. 195.

Questions as to *liability for damages caused by or incident to acts and undertakings authorized by statute* are often of great and confessed difficulty. In England the general rule is that no action impliedly lies for doing what Parliament has authorized. But the courts have frequently implied a condition that such authorized acts must be done without negligence, and with judgment and caution, or the doer will be liable. See Pollock on Torts, 110–115. The same general principles apply, of course, in this country, with the limitation that here the legislature cannot authorize acts which would otherwise be lawful, if thereby any constitutional provision is infringed. In applying the qualification to the general rule that unless the power be exercised with judgment and caution an action will lie, great care must be used where the authorized works and undertakings are not for profit or gain, but are constructed by incorporated or municipal bodies for the public good or convenience. *Post*, §§ 1684–1686. In *Connecticut*, it is held that where a property owner is injured owing to the negligent repair of the highway by the municipality, which suffers water from a heavy rain storm to pass into and upon his premises causing him damage, the injury is purely consequential and there can be no recovery therefor. Salzman *v.* New Haven, 81 Conn. 389, 392; citing Judge *v.* Meriden, 38 Conn. 90; Bronson *v.* Wallingford, 54 Conn. 513; Byrne *v.* Farmington, 64 Conn. 367; Downs *v.* Ansonia, 73 Conn. 33; Sisson *v.* Stonington, 73 Conn. 348; Rudnyai *v.* Harwinton, 79 Conn. 91.

[1] Alexander *v.* Milwaukee, 16 Wis. 247. Cited and distinguished, Pettigrew *v.* Evansville (surface water), 25

§ 1676 (989). **Consequential Damages; Grades and Change of Grades in Streets.** — In connection with the principle just mentioned that there is no implied or common-law liability for doing with proper care an act which is either directed or authorized by a valid statute, may be noticed the power of municipal corporations *to grade and to change the established grade or level of their streets*, though the exercise of the power may be injurious to the adjoining property owners.[1] The public nature of streets; the uses to which they may lawfully be put; the authority of the legislature over them; the nature of the rights of the adjacent proprietors, of the municipality, and of the public with respect thereto; and of the

Wis. 223; *ante*, § 1129, note; *post*, §§ 1683, 1732, 1733.

Referring to Alexander *v.* Milwaukee, *supra*, the Supreme Court of the United States observes that it has been frequently held by the Supreme Court of *Wisconsin* and elsewhere, that overflowing land by backing water upon it was a "taking" of private property within the meaning of the constitutional provision (*post*, § 1679, and note), and that "it is difficult to reconcile" Alexander *v.* Milwaukee with the decisions above referred to. Pumpelly *v.* Green Bay Co., 13 Wall. (U. S.) 166, 180. Undoubtedly the principle on which the court placed Alexander *v.* Milwaukee is a sound one; the doubt in the case is whether the plaintiff's land was not "taken" in such a sense as to give him a constitutional right to compensation. See *post*, §§ 1677, note, 1679, and note, 1683; Ashley *v.* Port Huron, 35 Mich. 296; Northern Transp. Co. of Ohio *v.* Chicago, 99 U. S. 635; noted *infra*, § 1683; 2 Thomps. Neg. 692, 743; Shearm. & Red. Neg. § 283. What is a "taking" of private property, is elsewhere discussed in the present work. See *post*, §§ 1684–1686; also Index, tit. *Eminent Domain*. Where a city owned the bed of a river and had the right to divert and sell water to its citizens, it was held not to be liable for damages to private property caused by a sudden and unlooked for flood. Moore *v.* Los Angeles, 72 Cal. 287.

[1] *Ante*, §§ 1674, 1675. *Infra*, § 1677, and cases, 1683–1686. Cummings *v.* Dixon, 39 Mich. 269; Koeppen *v.* Sedalia, 89 Mo. App. 648; Scott *v.* Marshall, 110 Mo. App. 178; Smith *v.* Boston & A. R. Co., 99 App. Div. 94; aff'd 181 N. Y. 132. "The objects to be accomplished by grades are twofold: (1) draft, and (2) drainage." *Per Champlin*, J., in Larned *v.* Briscoe, 62 Mich. 393; Fuller *v.* Atlanta, 66 Ga. 80; 2 Thomps. Neg. 747, and cases. In *Iowa*, by statute, owners of improved property are entitled to damages for changes of grade. Hempstead *v.* Des Moines, 52 Iowa, 303; Meyer *v.* Burlington, 52 Iowa, 560; Conklin *v.* Keokuk, 73 Iowa, 343; *post*, § 1677, note. Where a *statute* makes a city liable to adjoining property owners for damages caused by a change of grade, *its repeal* will not take away their right to damages for a change ordered while it was in force. Healey *v.* New Haven, 49 Conn. 394; *post*, § 1677, note. Text quoted and approved in Methodist Episc. Ch. *v.* Wyandotte, 31 Kan. 721. See also Heiser *v.* New York, 104 N. Y. 68; Healey *v.* New Haven, 47 Conn. 305. In Gray *v.* Knoxville, 85 Tenn. 99, a city was held liable for damages caused by grading a street, in doing which plaintiff's fences were destroyed and his land overflowed by surface water, on the ground that the act was a "taking" of private property for public use; *post*, §§ 1683–1686. Lowering the face of the street a few inches to improve its capacity, without changing the level of the curb, is not such a change of grade as will entitle abutting lot-owners to damages. Coates *v.* Dubuque, 68 Iowa, 550. A city, as against the owner of the fee in the street, held not empowered to authorize its contractor for grading streets to remove and sell stone, the removal of which was not necessary for the grading and improvement of the street. Rich *v.* Minneapolis, 37 Minn. 423. *Ante*, § 1149.

delegated authority of municipal bodies or officers to improve and graduate them, — are topics which have been considered in a former chapter.[1] In view of the nature of streets as there explained, and of that control over them which of right belongs to the State,[2] and of the nature of the ownership of lots bounded thereon, which implies subjection, if not consent, to the exercise and determination of the public will respecting what grades or changes in the grades thereof shall, from time to time, be found necessary, and what other improvements thereon or therein (within the legitimate purposes of streets[3]) shall be found expedient, it results, we think, that adjoining property owners are not entitled, of *legal right*, without constitutional or statutory aid, to compensation for damages which result as *an incident or consequence* of the exercise of this power by the State, or the municipality by delegation from the State.

§ 1677 (990). **No Common-law Liability for Consequential Damages for Change of Grade.** — Accordingly, the courts, by numerous decisions in most of the States, have settled the doctrine that municipal corporations, acting under authority conferred by the legislature to *make and repair, or to grade, level, and improve streets*, if they keep within the limits of the street, and do not trespass upon or invade private property, and exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner, whose lands are not actually taken, trespassed upon, or invaded, for *consequential damages* to his premises, unless there is a provision in the Constitution of the State, in the charter of the corporation, or in some statute, creating the liability.[4] There is no such implied or common-law liability, even though in grading and levelling the street a portion of the adjoining lot, in consequence of the removal of its natural support, falls into the highway.[5] And

[1] Chap. xxiv. on Streets, *ante*, § 1120 *et seq.* The power to grade is a *continuing* one. *Ante*, §§ 1151, 1448. "As the *duty* of keeping the street in repair *is a continuing one*, so is the *power* necessary to perform it." *Per Grier*, J.; Smith *v.* Washington, 20 How. (U. S.) 135, 148.

"*Grading*," as applied to streets, means their "reduction to a certain degree of ascent or descent." *Ib.*, per *Grier*, J. *Ante*, §§ 1145, 1447–1450.

[2] *Ante*, § 1122 *et seq.*

[3] What are such purposes. *Ante*, § 1161 *et seq.*

[4] Broadwell *v.* Kansas City, 75 Mo. 213, approving text. *Post*, § 1683; Smith *v.* Alexandria, 33 Gratt. (Va.) 208; Wallich *v.* Manitowoc, 57 Wis. 9; De Lucca *v.* North Little Rock, 142 Fed. Rep. 597, 603, citing text; Ehrsam *v.* Utica, 37 N. Y. App. Div. 272; Sauer *v.* New York, 206 U. S. 536, aff'g 180 N. Y. 27; s. c. 90 N. Y. App. Div. 36; Walish *v.* Milwaukee, 95 Wis. 16; Vanderlip *v.* Grand Rapids, 73 Mich. 522, 527, quoting text.

[5] Text quoted and approved in Methodist Episc. Ch. *v.* Wyandotte, 31 Kan. 721. See also Moore *v.* Albany,

the same principle applies, and the like freedom from implied liability exists, if the street be embanked or raised in reducing it to the grade line, so as to cut off or render difficult the access to the adjacent property. And this is so although the grade of the street has been before established, and the *adjoining property owner had erected buildings or made improvements with reference to such grade.*[1]

98 N. Y. 396; Reilly *v.* Ft. Dodge, 118 Iowa, 633; People *v.* Stillings, 76 N. Y. App. Div. 143. On the other hand if the grade of a street is changed otherwise than as authorized by law, the city will be held liable for injuries caused by it. Meinzer *v.* Racine, 68 Wis. 241; Same *v.* Same, 70 Wis. 561. As, for example, when the grade is changed without the consent of the property owners or of some proportion thereof, when this is required by statute, or without complying with other precedent or necessary statutory conditions. Crossett *v.* Janesville, 28 Wis. 420; Dore *v.* Milwaukee, 42 Wis. 18; Hill *v.* St. Louis, 59 Mo. 412; Karst *v.* Stillwater & T. F. R. Co., 22 Minn. 118; Lewis Em. Dom. § 105. *Infra*, §§ 1681, 1682; Lafayette *v.* Wortman, 107 Ind. 404.

[1] Callender *v.* Marsh, 1 Pick. (Mass.) 418, the early leading American case on this subject, and where the question was examined by *Parker*, C. J., with characteristic ability. The ground of the doctrine is thus stated by him: "Those who purchase house-lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of a city may require, in order to render the passage to and from the several parts ot it safe and convenient; and as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they shall see fit. They are presumed to foresee the changes which public necessity or convenience may require." 1 Pick. 431. The doctrine of Callender *v.* Marsh, 1 Pick. (Mass.) 418, has been very generally followed, as will be seen by the cases below cited. In *Massachusetts*, Griggs *v.* Foote, 4 Allen, 195; Brown *v.* Lowell, 8 Met. (Mass.) 172; Benjamin *v.* Wheeler, 8 Gray, 409. There is now in that State a remedy by statute giving adjoining owners damages "by reason of any raising or lowering, or other act done for the purpose of repairing a highway."

Where after damages had been awarded under an accepted order for widening a street, which referred to a certain plan as showing the "several locations and the amounts of land taken from each of the owners," the *grade was changed by another order*, as shown upon a certain other "*plan and profile*," it was held that the change was an independent proceeding for which a land-owner was entitled to additional damages. Lane *v.* Boston, 125 Mass. 519. Compare Cambridge *v.* Middlesex County, 125 Mass. 519. *Statute construed:* Flagg *v.* Worcester, 13 Gray, 601; Snow *v.* Provincetown, 109 Mass. 123; Burr *v.* Leicester, 121 Mass. 241; Ryan *v.* Boston, 118 Mass. 248; Wilbur *v.* Taunton, 123 Mass. 522; Brady *v.* Fall River, 121 Mass. 262. In Snow *v.* Provincetown, 109 Mass. 123, and Lane *v.* Boston, 125 Mass. 519, the facts were these: The streets in question had been widened and compensation paid for such widening to the abutting owners. Afterwards the municipal authorities raised the grades of the streets. It was held that for such changes in the grades the abutting owners were entitled to compensation; that the two proceedings were entirely independent of each other; and that compensation for the changes in grades was not included in that for the widening of the streets. Lewis Em. Dom. § 209, where the cases are digested.

An owner of abutting property is presumed to know what the established grade of the street was when he purchased and when he erected improvements, and to have built with reference to it. Denver *v.* Vernia, 8 Colo. 399, where the court intimated that the city could be held liable for damages caused by its neglect to reduce a street to the established grade for a long time after it had compelled the construction of a sidewalk several feet below the original surface of the street.

But the construction by a city, under express legislative authority, of a *levee along Front Street* to protect the city against inundation

Where the city engineer gave to a lot-owner, upon request, a grade which had not been established by the city, and the owner improved his property with reference to it, the court held that the city was not liable for damages caused by its afterwards establishing another grade. Mattingly *v.* Plymouth, 100 Ind. 545; s. p. Waller *v.* Dubuque, 69 Iowa, 541; *ante*, § 1663; *post*, §§ 1732–1747. Text cited and approved. Fellowes *v.* New Haven, 44 Conn. 240; Kehrer *v.* Richmond, 81 Va. 745. An *injunction* held not to lie to restrain the prosecution of the grading. *Ib.;* s. p. Goszler *v.* Georgetown, 6 Wheat. (U. S.) 593; Detroit *v.* Beckman, 34 Mich. 125. See, generally, Cheever *v.* Shedd, 13 Blatchf. 258; Tate *v.* Missouri, K. & T. R. Co., 64 Mo. 149; Pontiac *v.* Carter, 32 Mich. 164; Quincy *v.* Jones, 76 Ill. 231; Dorman *v.* Jacksonville, 13 Fla. 538; Terre Haute *v.* Turner, 36 Ind. 522; Whitehouse *v.* Fellowes, 10 C. B. (N. S.) 765; Mersey Docks Cases, 11 H. L. Cas. 687; North Vernon *v.* Voegler, 103 Ind. 314; Pontiac *v.* Carter (change of grade), 32 Mich. 164; Bunker *v.* Hudson, 122 Wis. 43.

Estoppel. Where an owner of property joined with others in a petition to change the grade of a street, it was held that he was estopped from setting up a claim for damages resulting from the grading, although he objected to the estoppel upon the ground that the petition had not been signed by the required number of property owners. Cross *v.* Kansas City, 90 Mo. 13.

In *New York:* Radcliff's Ex. *v.* Brooklyn, 4 N. Y. 195, in which the subject is discussed at length by *Bronson*, C. J., the court holds that there is no liability, both upon the ground that the damages complained of result as an incident from the exercise of legislative authority, and upon the ground (more doubtful) that the land of the street *belongs* to the corporation, and thay may level or fill it at pleasure, so that they do not touch the adjoining property. Mr. Shearman gives an interesting history of the facts out of which Radcliff's Case arose. It forcibly illustrates the occasional hardship of the rule, but does not demonstrate its unsoundness in point of legal principle. Shearm. & Red. Neg. (4th ed.) § 283, note. See, also, in *New York*, People *v.* Green, 64 N. Y. 606; St. Peter *v.* Denison, 58 N. Y. 416; Graves *v.* Otis, 2 Hill (N. Y.), 466; Wilson *v.* New York, 1 Denio (N. Y.), 595; Benedict *v.* Goit, 3 Barb. 459; Fifth Street, *In re*, 17 Wend. (N. Y.) 667; Mills *v.* Brooklyn, 32 N. Y. 489; McCall *v.* Saratoga Springs, 56 Hun (N. Y.), 639. See Waddell *v.* New York, 8 Barb. 95. In Clarence *v.* Auburn, 66 N. Y. 334, the principle stated in the text was held to have been erroneously applied in the court below in an action for an injury caused by a defective sidewalk. In Cogswell *v.* New York, N. H. & H. R. R. Co., 103 N. Y. 10, the court says of Radcliff's Case, *supra*, that it "carries to the utmost limit the right of the legislature," but it does not say that it passed those limits under the Constitution of *New York*. In 1852 New York City was made liable by statute for damages caused by change of grade. Lewis Em. Dom. § 213. See also Folmsbee *v.* Amsterdam, 142 N. Y. 118; Fuller *v.* Mt. Vernon, 171 N. Y. 247; *In re* City of New York, 65 N. Y. App. Div. 1; Bartlett *v.* Tarrytown, 55 Hun (N. Y.), 492; *In re* Smiddy, 65 Hun (N. Y.), 620. The remedy given is exclusive. Heiser *v.* New York, 104 N. Y. 68. The right to damages accrues when the work is done. People *v.* Zoll, 97 N. Y. 203; *In re* Anderson, 178 N. Y. 416; *In re* Grade Crossing Com'rs, 6 N. Y. App. Div. 327; *In re* East 187th Street, 78 N. Y. App. Div. 355; *In re* City of New York, 84 N. Y. App. Div. 312; Hosmer *v.* Gloversville, 27 N. Y. Misc. 669. A property owner is not entitled to damages for a change in the grade of a street where he does not show that his building was erected in conformity to an established grade of street. People *v.* Muh, 101 N. Y. App. Div. 423. *Post*, §§ 1732, 1733.

So also, in *Pennsylvania*, there is no implied municipal liability in street grade cases. Green *v.* Reading, 9 Watts (Pa.), 382. Approved, 20 How. (U. S.) 149; s. p. Reading *v.* Keppleman, 61 Pa. St. 233; Henry *v.* Pittsburgh & A. Br. Co., 8 Watts & S. (Pa.)

of a river, after a constitutional provision took effect which makes a city liable for private property "damaged" for public use, where

85; Charlton *v.* Allegheny, 1 Grant (Pa.) Cas. 208; Carr *v.* Northern Liberties, 35 Pa. St. 324; Ridge Street, *In re*, 29 Pa. St. 391; Kensington *v.* Wood, 10 Pa. St. 93. In O'Connor *v.* Pittsburgh, 18 Pa. St. 187, approved, Smith *v.* Washington, 20 How. (U. S.) 135, 149, a church had been built *according to the direction of the city regulator*, and in accordance with a *prior established grade*. Afterwards, the city authorities reduced the grade seventeen feet; the church had to be taken down and rebuilt, at an expense of $4,000. The authority given to the city was "to improve, repair, and keep in order the streets," &c. The Supreme Court of *Pennsylvania* say: "We had this case reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled, not only in *Pennsylvania*, but by every decision in the sister States except one [*Ohio*, see *infra*.]" *Gibson*, C. J., puts the decision upon the ground that as respects such matters the public corporation is the agent of the State, and partakes of the State's exemption from liability to be sued. Respecting the *Ohio* decisions, below referred to, he remarks, that though "founded on natural justice, they are not founded in the law which prevails elsewhere." In 1854, by statute, the city of Philadelphia was made liable for damages caused by a change of an established grade. Ridge Av., *Re*, 99 Pa. St. 469; Philadelphia *v.* Wright, 100 Pa. St. 235; Campbell *v.* Same, 108 Pa. St. 300; Act 1878. *Re* Brady Street, 99 Pa. St. 591, giving remedy for change of grade. The *Constitution of Pennsylvania* of 1874 provides that "municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for the property *taken, injured, or destroyed* by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction." Construed. New Brighton Bor. *v.* United Presbyterian Church, 96 Pa. St. 331; Pusey *v.* Allegheny, 98 Pa. St. 522; New Brighton Bor. *v.* Peirsol, 107 Pa. St. 280; Hendrick's Appeal, 103 Pa. St. 358; *In re* Plan 166, 143 Pa. 414; O'Brien *v.* Philadelphia, 150 Pa. 589; Hobson *v.* Philadelphia, 150 Pa. 595; Rudderow *v.* Philadelphia, 166 Pa. 241; Devlin *v.* Philadelphia, 206 Pa. 518; Cooper *v.* Scranton, 21 Pa. Super. Ct. 17. Compare Montgomery *v.* Townsend, 80 Ala. 489, decided under similar constitutional provision. Lewis Em. Dom. § 224; Pennsylvania R. Co. *v.* Lippincott, 116 Pa. St. 472. *Post*, §§ 1684–1686, and notes.

So in *Indiana:* Snyder *v.* Rockport, 6 Ind. 237, approving Radcliff's Ex. *v.* Brooklyn, *supra;* re-affirmed in Lafayette *v.* Spencer, 14 Ind. 399, where the same principle of municipal nonliability was held applicable, *under the General Municipal Corporations Act*. In support of the doctrine in the text, see Macy *v.* Indianapolis, 17 Ind. 267; Lafayette *v.* Bush, 19 Ind. 326; Vincennes *v.* Richards, 23 Ind. 381; Lafayette *v.* Fowler, 34 Ind. 140; Delphi *v.* Evans, 36 Ind. 90; Terre Haute *v.* Turner, 36 Ind. 522; Weis *v.* Madison, 75 Ind. 241. A statute of *Indiana* provides: "When the city authorities have once established the grade of any street, such grade shall not be changed until the damages have been assessed and tendered to the party injured, which damages shall be collected from the parties asking for such change of grade." Under this it is held that a city has no right to change an established grade until the damages have been assessed and tendered; if it makes such change and carries it into effect without such assessment and tender, it is an unlawful act for which it may be made directly liable in an action for damages. Lafayette *v.* Wortman, 107 Ind. 404. The point was made by the city that as the plaintiff did not enjoin the council from proceeding with the work of changing the grade, his only remedy was in *mandamus* to compel the city to have his damages assessed; citing Methodist Episc. Ch. Trs. of Hoboken *v.* Hoboken, 33 N. J. L. 13, and Macy *v.* Indianapolis, 17 Ind. 267 (decided prior to the statute); but the point was overruled. *Infra*, § 1681; Logansport *v.* Pollard, 50 Ind. 151; Lafayette *v.* Wortman, 107 Ind. 404; Wabash *v.*

no part of the plaintiff's property was taken, — the levee occupying the street alone, — but where the plaintiff's access was inter-

Alber, 88 Ind. 428, *quære;* Mattingly *v.* Plymouth (what is an established grade), 100 Ind. 545. What is a change of grade. *Ib.;* Kokomo *v.* Mahan, 100 Ind. 242; Lewis Em. Dom. 207; Lafayette *v.* Nagle, 113 Ind. 425; Jeffersonville *v.* Myers, 2 Ind. App. 532. City held not liable for change from the natural grade. Keehn *v.* McGillicuddy, 15 Ind. App. 580.

So in *New Jersey:* Quinn *v.* Paterson, 27 N. J. L. 35; Trenton W. P. Co. *v.* Raff, 36 N. J. L. 335, 340; Plum *v.* Morris Canal & B. Co., 10 N. J. Eq. 256. In *New Jersey* there is now a statute giving action for damages caused by a change of grade. Van Riper *v.* Essex Pub. R. Board, 38 N. J. L. 23; State *v.* Sayre, 41 N. J. L. 158; Clark *v.* Elizabeth, 61 N. J. L. 565; Lewis Em. Dom. § 212.

So in *Nebraska:* Nebraska City *v.* Lampkin, 6 Neb. 27. Under a provision of the Constitution adopted in 1875 that private property shall not be taken *or damaged* except upon just compensation, a city is held liable for damages sustained by a lot-owner, who had erected buildings before a grade was established, by reason of the city having established a grade which required the street to be raised above the level of the lot. Harmon *v.* Omaha, 17 Neb. 548; Goodrich *v.* Omaha, 10 Neb. 98; Gottschalk *v.* C. B. & Q. R. Co., 14 Neb. 550; Omaha & R. V. R. Co. *v.* Standen, 22 Neb. 343; Harvard *v.* Crouch, 47 Neb. 133; Omaha *v.* Williams, 52 Neb. 40; *post,* §§ 1684–1686, and notes.

So in *Rhode Island* there is no common-law liability: Rounds *v.* Mumford, 2 R. I. 154; Wakefield *v.* Pawtucket, 12 R. I. 75; Inman *v.* Tripp, 11 R. I. 520; Smith *v.* Same, 13 R. I. 152. By statute (Gen. Stat. R. I. ch. 60, § 38) abutting owners now have a remedy for injuries caused by "any change in the grade of a highway." See Anness *v.* Providence, 13 R. I. 17; Aldrich *v.* Providence, 12 R. I. 241. Original grade held to be established by recognition by the city without formal official action establishing it. *Ib.* A municipal corporation is not liable for the damages sustained by an abutting owner by reason of an original establishment of a grade for a street. O'Donnell *v.* White, 24 R. I. 483.

So in *Louisiana:* Reynolds *v.* Shreveport, 13 La. An. 426, approving Radcliff's Ex. *v.* Brooklyn, 4 N. Y. 195, *supra,* and Goszler *v.* Georgetown, 6 Wheat. (U. S.) 593, cited *ante,* § 1145.

So in *Georgia:* Rome *v.* Omberg, 28 Ga. 46; Roll *v.* Augusta, 34 Ga. 326; Markham *v.* Atlanta, 23 Ga. 402; Mitchell *v.* Rome, 49 Ga. 19, 29; Hurt *v.* Atlanta, 100 Ga. 274. Lot-owner cannot enjoin. *Ib.;* Macon *v.* Hill, 58 Ga. 597; Fuller *v.* Atlanta, 66 Ga. 80. Shade-trees may be removed in grading. If destroyed, the lot-owner is not entitled to damages unless they were killed through negligence or carelessness. Castleberry *v.* Atlanta, 74 Ga. 164. A *constitutional provision* similar to that of *Illinois* (q. v. *infra*) is similarly construed. Atlanta *v.* Green, 69 Ga. 386; *infra,* §§ 1684–1686, and notes.

So in *Illinois:* Murphy *v.* Chicago, 29 Ill. 279, 287; Roberts *v.* Chicago, 26 Ill. 249; Quincy *v.* Jones, 76 Ill. 231; Nevins *v.* Peoria, 41 Ill. 502; Moses *v.* Pittsburg, Ft. W. & C. R. R. Co., 21 Ill. 516. A *constitutional provision* (art. xi. § 13, adopted 1870) that "private property shall not be taken *or damaged for public use without just compensation*" imposes a municipal liability for damages to private property by bringing the street to grade or by a change of the grade of its streets. Elgin *v.* Eaton, 83 Ill. 535; Pekin *v.* Brereton, 67 Ill. 477; Bloomington *v.* Brokaw, 77 Ill. 194; Pekin *v.* Winkel, *Ib.* 56; Pittsburg, F. W. & C. R. Co. *v.* Reich, 101 Ill. 157; Chicago *v.* Union Build. Assoc., 102 Ill. 379. This position has received the approval of the Supreme Court of the United States. Chicago *v.* Taylor, 125 U. S. 161. When right accrues, and measure of damages. Elgin *v.* Eaton, *supra; infra,* §§ 1683–1686. In Nevins *v.* Peoria, 41 Ill. 502, relating to damages to abutting owners caused by surface-water from the streets, and decided before the adoption of the constitutional provision in 1870, above quoted, and noted *infra* (§ 1686), the court said: "While a *city has the right to grade its streets by raising or lowering them,* the property holder adjacent to the street thus graded can-

fered with and water was thrown by the embankment upon his property, was held to render the city liable for the damages thereby

not call the city to account for error in judgment in establishing the grade, nor can he recover damages for inconveniences or expense in adjusting the approach to his premises for the purposes of ingress or egress. Although the city may be the owner of its streets, it *has no more power over them than a private individual* over his own land, and it cannot, under the claim of public convenience, be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages, without itself becoming responsible. If it becomes necessary for the interest of the public, in grading or draining streets, that the lot of an individual should be rendered unfit for occupancy, either wholly or in part, the *public should pay for it to the extent to which the owner is deprived of its legitimate use*. Private property shall not be *taken* for public use without due compensation, applies as well to secure the payment for property partially taken for the use or convenience of a street, as where wholly taken and converted into a street. The question as to the extent to which the property is taken makes no difference in the application of the rule: private rights are never to be sacrificed to public convenience or necessity without full compensation, and for such an injury inflicted, an action may be maintained and damage recovered as a compensation." Nevins *v.* Peoria, 41 Ill. 502; followed Aurora *v.* Gillett, 56 Ill. 132, 133; Aurora *v.* Reed, 57 Ill. 29; Dixon *v.* Baker, 65 Ill. 518; Alton *v.* Hope, 68 Ill. 167; Slack *v.* East St. Louis, 85 Ill. 377; Pekin *v.* Brereton, 67 Ill. 477; Stone *v.* Fairbury, P. & N. R. R. Co., 68 Ill. 394; Bloomington *v.* Brokaw, 77 Ill. 194; Tearney *v.* Smith, 86 Ill. 391; Elgin *v.* Eaton, 83 Ill. 535; Shawneetown *v.* Mason, 82 Ill. 337; Bloomington *v.* Pollock, 141 Ill. 346; Marshall *v.* Chicago, 77 Ill. App. 351; Whaples *v.* Waukegan, 95 Ill. App. 29; Barrington *v.* Meyer, 103 Ill. App. 124; but see *infra*, §§ 1683–1686, note, 1732, 1741–1747.

So in *Tennessee* there is no common-law liability: Humes *v.* Knoxville, 1 Humph. 403. Afterwards, by statute, compensation was given for changing an established grade. Nashville *v.* Nicol, 3 Baxter (Tenn.), 338. A grade may be established without an ordinance. Gray *v.* Knoxville, 85 Tenn. 99, noted *supra*, § 1676, note.

So in *Maine:* Mason *v.* Kennebec & P. R. R. Co., 31 Me. 215; Hovey *v.* Mayo, 43 Me. 322.

So in *Missouri*, both as to grade and change of grade: Taylor *v.* St. Louis, 14 Mo. 20; St. Louis *v.* Gurno, 12 Mo. 414 (following Callender *v.* Marsh, 1 Pick. 418); Hoffman *v.* St. Louis, 15 Mo. 651; Cole *v.* St. Louis, 132 Mo. 633; Fred *v.* Kansas City C. R. Co., 65 Mo. App. 121. The attempt in Thurston *v.* St. Joseph, 51 Mo. 510, to overrule St. Louis *v.* Gurno, *supra*, failed, and the last-named case remains law in *Missouri* to the present, except as changed by the constitutional provision below given, Schattner *v.* Kansas City, 53 Mo. 162; Imler *v.* Springfield, 55 Mo. 119, where the *Missouri* cases are commented on by *Vories*, J. "Municipal corporations acting under authority conferred by the legislature to make and repair, or to grade, level, and improve streets, if they exercise reasonable care and skill in the performance of the work, are not answerable to the adjoining owner for consequential damages to his premises. But if the injury can be shown to have been the result of the negligence or unskilfulness of the city or its employees in performing the work, then an action will lie, and the party injured will be entitled to damages." Wegmann *v.* Jefferson, 61 Mo. 55, 56, decided before the constitutional provision noted below. "Such," says *Wagner*, J., "is the well-established doctrine in *Missouri*." Thompson *v.* Booneville, 61 Mo. 282. Distinguished, Hunt *v.* Booneville, 65 Mo. 620; Foster *v.* St. Louis, 4 Mo. App. 564. But in accordance with a charter provision, the city of St. Louis was held liable. Stickford *v.* St. Louis, 7 Mo. App. 217. See also Schumacher *v.* St. Louis, 3 Mo. App. 297; Fink *v.* St. Louis, 71 Mo. 452. In *Missouri*, under a *constitutional provision* adopted in 1875, that private property cannot be taken *or damaged* without just compensation, owners of adjoining property are entitled to damages caused by a change

occasioned. The embankment was not regarded by the court as a mere elevation of the grade of the street, or as being made to im-

of grade. Sheehy *v.* Kansas City Cable Ry. Co., 94 Mo. 574; Householder *v.* Kansas City, 83 Mo. 488; Werth *v.* Springfield, 78 Mo. 107; Blanchard *v.* Kansas City, 16 Fed. Rep. 444; s. c. 5 McCrary C. C. R. 217; *post*, §§ 1684–1686, and notes; McElroy *v.* Kansas City, 21 Fed. Rep. 257; Jarboe *v.* Carrollton, 73 Mo. App. 347; Rives *v.* Columbia, 80 Mo. App. 173; Carson *v.* Springfield, 53 Mo. App. 289.

A similar provision in the Constitution of *Colorado* is construed in the same way. Denver Circle R. Co. *v.* Nestor, 10 Colo. 403 (railroad in street); Denver *v.* Bayer, 7 Colo. 113. *Post*, §§ 1684–1686, and notes; also in *West Virginia:* Johnson *v.* Parkersburg, 16 W. Va. 402; Hutchinson *v.* Parkersburg, 25 W. Va. 226; *infra*, §§ 1684–1686; and in *Texas:* Houston *v.* Hutchins (Tex. Civ. App.), 33 S. W. Rep. 269; see *ante*, §§ 1014, 1151, 1152; *post*, §§ 1684–1686; Galveston R. R. Co. *v.* Fuller, 63 Tex. 467.

In *Connecticut*, the doctrine of municipal non-liability as stated in the text is adopted: Hooker *v.* New Haven & N. Co., 14 Conn. 146; Skinner *v.* Hartford Br. Co., 29 Conn. 523; Hollister *v.* Union Co., 9 Conn. 436; Bradley *v.* New York & N. H. R. R. Co., 21 Conn. 294; Clark *v.* Saybrook, 21 Conn. 313; Burritt *v.* New Haven, 42 Conn. 174. See Healey *v.* New Haven, 49 Conn. 394, noted *supra*, § 1676, note.

So in *Arkansas:* Simmons *v.* Camden, 26 Ark. 276. In 1874 *Arkansas* by its *Constitution* provided that compensation be made for property "*taken, damaged, or destroyed,*" &c. Art. ii. § 22. Hot Springs R. Co. *v.* Williamson, 45 Ark. 429. *Post*, §§ 1684–1686, and notes.

So in *Florida:* Dorman *v.* Jacksonville, 13 Fla. 538. In this case the court says: "A declaration, alleging that a city council, contriving and unjustly intending to injure, prejudice, and aggrieve the plaintiff, and to incommode and annoy him in the occupation and enjoyment of his property, dug away his sidewalk, destroyed his shade-trees, and created a nuisance in front of his premises, shows *prima facie* a cause of action at common law, the acts thus charged being in violation of law; and the declaration is not demurrable, although the city charter authorizes the city to grade and improve streets." The city must answer such allegations and plead its authority, and show that the acts alleged were within it. *Ib.* See also Bowden *v.* Jacksonville, 52 Fla. 216.

So in *Iowa* the general doctrine of the text is held: Creal *v.* Keokuk, 4 G. Greene, 47, approving Callender *v.* Marsh, *supra;* Cotes *v.* Davenport, 9 Iowa, 227; Cole *v.* Muscatine, 14 Iowa, 296; Ellis *v.* Iowa City, 29 Iowa, 229; Russell *v.* Burlington, 30 Iowa, 262; Burlington *v.* Gilbert, 31 Iowa, 356; Warren *v.* Henly, 31 Iowa, 31; Farmer *v.* Cedar Rapids, 116 Iowa, 322; Blanden *v.* Ft. Dodge, 102 Iowa, 441; Reilly *v.* Ft. Dodge, 118 Iowa, 633; Wilber *v.* Ft. Dodge, 120 Iowa, 555. But see Millard *v.* Webster City, 113 Iowa, 220. Under the statute of that State lot-owners can recover damages both to land and buildings caused by a change of grade thereafter adopted, when they have improved their lots with reference to a grade previously established. Dalzell *v.* Davenport, 12 Iowa, 437; Hempstead *v.* Des Moines, 52 Iowa, 303; Cotes *v.* Davenport, 9 Iowa, 227; Ressegien *v.* Sioux City, 94 Iowa, 543; Farmer *v.* Cedar Rapids, 116 Iowa, 322; Buser *v.* Cedar Rapids, 115 Iowa, 683; Reilly *v.* Ft. Dodge, 118 Iowa, 633; Caldwell *v.* Nashua, 122 Iowa, 179; Markham *v.* Anamosa, 122 Iowa, 689; Stevens *v.* Cedar Rapids, 128 Iowa, 227; York *v.* Cedar Rapids, 130 Iowa, 453; Kepple *v.* Keokuk, 61 Iowa, 653, holding that an established grade is one adopted by action of the city council. Meyer *v.* Burlington, 52 Iowa, 560. Where a city lowered the grade of a street four and one-half feet, but made no provision as to an intersecting street, it was held that the *alteration or change of the grade of the intersecting street* was a necessary consequence which entitled an owner of property abutting upon it to compensation for damages as allowed by statute. Conklin *v.* Keokuk, 73 Iowa, 343. If in grading a street the city causes earth to be deposited upon the adjoining lot, it is liable for the damages thus caused. Hendershott *v.* Ottumwa, 46 Iowa, 658.

So, in *Mississippi*, the non-liability

prove the street, and hence was not within the uses for which the street was dedicated or acquired; but was an appropriation of the

of the municipality for grading or changing grades is declared. White *v.* Yazoo City, 27 Miss. 357. City held liable for change of grade. Vicksburg *v.* Herman, 72 Miss. 211.

So in *Minnesota:* Lee *v.* Minneapolis, 22 Minn. 13, approving Callender *v.* Marsh, 1 Pick. (Mass.) 418; Radcliff's Ex. *v.* Brooklyn; Smith *v.* Washington, 20 How. (U. S.) 135, above cited; Karst *v.* St. Paul, S. & T. F. R. Co., 22 Minn. 118; Alden *v.* Minneapolis, 24 Minn. 254; Henderson *v.* Minneapolis, 32 Minn. 319; Genois *v.* St. Paul, 35 Minn. 330. Where a city is made liable by statute for damage to abutting property by change of grade of a street, *the right of action accrues* when the change is legally and finally determined on and fixed, though the street has not been actually lowered to such grade; and in such action *the plaintiff may, where the statute gives an action, recover as damages* what it will cost to lower his lot to conform to the new grade, and to build a retaining wall, if the same is necessary, to protect his lot when so lowered, from the caving in of an adjacent lot. McCarthy *v.* St. Paul, 22 Minn. 527; Munger *v.* St. Paul, 57 Minn. 9; s. p. Campbell *v.* Philadelphia, 108 Pa. St. 300. This view seems to the author doubtful; the change may never be executed; and the point has elsewhere been otherwise decided. Hempstead *v.* Des Moines, 63 Iowa. 36; Mulholland *v.* Des Moines A. & W. Co., 60 Iowa, 740; Brown *v.* Lowell, 8 Met. (Mass.) 172; Tyson *v.* Milwaukee, 50 Wis. 78; Jennings *v.* Leroy, 63 Cal. 397; Lewis Em. Dom. §§ 210, 667, and cases. The rule in *Minnesota* was stated to be that a municipal corporation is "liable for damages caused to private property by grading streets, when a private owner of the soil over which the streets are laid would be liable if improving it for his own use." O'Brien *v.* St. Paul, 25 Minn. 331; followed in Dyer *v.* St. Paul, 27 Minn. 457; and in Armstrong *v.* St. Paul, 30 Minn. 299. The last two cases hold that an owner may recover damages from a municipality for the removal of the natural support of his land, and that he cannot be taxed for the cost of a retaining wall to support his land. In O'Brien *v.* St. Paul, *supra,* the court briefly reviewed the cases above cited. It seems to the author that the legislature, and, by delegation, a municipal corporation, has rightful authority over streets not limited by the rights which an individual owner of soil has over his property as respects the rights of an adjoining owner. See *infra,* §§ 1679, 1684–1686.

So in *Vermont:* Fairbanks *v.* Rockingham, 75 Vt. 221.

So in *West Virginia:* Blair *v.* Charleston, 43 W. Va. 62; Yeager *v.* Fairmont, 43 W. Va. 259. City is not liable to a lot-owner because change of grade prevents surface water from flowing off the lot; nor because such change of grade increases the quantity of surface water on the lot, if it is not thrown thereon in a body. Jordan *v.* Benwood, 42 W. Va. 312.

So in *Wisconsin:* Smith *v.* Eau Claire, 78 Wis. 457; Jorgensen *v.* Superior, 111 Wis. 561; Colclough *v.* Milwaukee, 92 Wis. 182; Liermann *v.* Milwaukee, 132 Wis. 628.

In *Michigan,* an adjacent property owner is entitled to damages for the change in a street grade only when the prior grade in conformity to which his improvements were made was established by proper municipal authorities in the manner prescribed. Cummings *v.* Dixon, 139 Mich. 269.

In *Texas,* abutting owner is entitled to damages for change of street grade, though it had never before been established. Ft. Worth *v.* Howard, 3 Tex. Civ. App. 537.

In *California,* prior to the constitutional provision noted below, it was held that a city had a right to raise the grade of a street, and if the contractor or a city performed the work with proper care and skill, there was no responsibility for any consequential damage which might result to the contiguous property. Negligence or want of skill in the grading of a street, by a contractor under the city, will not be presumed or inferred from the mere fact of damage; it must be proved. Shaw *v.* Crocker, 42 Cal. 435. In 1879 *California* by *constitutional* provision provided for compensation for property "taken, appropriated, or damaged." Art. i. § 14. Reardon *v.* San Francisco, 66 Cal. 492. Change of grade act held

street to a *new use*, for which abutting owners are under the Constitution of 1870 entitled to compensation if they are thereby "damaged." [1]

not to include the original establishment of grades. German Sav. & Loan Soc. *v.* Ramish, 138 Cal. 120. *Post*, §§ 1684–1686.

The general rule given in the text is recognized in the *Federal courts*. Goszler *v.* Georgetown, 6 Wheat. (U. S.) 593, cited *ante*, § 1145; Smith *v.* Washington, 20 How. (U. S.) 135, where the power of the city was "to open and keep in repair streets," &c.; Northern Transp. Co. of Ohio *v.* Chicago, 99 U. S. 635; s. p. British Cast Plate Co. *v.* Meredith, 4 T. R. 794; Sutton *v.* Clarke, 6 Taunt. 28; Boulton *v.* Crowther, 2 B. & C. 703.

In *Kentucky* the general doctrine that the corporation is not liable for consequential damages caused by changing the grade of a street has been affirmed by the Court of Appeals of that State. Keasy *v.* Louisville, 4 Dana (Ky.), 154, opinion by *Robertson*, C. J. But in a later case in that State the majority of the court qualified the doctrine, and assumed a middle ground, namely, that if the improvement of the street is of the usual character, and the incidental damages such as ordinarily result, the law affords no remedy; but if the improvements are extraordinary, and peculiarly injurious, they can only be made on condition that the adjoining owners be compensated. This view makes the right to compensation depend not upon the fact of injury, but the amount, and treats the improvement of the street as a *taking* of the property of the lot-owner. If it is a taking, then, for *any* injury, he should be entitled to compensation. *Robertson*, J., dissented, holding, in accordance with the prevailing doctrine elsewhere, that the city might change the grade as it should judge the public interest required, taking care to avoid all peril or inconvenience which could be avoided by a proper execution of the work, and being liable only for such loss as might be occasioned by the wanton and unskilful mode of execution. Louisville *v.* Louisville Rolling Mill Co., 3 Bush (Ky.), 416. Mr. Lewis says, "It does not seem to us that this decision is either logical or sound." Em. Dom. § 99. In Newport & Cinc. Br. Co. *v.* Foote, 9 Bush (Ky.), 264, the prior cases in that State are reviewed, and the extent of legislative and municipal power as against the adjacent lot-owners determined. See Kemper *v.* Louisville, 14 Bush, 87; Pearson *v.* Zable, 78 Ky. 170. A lot-owner may recover damages of a city for injury to his property by reason of the excavation of the street in front of his lot for the purpose of grading it. Louisville *v.* Hegan (Ky.), 49 S. W. Rep. 532.

In *Ohio* the common-law measure of liability of municipal corporations has been designedly and deliberately carried beyond the limits established by the current of decisions elsewhere. They are here held liable for conse-

[1] Shawneetown *v.* Mason, 82 Ill. 337. Similar principle under act of Parliament. McCarthy *v.* Met. Board, 43 L. J. C. P. 385, embankment in public dock interfering with access to plaintiff's house. See also Seattle *v.* Methodist Protestant Church, 138 Fed. Rep. 307; Astoria H. Land Co. *v.* New York, 89 N. Y. App. Div. 512.

Pecuniary loss is the measure of damages, and hence if the property is benefited as much as damaged there can be no recovery. Elgin *v.* Eaton, 83 Ill. 535; Stone *v.* Fairbury, P. & N. R. R. Co., 68 Ill. 394; Chicago & Pac. R. R. Co. *v.* Francis, 70 Ill. 238; Page *v.* Chicago, St. P. & M. Ry. Co., 70 Ill. 324; Shawneetown *v.* Mason, 82 Ill. 337; Rigney *v.* Chicago (street viaduct), 102 Ill. 64; Chicago *v.* Taylor (street viaduct), 125 U. S. 161; Lehigh Coal Co. *v.* Chicago (street viaduct), 26 Fed. Rep. 415, *per Dyer*, J.; Seattle *v.* Methodist Protestant Church, 138 Fed. Rep. 307; North Alton *v.* Dorsett, 59 Ill. App. 612; Jacksonville *v.* Loar, 65 Ill. App. 218; Joliet *v.* Adler, 71 Ill. App. 456; Davenport *v.* Dedham, 178 Mass. 382; Davenport *v.* Hyde Park, 178 Mass. 385; Kent *v.* St. Joseph, 72 Mo. App. 42; Hampton *v.* Kansas City, 74 Mo. App. 129; *In re* William St., 7 Pa. Dist. R. 1; San Antonio *v.* Mullaly, 11 Tex. Civ. App. 599; Blair *v.* Charleston, 43 W. Va. 62. *Post*, §§ 1684–1686, and notes. Index, tit. *Damages*.

§ 1678. **Change of Grade; Elevated Viaducts; Bridge Approaches.** — It has also been held that the *erection over a street of an elevated*

quential injuries which result from the exercise of their lawful powers, though these powers be exercised judiciously, without malice, and without illegality, the court proceeding upon the ground that if an act (digging drains, as in Rhodes *v.* Cleveland, 10 Ohio, 159, or cutting down a street, as in McCombs *v.* Akron Council, 15 Ohio, 474; s. c. 18 Ohio, 229), though legal and properly executed, be done for the good of all to the injury of an individual, the injury should, in justice and good morals, be shared by all. See Goodloe *v.* Cincinnati, and Smith *v.* Same, 4 Ohio, 500, 514 (injuries to property by grading), and consult Crawford *v.* Delaware V., 7 Ohio St. 459; Scovil *v.* Geddings, 7 Ohio, Part 2, 211; Hickox *v.* Cleveland, 8 Ohio, 543, which last two accord with authorities elsewhere. In Crawford *v.* Delaware, *supra*, the doctrine is admitted to be in "direct conflict with the decisions both in England and America," and was known to be so when decided. This doctrine, says *Bronson*, C. J., 4 N. Y. 195, 205, *supra*, is not law "beyond the State of *Ohio*." The later cases seem to modify the broad doctrines of the earlier ones, and make the municipal liability depend upon circumstances. Cincinnati *v.* Penny, 21 Ohio St. 499, where the prior cases are reviewed by *McIlvaine*, J., Youngstown *v.* Moore, 30 Ohio St. 133. See Simmons *v.* Providence, 12 R. I. 8. Referring to the *Ohio* cases, the Supreme Court of *Wisconsin* declared them not to be law, but observes that there is "much justice and equity in the principle they adopt." Alexander *v.* Milwaukee, 16 Wis. 247, 256, noted *supra*, § 1675. Even in *Ohio*, a city which has constructed with reasonable and ordinary care a sewer excavation, by which *the lateral support of the plaintiff's house is withdrawn* so that the foundation walls give way, is not liable in damages therefor. Cincinnati *v.* Penny, 21 Ohio St. 499. In a later decision in this State, it is held that the owner of a lot abutting on an improved street of a city or village, in erecting buildings thereon, assumes the risk of all damage which may result from the subsequent grading and improvement of the street by the municipal authorities, if made within the reasonable exercise of their power. The liability of a municipality for injury to buildings on abutting lots exists only where such buildings were erected with reference to a grade actually established, either by ordinance or such improvement of the street as fairly indicated that the grade was permanently fixed, and the damage resulted from a change of such grade, or, when the buildings, if erected before a grade was so established, were injured by the subsequent establishment of an unreasonable grade. Whether a grade be unreasonable or not must be determined by the circumstances existing at the time the grade was established, and not by the circumstances existing at the time the abutting lots may have been improved. This principle of municipal liability applies where a lot is improved in anticipation of a reasonable future grade which is afterward established, and damage results from a subsequent change in the grade. Akron *v.* Chamberlain County, 34 Ohio St. 328; Ross *v.* Cincinnati, 24 Ohio Cir. Ct. R. 43. But can the courts adjudge a grade to be unreasonable, which the city council has decided to be reasonable? We should say not. As to amount of damages for appropriation of an easement for lateral support of street, see Dodson *v.* Cincinnati, 34 Ohio St. 276; Keating *v.* Cincinnati, 38 Ohio St. 141 (a street on a hillside so excavated as to cause a landside on a lot fronting on another and higher street). In Cohen *v.* Cleveland, 43 Ohio St. 190 (erecting a viaduct), the same court said: "This court has, however, constantly acknowledged that McCombs *v.* Akron Council and cases following it are a departure from the current of authorities elsewhere; and although these cases have not found favor with the judges delivering the opinions in Radcliff's Ex. *v.* Brooklyn, 4 N. Y. 195; Hill *v.* Boston, 122 Mass. 344; Alexander *v.* Milwaukee, 16 Wis. 247; Northern Transp. Co. of Ohio *v.* Chicago, 99 U. S. 635, we are entirely content with the doctrine, and would not change it if we could. But the justice of the Ohio rule, the firmness with which it has been adhered to for nearly half a century, and the

viaduct, such as a bridge approach, or elevated way to bridge a hollow, *intended for general public travel and not devoted to the exclusive use of a private transportation corporation*, is a legitimate street improvement equivalent to a change of grade, and that as in the case of a change of grade, and within the principles laid down in the preceding sections, an owner of land abutting on the street is, under such circumstances, not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it, in the absence of any statutory or constitutional provision conferring upon the abutting owner the right to recover therefor.[1]

manner in which it is recognized and enforced in our statutes, have established the doctrine as a rule of property, and it is now too late to enquire whether McCombs *v.* Akron Council was properly decided." Mr. Lewis reviews the Ohio cases at length, and considers them as "not founded upon a logical basis." Em. Dom. § 98.

The learned opinion of *Smith*, J., in Eaton *v.* Boston, C. & M. R. R. Co., 51 N. H. 504, 529, reviews, criticises, and classifies "the highway grade cases," and distinguishes them from each other and from the case before the court (see note to § 1679, *infra*), and propounds the basis on which the liability or non-liability in such cases should be made to depend. It may be usefully consulted. The learned judge seems inclined to favor views more liberal than those taken in many of the cases he refers to; but see, in support of his opinion, Pumpelly *v.* Green Bay Co., 13 Wall. 166. *Infra*, § 1683.

Municipal power to enlarge liability by ordinance in respect to damages caused by change of grade, see Goodall *v.* Milwaukee, 5 Wis. 32, but *quære*. Approved by Paine, J., Weeks *v.* Milwaukee, 10 Wis. 242, 270. See Pearce *v.* Milwaukee, 18 Wis. 32; Goodrich *v.* Milwaukee, 24 Wis. 422. Mr. Lewis thinks "the justice of the claim for compensation in such cases [street grade cases] so plain that any public corporation would undoubtedly be sustained in the voluntary discharge of such a claim." Em. Dom. § 108. We are unable to see, however, on what legal ground such a corporation could voluntarily create a legal liability. Damages under a special charter held to be recoverable for injury to an *unimproved lot* caused by a change of grade. French *v.* Milwaukee, 49 Wis. 584; Church *v.* Milwaukee, 31 Wis. 512; Stowell *v.* Milwaukee, 31 Wis. 523; Tyson *v.* Milwaukee, 50 Wis. 78; Haubner *v.* Milwaukee, 124 Wis. 153. Remedy for injury done by regrading held to be by appeal, not by original action. Owens *v.* Milwaukee, 47 Wis. 461. *Ante*, §§ 245, 570, 587, 1145.

[1] Sauer *v.* New York, 206 U. S. 536; aff'g 180 N. Y. 27; De Lucca *v.* North Little Rock, 142 Fed. Rep. 597; Selden *v.* Jacksonville, 28 Fla. 558; Willis *v.* Winona, 59 Minn. 27; Kearney *v.* Ballantine, 54 N. J. L. 194; Willetts Mfg. Co. *v.* Mercer County, 62 N. J. L. 95; Talbot *v.* New York & H. R. Co., 151 N. Y. 155; Brand *v.* Multnomah County, 38 Oreg. 79; Mead *v.* Portland, 45 Oreg. 1, aff'd 200 U. S. 148; Home Building & C. Co. *v.* Roanoke, 91 Va. 52 (approved in Meyer *v.* Richmond, 172 U. S. 82, 92); Colclough *v.* Milwaukee, 92 Wis. 182; Walish *v.* Milwaukee, 95 Wis. 16. See *infra*, § 1680, also chapter on Streets, *ante*. See also Sandpoint *v.* Doyle, 14 Idaho, 749.

Power to reduce streets to an established grade without liability therefor has been held not to include power to obstruct or authorize the obstruction of streets by the *approach to a bridge* in a public street, whereby the abutting owner's access to the street is prevented and water caused to flow and drain upon his property. Stack *v.* East St. Louis, 85 Ill. 377; Pekin *v.* Brereton, 67 Ill. 477; Nevins *v.* Peoria, 41 Ill. 502; Pekin *v.* Winkel, 77 Ill. 56; Chicago *v.* Baker, 98 Fed. Rep. 830. See also East Rome *v.* Lloyd, 124 Ga. 852. These cases also hold the more doubtful proposition

§ 1679 (991). **Same Subject; No Right to Lateral Support of Soil.** — Where the power is not exceeded, there is no implied or common-law liability to the adjacent owner for grading the whole width of the street, and so close to his line as to cause *his earth or fences and improvements to fall*, and the corporation is not bound to furnish supports or build a wall to protect it.[1] The abutting owner has, as against a city, no right to the lateral support of the soil of the street, and can acquire none from prescription or lapse of time.[2] But

that if the city authorizes an independent bridge company to construct such an approach to its bridge and the bridge company constructs it, the city is liable to the abutting lot-owner for the damages which he thereby sustains. The court does not appear to rest this conclusion essentially upon the clause in the Constitution of 1870 that "private property shall not be taken or *damaged* for public use without compensation," but rather upon the ground that it is the duty of the city to keep its streets open and in repair for public use as streets, and that what it does by another it does by itself. It does not seem to us that the principle of agency is applicable. If the city has the power to authorize such an approach, it is not liable; if it has no such power, its action would not justify the nuisance, and on what principle is the city corporation to be held liable for authority attempted to be conferred by an *ultra vires* ordinance on the bridge company? But under the provision of the Constitution of 1870 quoted above, if a city constructs an elevated viaduct in streets, doing special damage to abutters, it is liable to them therefor. Rigney *v.* Chicago, 102 Ill. 64; s. p. Chicago *v.* Taylor, 125 U. S. 161; Lehigh Coal Co. *v.* Chicago, 26 Fed. Rep. 415, *per Dyer*, J. *Post*, §§ 1684–1686, and notes. See also Ladd *v.* Philadelphia, 171 Pa. 485; Walsh *v.* Scranton, 23 Pa. Super. Ct. 276. Property alleged to be injured by the closing of a street need not abut the closed portion of the street. Chicago *v.* Baker, 86 Fed. Rep. 753.

[1] *Ante*, § 1677, and cases cited; Quincy *v.* Jones, 76 Ill. 231; Fyfe *v.* Turtle Creek, 22 Pa. Super. Ct. 292, 297; Taylor *v.* St. Louis, 14 Mo. 20; St. Louis *v.* Gurno, 12 Mo. 414; Pontiac *v.* Carter, 32 Mich. 164; Rome *v.* Omberg, 28 Ga. 46. In thus holding, *Lumpkin*, J., who delivers the opinion of the court, remarks: "I confess, my convictions are not so clear as I could wish them to be." The same doctrine was, however, substantially adhered to in Roll *v.* Augusta, 34 Ga. 326. But see Dyer *v.* St. Paul, 27 Minn. 457; Armstrong *v.* St. Paul, 30 Minn. 299, referred to in note to previous section. As to recovery under the *Iowa statute* for removal of lateral support of abutting lot, see Richardson *v.* Webster City, 111 Iowa, 427.

[2] Quincy *v.* Jones, 76 Ill. 231; s. p. Mitchell *v.* Rome, 49 Ga. 19; Hall *v.* Bristol (sewer excavation in street), L. R. 2 C. P. 322; Northern Transp. Co. of Ohio *v.* Chicago, 99 U. S. 635. In this last case the court says: "There was evidence at the trial that during the progress of the necessary excavation of La Salle Street a portion of the walls of the plaintiff's buildings on the lot cracked and sunk. This was caused by the caving in of the excavation in the street, the timbers used for bracing the sides having given way. In reference to this testimony the court instructed the jury that if they were satisfied from the evidence that the sinking of the wall, or rather the cracking of the wall, was due to the weight of the wall upon the selvage or portion of the earth which was left, and not to the removal of the material which was taken out of the street, that is, from the pit, the defendants were not liable. If they were satisfied that if the wall had not stood upon the plaintiff's lot where it did, there would have been no change in the level of the ground there, but that the change in the level which caused the deflection of the wall was due to the weight of the wall resting upon the earth after the excavation was made, then the defendant was not liable for that. We think this instruction was entirely right. The general rule may be admitted that every land-owner has a right to have his land preserved

the Court of Appeals of New York has held that the preservation of *lateral support to a highway,* as constructed and prepared for the

unbroken, and that an adjoining owner excavating on his own land is subject to this restriction, — that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land. *But this right of lateral support extends only to the soil in its natural condition.* It does not protect whatever is placed upon the soil increasing the downward and lateral pressure. If it did it would put it in the power of a lot-owner, by erecting heavy buildings on his lot, to greatly abridge the right of his neighbor to use his lot. It would make the rights of the prior occupant greatly superior to those of the latter. Wyatt *v.* Harrison, 3 Barn. & Ad. 871; Lasala *v.* Holbrook, 4 Paige (N. Y.), 169; Washburn on Easements, chap. iv. § 1." See also Bunker *v.* Hudson, 122 Wis. 43. But see Richardson *v.* Webster, 111 Iowa, 427, and Columbus *v.* Williard, 7 Ohio Cir. Dec. 33, aff'd 54 Ohio St. 615; *infra,* § 1683. Municipal corporations and their contractors must notify abutting owner of the proposed excavation and afford him a reasonable opportunity to protect his property. Gerst *v.* St. Louis, 185 Mo. 191.

In Meares *v.* Wilmington, 9 Ired. L. (N. Car.) 73, the general rule stated in the text is recognized in *North Carolina,* but it seems to have been held that it was the duty of the authorities "to have erected a substantial wall as the excavation proceeded, and thus preventing the caving in of the plaintiff's lot." And the substance of the reasoning of the able judge (*Pearson,* J.) who delivered the opinion is, that it is *implied* that the corporation will do the work *properly,* and if in such a case they failed to take measures to protect the plaintiff's lot (which was improved), they failed to do the work properly, and are liable to an action; but it seems difficult, judicially, to sustain this intermediate ground, however just in its results. The foregoing criticism, which appeared in the third edition of this work, was noticed by the Supreme Court of North Carolina, in Wright *v.* Wilmington, 92 N. Car. 156, where *Smith,* C. J., said: "The test of corporate liability in such cases is the manner in which the work is done, and it is not incurred when the work is 'done with *ordinary skill and caution,*' in the words of the court. The caving in of the walls, in that case, was the direct and obvious result of the removal of the supporting soil, the danger of which must have been foreseen and should have been provided against. There was clear negligence in this indifference to the plaintiff's interest, and for this the corporation was made liable. We do not propose to depart from this ruling, or to impair the force of the decision as a precedent to guide in similar cases." Implied corporate liability recognized for *working beyond or below established grade, or without any established grade.* Cole *v.* Muscatine, 14 Iowa, 296, 299. But this was not the main question in the case. Liability asserted where the city cut down *deeper than the legally established grade.* Thomson *v.* Boonville, 62 Mo. 282.

Under the legislation of *Iowa* (*supra,* § 1677, note), where a city desires to change the grade of a street, and the property of any one who has built in accordance with the grade is damaged by such change, there must be an appraisal of damage before the work is commenced; if this is not done, an action for damage will lie against the city. The city is guilty of an unlawful act, because the granted power is not exercised in a lawful manner. Noyes *v.* Mason City, 53 Iowa, 418; Hempstead *v.* Des Moines, 63 Iowa, 36; Dore *v.* Milwaukee, 42 Wis. 18. On the general subject, see Crossett *v.* Janesville, 28 Wis. 420; Chambers *v.* Satterlee, 40 Cal. 497; Delphi *v.* Evans, 36 Ind. 90; Lewis Em. Domain, chap. viii., where the statutes and constitutions of several of the States giving a remedy in *street grade cases* are referred to and the decisions construing and applying these remedial provisions are collected.

Courts will not inquire whether the grade adopted is the best one, or whether one causing less damage would not equally have answered the purpose intended. Roberts *v.* Chicago, 26 Ill. 249; Snyder *v.* Rockport, 6 Ind. 237; Reynolds *v.* Shreveport, 13 La. An.

public use, is an obligation to the community which rests upon the adjacent land-owner; and hence, although the municipality is under no obligation to afford lateral support to the abutting premises, the owner of the abutting premises cannot, by digging or excavating upon his land, so affect the lateral support of the highway as to cause or threaten its subsidence.[1]

§ 1680 (992). **Consequential Damages not a "Taking" of Property; Special Remedy.** — Provisions in a city charter, or other statute, authorizing the opening and improving of streets or the construction of works of a public nature therein if these be within the scope of the legitimate uses of streets and highways, *are not unconstitutional,* in the absence of special provision to that effect, because they omit to provide compensation for those who, although their property be not *taken,* thereby suffer indirect or consequential damages. Although the adjoining property may by such improvement of the street be consequentially injured, still it is not, in a constitutional sense, *taken* for public use.[2]

426. And the reason is, that the determination of such questions has been committed by the legislature to the governing body of the corporation, and not to the judicial tribunals.

As to wantonness, oppression, or malice in exercising the power. Rounds *v.* Mumford, 2 R. I. 154; Reynolds *v.* Shreveport, *supra;* Rudolphe *v.* New Orleans, 11 La. An. 242; Roberts *v.* Chicago, 26 Ill. 249; Philadelphia *v.* Randolph, 4 Watts & S. (Pa.) 514; *supra,* § 988, note; Henderson *v.* Midland R. Co. (Court of Exchequer), 24 L. T. R. N. S. 881; *infra,* § 1683, and note, in which an extract is given from the opinion of the Supreme Court of the United States, delivered by *Strong,* J., in Northern Transp, Co. of Ohio *v.* Chicago, 99 U. S. 635. *Supra,* § 1674, note.

Construction of English Act giving compensation for lands "injuriously affected" by public works. Becket *v.* Midland R. Co. (change of grade impeding access), L. R. 3 C. P. 82; Hall *v.* Bristol (sewer excavation injuring building), L. R. 2 C. P. 322; Queen *v.* Wallesey L. Board of Health (making sewer and levelling street), L. R. 4 Q. B. 351; Queen *v.* Vestry of St. Luke, L. R. 6 Q. B. 572, aff'd L. R. 7 Q. B. 148; Caledonian Ry. Co. *v.* Ogilvie, 2 Macq. 229.

[1] Haverstraw *v.* Eckerson, 192 N. Y. 54, aff'g 124 N. Y. App. Div. 18. See also People *v.* Eckerson, 133 N. Y. App. Div. 220; New York Steam Co. *v.* Foundation Co., 195 N. Y. 43, 50.

[2] Callender *v.* Marsh, 1 Pick. (Mass.) 418, 430; Thurston *v.* Hancock, 12 Mass. 220; Selden *v.* Jacksonville, 28 Fla. 558; Omaha *v.* Croft, 60 Neb. 57; Comesky *v.* Suffern, 83 N. Y. App. Div. 137; Hoster *v.* Philadelphia, 12 Pa. Super. Ct. 224. But see Eachus *v.* Los Angeles Consol. Electric R. Co., 103 Cal. 614. Note doubts in the dissenting opinion of Mr. Justice *Story,* in Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, and see note by Chancellor *Kent:* 2 Kent Com. 340, 6th ed. But the doctrine in the text was asserted by the Court of Appeals, upon great consideration, in Radcliff's Ex. *v.* Brooklyn, 4 N. Y. 195, 205.

What constitutes a *taking.* Terre Haute *v.* Blake, 9 Ind. App. 403; Bush *v.* McKeesport, 166 Pa. 57. *Ante,* § 1014; *infra,* §§ 1683–1686; Cooley Const. Lim. 541. *Legitimate use of streets,* see chapter on Streets, *ante,* §§ 1161 *et seq.*

Taking of private property. For a valuable discussion of *what constitutes a "taking" of private property,*

§ 1681 (993). **Change of Grade; Special Remedy exclusive.** — If, in such cases, the *statute provides a specific remedy*, or a remedy other than an ordinary civil action, that remedy alone can be pursued.[1] Accordingly, where a municipal charter provided that

the reader is referred to the case of Eaton *v.* B. C. & M. R. R. Co., 51 N. H. 504. The opinion of *Smith*, J., in this case cites most of the leading adjudications, and attempts to classify them; and the learned judge evidently favors a less rigid view than is maintained in many of the cases. The precise point held by the court was that the legislature has no power to authorize a railroad corporation to divert the waters of a river, by cutting through, in the course of making their road-bed, a natural ridge, thereby causing the waters, "sometimes in floods and freshets," to flow upon the plaintiff's land, carrying thereon sand and gravel, without making provision for his compensation. And the ground of the decision is that such an injury is a *taking* of the property within the meaning of the Constitution. 51 N. H. 504. The same view has received the full sanction of the Supreme Court of the United States, which, after recognizing the conflict in the decisions of the State courts, held that "where the real estate is actually invaded by superinduced additions of water, earth, sand, or other materials, or by having any artificial structure placed on it, so as effectually to destroy or impair its usefulness, it is a *taking* within the meaning of the Constitution." "This proposition," says Mr. Justice *Miller*, who delivered the opinion of the court, "is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle." Pumpelly *v.* Green Bay Co., 13 Wall. (U. S.) 166, 168, 181. Approved, Ashley *v.* Port Huron, 35 Mich. 296; Cumberland *v.* Willison, 50 Md. 138; Arimond *v.* Green Bay & M. Canal Co., 31 Wis. 316; Rowe *v.* Portsmouth, 56 N. H. 291; Thurston *v.* St. Joseph, 51 Mo. 510; *post*, §§ 1739, 1740; Elgin *v.* Eaton, 83 Ill. 535; Rigney *v.* Chicago, 102 Ill. 64 (constructing a viaduct so as to deprive plaintiff of access to his house except by means of stairs); Chicago *v.* Taylor, 125 U. S. 161; *infra*, §§ 1683, note, 1684–1686, and notes. This subject was thoroughly considered by the Court of Appeals of New York in Story *v.* New York Elev. R. R. Co., 90 N. Y. 122, the principles of which were restated and adhered to in Lahr *v.* Metropolitan Elev. R. Co., 104 N. Y. 268. In these cases the court *inter alia* held that the erection of an elevated railroad, the use of which is intended to be permanent in a public street, and upon which cars are propelled by steam engines, generating gas, steam, and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement of the abutting owner in the street, and its appropriation by the railroad corporation, thereby rendering it liable to the abutters for damages occasioned by such taking. Tate *v.* Greensboro, 114 N. Car. 392. See *ante*, chap. xxv. on "Street Franchises," §§ 1210 *et seq.*, where this subject is considered at length.

Party owning a house in which he carries on an inn is not entitled to be compensated for the *indirect injury to his trade* resulting from the diversion of traffic caused by an unauthorized act of lowering the roadway, but only for direct structural injury occasioned by the unauthorized interference with his cellar. Bigg *v.* London, L. R. 15 Eq. 376; but see Ricket *v.* Metropolitan R. Co., L. R. 2 H. L. 175; Duke of Buccleuch *v.* Metropolitan Bd. of Works, L. R. 5 H. L. C. 418; Beckett *v.* Midland Ry. Co., L. R. 3 C. P. 82; McCarthy *v.* Metropolitan Bd. of Works, L. R. 7 C. P. 508; s. c. L. R. 8 C. P. 191. See further on this subject chapter on Streets, *ante*. Construction of constitutional provision in Illinois and in other States that "private property shall not be taken or *damaged*, for public use, without compensation." *Supra*, § 1677, note; *infra*, § 1683, note, 1684–1686, and notes, 1689.

[1] Heiser *v.* New York, 104 N. Y. 68; Seufferle *v.* MacFarland, 28 App. D. C. 94, 105, citing text; Hovey *v.* Mayo, 43 Me. 322; Ernst *v.* Kunkle, 5 Ohio St. 520; Andover & M. Turnp. Co.

whenever the common council should change the grade of a street, "*they should make compensation to the owners of property for actual damages thereby caused,*" and provide for such payment *by an assessment upon all real estate benefited,* and an action was brought against the city by an individual injured by a change in the grade of a street, alleging as a breach of duty that the city would not pay, or provide for the payment of, the damages, it was held that he could not recover, because the effect of a recovery would be to throw the burden upon the whole city, when the law imposed it on those locally benefited. The court regarded the case as one where the law creating the liability had provided a special mode of obtaining payment from a particular fund, and where the plaintiff's remedy was not by a suit for damages, but by *mandamus* to compel the council to make the assessment and collection; and the judgment of the court was, we think, correct.[1]

§ 1682 (994). **Same Subject; Remedy of Abutter by Injunction.** — When, however, the charter provides that the established grade of a street "shall not be changed until the damages have been assessed and tendered to the property owners *before* any such change shall be made," this is imperative, and the city may be enjoined by the abutter from entering on the work of changing the surface of the street, in conformity with the altered grade, until his damages have been *first* ascertained and tendered.[2]

v. Gould, 6 Mass. 40; Boston *v.* Shaw, 1 Met. (Mass.) 130; Cole *v.* Muscatine, 14 Iowa, 296; Dorman *v.* Jacksonville, 13 Fla. 538, 552; *supra,* § 1635. *Ante,* § 1677, note; *infra,* §§ 1681, 1682.

Construction of special statutes. Cole *v.* Muscatine (remedy in Commissioners' Court), 14 Iowa, 296; Dalzell *v.* Davenport (mode of estimating and proof of damages), 12 Iowa, 437; Crossett *v.* Janesville (requiring recommendation of property owners), 28 Wis. 434; Freeland *v.* Muscatine, 9 Iowa, 461. Since the decision in Callender *v.* Marsh, *supra,* the law as there held has as above stated been changed by statute, and a specific remedy provided for such an injury. *Ante,* § 1677, note. Fernald *v.* Boston, 12 Cush. (Mass.) 574. This remedy excludes a civil action for all damages *necessarily* occasioned. Flagg *v.* Worcester, 13 Gray (Mass.), 601; *Ib.* 193; 6 Gray, 544; Benjamin *v.* Wheeler, 8 Gray (Mass.), 409, 413. Statute giving damage caused by change of grade held to extend to *property outside* of the city limits, as well as to that within the city. Columbus *v.* Hydraulic Woolen Mills Co., 33 Ind. 435.

[1] Reock *v.* Newark, 33 N. J. L. 129. Nor would a suit for damages lie for the omission of the common council to make, or cause the assessment to be made, the remedy being by *mandamus. Ib.;* see also Heiser *v.* New York, 104 N. Y. 68. In *Illinois* it is held that a city is liable if it fails to have the damages assessed. Elgin *v.* Eaton, 83 Ill. 537; Clayburgh *v.* Chicago, 25 Ill. 535. So in *Indiana.* Lafayette *v.* Wortman, 107 Ind. 404, noted, § 1677, *supra,* note; *ante,* §§ 827, 1487, note; *supra,* § 1665, note; § 1676, note.

[2] Hurford *v.* Omaha, 4 Neb. 336; Schrodt *v.* St. Joseph, 109 Mo. App. 627. Grade ought, primarily, to be proved by the record and files; if these are lost, then by secondary evidence; but it cannot be established

§ 1683 (995). **Same Subject; Judgment of the Supreme Court of the United States.** — The *principles stated in the preceding sections*, viz., that a city is not liable at common law for consequential damages caused by an authorized change in the grade of a public street, and that such a change, where private property is not actually encroached upon, though it may be injured in its use, is not a "taking" of property within the constitutional provision that private property shall not be "taken" for public use without compensation, have been recognized and applied in a judgment of the Supreme Court of the United States, in a case in which it was sought by the owner of property bounded on one side by the Chicago River and on another by a street, to recover of the city damages for special injuries to such property, sustained in consequence of the action of the city authorities in *constructing under express legislative authority a tunnel or passage-way within the limits of the street*, under the river where it intersected the street. The only constitutional provision then in force bearing on the question was the usual one that private property shall not be "taken" for public use without compensation. The complaint of the lot-owner was that, by reason of the operations of the city, he was *deprived of access* to his premises on the side of the river, caused by a coffer-dam (which was, however, *necessary* to enable the city to construct the tunnel), and by obstructions in the street resulting from the work. Neither the coffer-dam nor the obstructions in the street were continued longer than was necessary. A recovery was sought on the ground that the erection of the coffer-dam and the necessary excavations in the street constituted a public nuisance, causing *special damages* beyond those suffered by the public at large. But the Supreme Court, on the principle that a nuisance cannot be predicated of that which the law authorizes, and that the city was the agent of the State in performing a public duty authorized by statute, held that there *was no implied or common-law liability even for such special damages*, since it did not appear that the power granted to the city had been exceeded, or that the owner's lot had been trespassed on, or that any wanton or negligent injury had been inflicted. Under such circumstances, it was regarded as settled on the soundest of legal reasons, that there is no right to compensation for consequential injuries caused by authorized erections or public works, unless such right is given by constitutional provision

by admissions of municipal officers that such a grade had been made. Nebraska City *v.* Lampkin, 6 Neb. 27.

Remedy by injunction, see Index, tit. *Equity, Injunction; infra*, § 1684, note.

or legislative enactment, and that it was immaterial whether the fee of the street was in the State, or in the city, or in the abutter.[1]

[1] Northern Transp. Co. of Ohio *v.* Chicago, 99 U. S. 635; reprinted 2 Thomps. Neg. 692; annotated, *Ib.* 743, 747. In giving the judgment of the court in this case, Mr. Justice *Strong* observed: "It is undeniable that in *making the improvement* of which the plaintiffs complain the *city was the agent of the State, and performing a public duty imposed upon it by the legislature;* and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill, is a doctrine almost universally accepted, alike in England anl in this country. It was asserted unqualifiedly in British Plateglass M. Co. *v.* Meredith, 4 T. R. 794; in Sutton *v.* Clarke, 6 Taunton, 28, and in Boulton *v.* Crowther, 2 Barn. & C. 703. It was asserted in Green *v.* Reading Bor., 9 Watts (Pa.), 382, 384; O'Connor *v.* Pittsburg, 18 Pa. St. 187; in Callender *v.* Marsh, 1 Pick. (Mass.) 418, as well as by the courts of numerous other States. [*Ante*, § 1677, and note.] It was asserted in Smith *v.* Washington Corp., 20 How. 135, in this court; and it has been held by the Supreme Court of *Illinois*. The decisions in Ohio, so far as we know, are the solitary exceptions. The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. *The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility of course should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the legislature shall give.* It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta, and the restriction to be found in the Constitution of every State that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held *not to be 'a taking'* within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. Cooley on Constitutional Limitations, page 542, and notes. The extremest qualification of the doctrine is to be found, perhaps, in Pumpelly *v.* Green Bay Co., 13 Wall. (U. S.) 166, 180, and in Eaton *v.* Boston, C. & M. R. Co., 51 N. H. 504 [*supra*, § 1679, note]. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient. The present Constitution of *Illinois* [see *infra*, § 1686, and note] took effect [on the 8th day of August, 1870] after the work of constructing the tunnel had been substantially completed. It ordains that private property shall not be 'taken or *damaged*' for public use without just compensation. This is an extension of the common provision for the protection of private property. [*Ante*, § 1677, note. *Post*, §§ 1684–1686.] But it has no application to this case, as was decided by the Supreme Court of the State in the case of Chicago *v.* Rumsey, 87 Ill. 348; s. c. 10 Chicago Legal News, 333. That case also decides that the city is not liable for consequential damages resulting from an improvement made in the street, the fee of which is in the city, provided the improvement had the sanction of the legislature. [As to materiality of fee being in city, see *ante*, chap. on Streets.] It also decides that La Salle Street is such a street, and declares that a recovery of such damages by

§ 1684 (995 *a*). **Liability for Consequential Damages under Special Constitutional Provisions; Grades and Changes of Grade.** — Several of the more recent State Constitutions have, as we have seen, ordained that " private property shall not be taken or *damaged* for public use without compensation." [1] This extension of the usual constitutional provision by the introduction of the word "damaged" was first adopted in 1870 in the Constitution of that

an adjacent lot-holder has been denied by the settled law of the State up to the adoption of the present Constitution." See Elgin *v.* Eaton, 83 Ill. 535; Pekin *v.* Brereton, 67 Ill. 477; Shawneetown *v.* Mason, 82 Ill. 337; People *v.* McRoberts, 62 Ill. 38; Chicago & Pac. R. Co. *v.* Francis, 70 Ill. 238; Putnam *v.* Douglas County, 6 Oreg. 318; Hornstein *v.* Atlantic & Gt. W. R. Co., 51 Pa. St. 87. [*Ante*, § 1677 and notes. *Post*, §§ 1684–1686.]

"We have examined," continues *Strong*, J., "the decisions of the courts of *Illinois*, and others to which we have been referred by the plaintiffs in error, but in none of them was it decided that a riparian owner on a navigable stream, or that an adjoiner on a public highway, can maintain a suit at common law against public agents to recover consequential damages, resulting from obstructing a stream or highway in pursuance of legislative authority, unless that authority has been transcended, or unless there was a wanton injury inflicted, or carelessness, negligence, or want of skill in causing the obstruction. Very many of the decisions relied upon were cases in which it appeared that the acts complained of as having wrought injurious consequences were done by *private individuals, for their own benefit and without sufficient legislative authority*. The distinction between cases of that kind and such as the present is very obvious. It was well stated by *Gibbs*, C. J., in Sutton *v.* Clarke, 6 Taunton, 28, which, as we have seen, was decided on the ground that the defendant was acting under the authority of an act of Parliament, deriving no advantage to himself personally, and acting to the best of his skill and within the scope of his authority, and so was not liable for consequential damages. 'This case,' said the chief justice, 'is totally unlike that of the individual who for his own benefit makes an improvement on his own land according to his best skill and diligence, not foreseeing it will produce injury to his neighbor; if he thereby, though unwittingly, injure his neighbor, he is liable. The resemblance fails in this most important point, — that his act is not done for a public purpose, but for private emolument. Here the defendant is not a volunteer; he executes a duty imposed upon him by the legislature, which he is bound to execute.' "

The case of Northern Transportation Co. *v.* Chicago is distinguished in Chicago *v.* Taylor (construction by city of a street viaduct), 125 U. S. 161, a case from *Illinois* which arose under the Constitution of 1870, which approves Rigney *v.* Chicago (Street Viaduct Case), 102 Ill. 64. In both of these cases the city was held liable under that Constitution to the abutter, for damages, although the *corpus* of his lot was not invaded. Rigney *v.* Chicago, 102 Ill. 64, is the leading case in *Illinois* construing the constitutional provision imposing liability for property *damaged* for public use. See Chicago *v.* Union Blg. Assoc., 102 Ill. 379, distinguished from Rigney *v.* Chicago, 102 Ill. 64, and holding that the city could not be enjoined by the owner of lots distant three and one-half blocks, from vacating and closing up a street under legislative authority, and permitting it to be occupied by the Board of Trade with its building. *Infra*, § 1686, and note. See also Chicago & W. I. R. Co. *v.* Ayres, 106 Ill. 511; Lake Erie & W. R. Co. *v.* Scott, 132 Ill. 429; Bloomington *v.* Pollock, 141 Ill. 346; Schroeder *v.* Joliet, 189 Ill. 48; Chicago *v.* Lonergan, 196 Ill. 518; Winnetka *v.* Clifford, 201 Ill. 475; Metropolitan W. S. El. R. Co. *v.* Goll, 100 Ill. App. 323.

[1] *Ante*, § 1677, note. *Ante*, chapter on Eminent Domain, §§ 1015–1018, 1054, note.

year of the State of Illinois. Undoubtedly this word effects a very important change in the law, the exact scope of which remains yet to be definitely ascertained and limited by the courts. After much uncertainty and oscillation in the State of Illinois, it has at length been deliberately determined that this constitutional provision requires compensation to be made not only where property is *actually invaded*, but also where it appears that there has been a *physical disturbance* of a *right*, either public or private, which the property owner enjoys in connection with his property and which gives to it an additional value, and that by reason of such disturbance he has sustained damage with respect to his property in excess of that sustained by the public generally.[1] The interpretation was sustained as not in conflict with the Federal Constitution by the Supreme Court of the United States, in a case that came from that State.[2]

What *effect has the introduction of the word "damaged"* into the organic law on the liability of a municipal corporation for consequential damages caused by bringing a street to an established grade line, or by changing the established grade of a street? In answering this question, it must be borne in mind that streets are essentially public in their nature, and as such are under the paramount control of the legislature, which, subject to the *property rights* of the abutting owners, has, except as specially limited by the Constitution, plenary power over them and their uses for all legitimate street purposes.[3] Power to graduate and improve streets so as to make them safe and convenient for public use unquestionably exists in the legislature, and is almost universally conferred by it upon the municipal or local authorities, to be used according to their judgment. This is a continuing power not exhausted by its first exercise.[4] When, under such legislation, an owner dedicates without restriction land for a public street, he must be taken to consent, for the reasons stated in a previous section, that the public authorities may determine grades, and possibly what future changes in grades may be necessary or desirable for the public convenience.[5] He must contemplate that hills within the limits of the street will be reduced from the natural surface, making a cut; that ravines and low places therein will be filled up

[1] Rigney *v.* Chicago (street viaduct case), 102 Ill. 64, which is the leading case in that State on this subject, modifying and explaining the previous decisions. See also Spencer *v.* Pt. Pleasant & O. R. R. Co., 23 W. Va. 406.

[2] Chicago *v.* Taylor (street viaduct case), 125 U. S. 161.

[3] *Ante*, §§ 1122, 1163.

[4] *Ante*, §§ 1145, 1151, 1152.

[5] *Ante*, § 1676.

to the ordained grade or level, leaving an embankment in front of the abutting property. The right to make such improvement of the street for *legitimate street purposes* would seem to be embraced in his grant or dedication to the public. If lands for a street are unconditionally acquired by eminent domain, the right thus to graduate and improve the street for street uses proper is included in the compensation awarded. In view of these considerations, it seems to us clear that for the original establishment of a grade line and the reduction of the natural surface of the street for street purposes to such line, there is no legal right or even natural equity in the dedicator or his assignee to compensation. That there is no implied or common-law liability on the part of a municipality to make compensation in such cases is everywhere admitted and adjudged; and in our examinations we have found no remedial statute expressly limited to city streets, creating a liability in favor of the abutting owner for damages caused by bringing the street down to a grade line for the *first* time established.

§ 1685 (995 *b*). **Same Subject.** — But *where a grade has been officially established*, and where improvements have been thereafter made according to such established grade, and it is *afterwards* changed to the injury of the abutting owners, there is a strong natural equity in their favor for compensation. This is manifested by the frequency of statutes creating liability for damages caused to property, and especially to improved property, by a change of an established grade.[1] For the reasons above suggested, it seems to us that, on principle, the mere provision of the Constitution imposing a liability for property *damaged* for public use does not create a liability on the part of the municipality for reducing the natural surface of the street, in the course of its normal and ordinary improvement for street purposes proper, to a grade line for the first time established. If there are cases to the contrary we doubt whether they were well considered and think that they are not well decided. Admitting that under the amended constitutional provision under consideration a municipality may be required to make compensation, not only in cases where there is an actual physical invasion of the adjoining property, but also a physical disturbance of a *right or easement* connected therewith, such as the easement of access, or of light and air, which causes a special damage over and above special benefits and over and above the damage which is sustained by the public generally, still such rights and easements of the abut-

[1] *Ante*, § 1677, note, where many of these statutes are referred to.

ting owner or the right to the support of his soil is, in the case under consideration, subject, by the very terms and conditions of the dedication or acquisition of the street, to the right of the public to bring it down for *street purposes proper* to such grade line as the public authorities shall first adopt. Although sensible of the apparent difficulty of defining the grounds for the distinction, it seems to us, where a grade line has been officially established and where property has been improved on the faith of it (which is, of course, done on the assumption that the grade is permanent, although the power to change it for the public good exists), that such a case rests upon so strong a basis of natural justice as to bring it within the purpose of the constitutional provision in question, which was to prevent the unequal sacrifice for the public good which in such cases the abutting owner was, by the established course of decisions, required to make, since such decisions in many of the States limited his right to compensation to cases where there was a trespass upon or physical injury to the *corpus* of his property. The decisions under the amended constitutional provision upon the exact point, as to its effect on street grade cases, are not as yet very decisive, but some of those referred to in the note to the next section appear to give to this provision a scope greater than the one here suggested. Part of the decisions cited rest, however, in whole or in part upon statutes; and hence a critical examination of the legislation and of the opinions in the cases is necessary to ascertain the exact force, value, and effect of any given judicial judgment.

§ 1686 (995 *c*). **Same Subject; Change of Grade for other than Street Purposes.** — Where, however, *the establishment or change of the grade is made, not for ordinary and usual street purposes*, but for the use and convenience of railway or other private companies, or even by the municipality for other than ordinary and proper street uses, and damages are thereby caused to the abutter, the decisions hold with scarcely any dissent, and we think properly, that the constitutional amendment under consideration is applicable, and imposes or declares a liability therefor. Thus, if a city should, for the public benefit, put the street to an unusual use, as, for example, a high viaduct constructed by the city, especially if it interferes with general public travel, thereby specially injuring the abutting owner's access or his light or air, such a case rightly falls within the remedial purpose of the constitutional amendment. In view of the wide-reaching and as yet somewhat undefined limits of the operation of the constitutional provisions in question, we have given the text

thereof in the note, and have illustrated the subject by a reference to the leading decisions thereon in the several States. We only add, that unless the broad language of these provisions is carefully applied and limited to reach the evil in which the provisions themselves had their origin they are capable of working mischiefs as great as those which they will remove or cure.[1]

[1] ALABAMA. — *Constitution*, art. xiv. § 7. "Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction." [Same as Pennsylvania (noted *infra*), except the omission of the words "or secured" after the word "paid."] In Montgomery *v.* Townsend (street grade case), 80 Ala. 489, the municipal authorities had damaged plaintiff's property by cutting down the sidewalk contiguous thereto. Plaintiff's lot was thus left twenty feet above the street. It was held that the question ought to have been submitted to the jury whether the evidence showed a "construction or enlargement" of the highway within the meaning of the Constitution. The court said: "The Constitution requires compensation to be made for the extraordinary changes which may not be due to the natural formation of the surface, or to the mode of original construction, as then deemed sufficient to a safe and convenient way. A material change, operating injury to adjoining premises, occasioned by a contingency which could not have been reasonably and fairly foreseen, or made merely because the corporate authorities may judge that the public convenience would be increased thereby, or the general appearance of the street improved, is a new description of injury in the enlarged sense of the Constitution, which casts on the property owner an additional burden entitling him to compensation. Injuries by the construction of a highway, as provided for in the Constitution, include those injuries produced by alterations, which could not have been naturally and reasonably anticipated, and damages for which could not have been legally awarded in the preliminary assessment, if the land is condemned, or if dedicated, which the owner would not be estopped to claim. This construction effectuates the cardinal purposes of the Constitution, — the protection of private property, and the equal distribution of the public burdens — avoids double compensation, and is applicable alike to all corporations, municipal and other, and individuals invested with the privilege of taking private property for public use." This case was remanded for a new trial. On the second appeal (Montgomery *v.* Townsend, 84 Ala. 478), these principles were adhered to; and the rule as to measure of damages laid down in Pennsylvania R. R. Co. *v.* Marchant, 119 Pa. St. 541 (noted *infra*), was approved. In Columbus & W. R. Co. *v.* Witherow (railroad in street), 82 Ala. 190, where a railroad company was about to construct a railroad through the middle of a street on which complainant was an abutting owner and in which he owned the fee, and the company was proceeding to raise an embankment in the street, from eight to thirteen feet high, an injunction was granted until security was given for the prepayment of compensation as required by the Constitution.

ARKANSAS. — *Constitution*, art. ii. § 22. "Private property shall not be taken, appropriated, or damaged for public use without compensation therefor." A railroad was constructed in a street on which plaintiff was an abutting owner. The road-bed was made fifty feet wide, and from three to four feet above the grade of the street. This made an obstruction, and otherwise injured the plaintiff's property. It was held that under the constitutional provision above quoted, plaintiff was entitled to compensation. Hot Springs R. Co. *v.* Williamson (railroad in street), 45 Ark. 429.

CALIFORNIA. — *Constitution*, art. i. § 14. "Private property shall not be taken or damaged for public use, without just compensation having first been made or paid into court for the owner." Plaintiffs were owners of land abutting

Civil Liability in respect of Defective Streets.

§ 1687 (996). **Liability for Defective Streets and Sidewalks.** — We come now to consider the civil liability of municipal corporations

on Army Street in San Francisco. The city constructed a sewer in the street, and brought the street to the official grade (it seems for the first time). In doing so, the heavy street filling caused by its weight the soft earth in the street to be "squeezed out," and the foundations of the plaintiff's buildings and the buildings themselves to be thereby injured. It was held that the plaintiffs were entitled to recover compensation by virtue of the constitutional provision. Reardon *v.* San Francisco (street grade case), 66 Cal. 492. See also Eachus *v.* Los Angeles, 130 Cal. 492. See Hall *v.* Bristol, L. R. 2 C. P. 322; *ante*, §§ 1018, note, 1679, note, and cases construing English statutes there cited; Index, tit. *Damages, Eminent Domain, Streets.*

COLORADO. — *Constitution*, art. ii. § 15. "Private property shall not be taken or damaged, for public or private use, without just compensation." In Mollandin *v.* Union Pac. Ry. Co. (railroad in street), 14 Fed. Rep. 394 (*Hallett*, J.), where a steam railroad company had laid its track in the street in front of plaintiff's premises, it was held that plaintiff was, under the constitutional provision, entitled to compensation. In Denver *v.* Bayer (railroad in street), 7 Colo. 113, it was said that the abutting owner is entitled to compensation from the railroad company, when the street is occupied by a railroad, and his property is injured thereby; and it is immaterial that the fee of the street is in the city. The case decided that the *city* is not liable. See Denver *v.* Bonesteel, 30 Colo. 107.

GEORGIA. — *Constitution, Bill of Rights*, § 3, par. 1. "Private property shall not be taken or damaged for public purposes without just compensation being first made." In Atlanta *v.* Green (street grade case), 69 Ga. 386, *the city had raised the grade of the street* on which plaintiff was an abutting owner, making the level of the street opposite the plaintiff's premises fifteen feet higher than it was originally. It was held that the plaintiff was entitled to compensation, although there was no direct invasion of her premises; and that the *measure of damages* was the decrease in the value of the property, taking into account any benefit as well as any injury done to the property. In Moore *v.* Atlanta (street grade case), 70 Ga. 611, the grade had been fixed by the city several years before, but the complainant had neglected to have it recorded, as required by statute in order to give him a right to maintain an action for damages if the grade was afterwards changed. The court regarded the case, which arose after the adoption of the constitutional provision, as the proper subject of an action for damages; but refused an injunction, citing Stetson *v.* Chicago & Ev. R. R. Co., 75 Ill. 74 (noted *infra*), and distinguishing the case from Chambers *v.* Cincinnati & Ga. R. Co., 69 Ga. 320, where an injunction was granted, on the ground that in the latter case the property was actually taken, while here the property suffered only a consequential injury. But is this distinction sound under the language of the Constitution? See also Castleberry *v.* Atlanta, 74 Ga. 164; Peel *v.* Atlanta, 85 Ga. 138.

ILLINOIS. — *Constitution*, art. ii. § 13. "Private property shall not be taken or damaged for public use without just compensation." The leading case in Illinois is Rigney *v.* Chicago, 102 Ill. 64, approved Chicago *v.* Taylor, 125 U. S. 161, referred to, *supra*, § 1684. In Rigney *v.* Chicago the court explains the previous decisions in that State. See also Chicago *v.* Murdoch, 212 Ill. 9, aff'g 113 Ill. App. 656; Schroeder *v.* Joliet, 189 Ill. 48; Chicago *v.* Jackson, 196 Ill. 496; Winnetka *v.* Clifford, 201 Ill. 475.

BRIDGE, GRADE, AND OTHER CASES. In Shawneetown *v.* Mason (street grade case), 82 Ill. 337, *the grade of a street* on which plaintiff was an abutting owner *was raised* by the defendant city so as *to form a levee* along the river front. An embankment ten feet high was thus left in front of the plaintiff's premises. It was held that the city was liable. The constitutional provision requiring compensation for private property "damaged" for public

for *injuries caused by defective and unsafe streets and sidewalks.*[1] And here it is important to attend to the different grades of corpo-

use, embraces cases of injury caused by bringing street to grade. Elgin *v.* Eaton, 83 Ill. 535. The Constitution, it is said, without discussion, changed the rule. It does not very clearly appear whether the change was from the natural surface or from a grade previously established. In another case a bridge company, with the consent of the defendant city, *erected its bridge on the street* in front of the plaintiff's premises, thereby obstructing the street, and rendering it useless to the plaintiff as a street. It was held that the *city* was liable; but *quære* as to liability of city. Stack *v.* East St. Louis (bridge in street), 85 Ill. 377. Compare Olney City *v.* Wharf, 115 Ill. 519, noted *infra*. In Chicago *v.* Union Build. Assoc. (vacating street), 102 Ill. 379, it was held that the constitutional provision did not extend to the case of loss in value of property *arising from the vacating and closing of part of a street* on which plaintiff was an abutting owner, when the part closed was not in front of, but some considerable distance from, the complainants' prop-

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[1] In *England* and *Canada*, it is the duty of the parishes and counties to keep every public road, street, bridge, and highway in repair, but they are not suable in damages, in the absence of a statute to that effect, for neglect of duty. King *v.* Broughton, 5 Burr. 2700; King *v.* Penderryn, 2 T. R. 513; Queen *v.* Scott, 2 Ld. Raym. 922; King *v.* Liverpool, 3 East, 86; King *v.* Oxfordshire, 4 B. & C. 194; King *v.* Ecclesfield, 1 B. & Al. 348; King *v.* Eastrington, 5 A. & E. 765; King *v.* Leake, 5 B. & Ad. 469, 482; Regina *v.* Lordsmere, 19 L. J. M. C. 215; Healey *v.* Batley Corp., L. R. 19 Eq. 375; Queen *v.* Horley, 8 L. T. N. S. 382; Queen *v.* Kitchener, L. R. 2 C. C. 88; Wellington *v.* Wilson, 14 Up. Can. C. P. 299, 304; Harrold *v.* Simcoe, 16 Up. Can. C. P. 43; s. c. 18 Up. Can. C. P. 9; Queen *v.* Yorkville, 22 Up. Can. C. P. 431; Grassick *v.* Toronto, 39 Up. Can. Q. B. 306. Harrison's Munic. Manual (5th ed., 486, 494) cites the cases fully. See also Biggar's Municipal Manual (Canada, 1900), 824 *et seq.; infra*, § 1688, note.

"*By the common law of England,*" says Chief Justice *Gray*, "*the charge of repairing highways lay upon the inhabitants of the parish, of common right, and could rest upon other corporations or individuals only by tenure or prescription.* Lord *Hale*, in Austin's Case, 1 Ventr. 183, 189; Com. Dig. Chimin. A. 4; Bac. Ab. Highways, E. 13 Rep. (ed. 1826) 33, note B. *Bridges in highways*, if '*within* any city or town corporate,' were to be repaired by the inhabitants of such city or town; if '*without* the city or town corporate, *by the county;* and no other corporation or private person was bound to repair a bridge, unless by tenure or prescription. For want of repair in a private bridge, the person entitled to a passage over it might have a remedy by writ *de ponte reparando*, but for want of repair in a public bridge, the remedy was by presentment or information at the suit of the king. 'Where it cannot be known and proved what persons, lands, tenements, and bodies politic' were bound to make or repair a public bridge, the St. of 22 Henry VIII. chap. 5, provided a more speedy remedy to compel the inhabitants of the city, town, or county to repair, by application to four justices of the peace. 3 Sts. of the Realm, 322; 2 Inst. 696–703; Repair of Bridges, 13 Rep. 33; Regina *v.* Justices of St. Peter's, 2 Ld. Raym. 1249, 1251; Com. Dig. Chimin. B. 3; Bac. Ab. Bridges. Although the English books contain numerous cases of indictments or informations for neglect to repair highways and bridges, *no instance has been referred to*, in the frequent discussions of the subject in England and in this country, *in which an English court has sustained a private action against a public or municipal corporation or quasi corporation for such neglect, except under a statute expressly or by necessary implication giving such a remedy.*" Hill *v.* Boston, 122 Mass. 344, 345, where the learned Chief Justice gives an instructive review of the English and American decisions on the subject. See also McEvoy *v.* Sault Ste. Marie, 136 Mich. 172. *Review of Cases:* 18 Am. Law Review, 1008; 2 Thomps. Neg., chaps. xv., xvi. *Ante*, § 1642.

rations, and to keep in mind *the distinction between municipal corporations proper and quasi corporations*, such as counties and town-

erty. The court placed its decision upon the ground that such an injury was not different in character from that suffered by the public generally. So, in *Iowa*, where power to vacate streets is given under statute, where a vacation of streets affects all the property owners alike, though in different degrees, they have no remedy. Borghast *v.* Cedar Rapids, 126 Iowa, 313. As to an *injunction* in *Illinois* in case of damage, see Stetson *v.* Chicago & Ev. R. Co., 75 Ill. 74. In Board of Trade Tel. Co. *v.* Barnett (telegraph poles in street), 107 Ill. 507, the action was trespass *quare clausum* for *erecting poles in the street* on which plaintiff was an abutting owner, and in which he owned the fee. It was held that this was a new use of the street, imposing on the fee an additional burden, for which compensation should be made. The court cited Indianapolis B. & W. R. R. Co. *v.* Hartley, 67 Ill. 439. *Ante*, § 1220. But if so, there would be a remedy at common-law aside from the constitutional provision in question; and the court, while it mentioned the constitutional provision, seemed so to hold.

RAILROADS IN STREETS. Pekin *v.* Brereton, 67 Ill. 477. Excavations by railroad company in street and sidewalk adjoining plaintiff's premises. *City* held liable. Stone *v.* Fairbury, P. & N. R. Co., 68 Ill. 394. Smoke and cinders from locomotives. Railroad company held liable. Chicago & Pac. R. Co. *v.* Francis, 70 Ill. 238. Benefit equalled the injury, so that there was no decrease in value. *Held*, no damage, and hence no liability. Injunction refused. Stetson *v.* Chicago & Ev. R. Co., 75 Ill. 74. In Newman *v.* Metropolitan Elevated Railway Co., 118 N. Y. 618, the court construed the provisions of the Rapid Transit Act and the General Railroad Act, which declare that the commissioners of appraisal in determining the amount of compensation for property acquired by railways under said acts shall not "make any allowance or deduction on *account of any real or supposed benefits* which the party in interest may derive from the construction of the proposed railway." After stating that the rule under the General Railroad Act, as now established, is that the owner shall receive, first, the full value of the land taken, and second, where a part only is taken, a fair and adequate compensation for all injury to the residue, sustained or to be sustained by the construction and operation of the railroad, the court held that, in the contemplation of the second part of the rule, such damages are wholly consequential, and that in ascertaining them there is necessarily involved an inquiry into the effect of the road upon the property, and a consideration of all the advantages and disadvantages resulting and to result therefrom; and that the rule established under the General Railroad Act must govern and control awards against the Elevated Railway Companies made under the Rapid Transit Act. The court, *Brown*, J., delivering the opinion, said that easements of ingress and egress and of light and air "cannot be severed from the lands abutting on the street, and the effect of the construction of a railroad in the street is not to transfer them to the company, but to destroy or impair them. The right therefore of the property owner to compensation is not the value of the easements in the street separate and distinct from his abutting property, but the damage his property sustains as a result or consequence of the loss of these easements." The record in the case showed that the rental value of the upper floors of the building belonging to plaintiff had been diminished, but that the rental value of the ground floor had been greatly enhanced in value, by reason of the proximity of the stairway to the railroad station. The court held that, in awarding damages to the owner, the effect upon the entire property should be considered, and not merely that upon any particular part thereof. See *ante*, §§ 1018, 1259, 1261, and cases. Injunction refused; the proper remedy being, in the case presented, an action at law. Pekin *v.* Winkel, 77 Ill. 56. *City* held liable. Pittsburg, Ft. W. & C. R. Co. *v.* Reich, 101 Ill. 157; Chicago & W. Ind. R. Co. *v.* Ayres, 106 Ill. 511, railroad companies held liable. But *quære* as to the liability of the *municipalities* in the above cases. See on this point the later case of Olney *v.* Wharf

ɔs, including in the latter, for this purpose, the *towns* of New ɡland. With respect to corporations of the character last men-

ɹoad in street), 115 Ill. 519, in ɔh the court held that the city was liable in such a case, saying: "The is in no manner liable, but the ility for all damages sustained must upon the railroad company." tley *v.* Atlanta, 92 Ga. 623; Burk- ı *v.* Ohio & M. Ry. Co., 122 Ind. 344; ɜant *v.* Marlboro, 175 Mass. 459; ɔe *v.* Northampton St. R. Co., 189 ıs. 254; Tatman *v.* Benton Harbor, Mich. 695; Dillon *v.* Raleigh, 124 Car. 184; Denison, &c. Ry. Co. *v.* ıes, 20 Tex. Civ. App. 358. A city ely exercises a delegated govern- ıtal power when it authorizes a way company to build a tunnel er a street. Terry *v.* Richmond, Va. 537.

KENTUCKY. — A city is liable to a owner for taking part of his lot ıout his consent, and for the in- es to trees and shrubbery in mak- a city improvement. Ludlow *v.* ɜkintosh (Ky.), 53 S. W. Rep. 524. also Layman *v.* Beeler, 113 Ky. 221.

MISSOURI. — *Constitution*, art. ii. ı. "Private property shall not be ɜn or *damaged* for public use with- just compensation." Payment is ıired "before the property is dis- ɔed or right of owner divested." Blanchard *v.* Kansas City (street le case), 16 Fed. Rep. 444, the facts not clearly appear. But from the ɡuage of the court (Mr. Justice *ler*), it seems that the action was damages for cutting down the grade he street in front of the plaintiff's It was held that he was entitled ompensation. In another case the ıplainant, sought an injunction to rain the city from grading in front is lot. A grade had previously been blished, and the street graded. The ɜt of the proposed change of grade ıld have been to damage complain- s lot by making a cut in front there- eaving the lot many feet above the et as newly graded. The injunction granted until compensation should made. McElroy *v.* Kansas City eet grade case), 21 Fed. Rep. 257, *wer*, J. In Werth *v.* Springfield eet grade case at common law), Mo. 107, the court said: "When ɔerty is damaged by establishing grade of a street, or by raising or lowering the grade of a street previously established, it is damaged for public use within the meaning of the Constitution." But the point thus stated was not necessary to the decision of the case. The case came up on demurrer to the petition based on the ground that it stated no cause of action. The first count charged that the defendant raised the grade in a *negligent and unskilful manner*. The gist of the petition was, therefore, the *negligence* in raising the grade, for which the petition on its face stated a good cause of action at common law; and this was all that the case decided. On this point the court said: "For damages arising from the negligent and unskilful execution of the work, an ordinary action undoubtedly still remains to the party injured. We are of opinion that the first count states a cause of action." Householder *v.* Kansas City (street grade case), 83 Mo. 488, was a suit for damages for an alleged injury to a lot owned by plaintiff, occasioned by *a change in the grade of the street* on which the lot abutted. Defendant urged that the provision of the Constitution did not authorize the bringing of an ordinary action for damages, but required legislation to make it effective. It was held that an ordinary action could be maintained. In Julia Build. Assoc. *v.* Bell Teleph. Co. (telephone poles in street), 88 Mo. 258, the court held that the erection and maintenance of telephone poles is a proper use of a street; that, under the rule that when a city acquires a street by condemnation or dedication it may be put to all proper uses as a street at any time thereafter, the abutting owner is not entitled to compensation for such use. But see *ante*, § 1220; Index, tit. *Telegraph Poles*. In Sheehy *v.* Kansas City Cable Ry. Co. (grade and railroad in street), 94 Mo. 574, 575, the grade of a street as established in 1879 in front of plaintiff's premises was lowered more than fifteen feet by the defendant railway company, acting under a municipal ordinance of 1883. It was held that the plaintiff was entitled to compensation. The *dictum* in Werth *v.* Springfield, 78 Mo. 107, *supra*, was quoted with approval.

NEBRASKA. — *Constitution*, art. i. § 21. "The property of no person

tioned, it is almost, but not quite universally considered, as we shall see below, that they are not liable to a civil action for damages oc-

shall be taken or damaged for public use without just compensation therefor." In Gottschalk *v.* Chicago, B. & Q. R. Co. (railroad in street), 14 Neb. 550, a steam railroad was constructed in a street on which plaintiff was an abutting owner, and the fee of which was in the city. The plaintiff was held to be entitled to compensation. In Harmon *v.* Omaha (street grade case), 17 Neb. 548, the owner of land abutting on a street had erected buildings on the land before the grade was established. The city afterwards established a grade, and raised the street so that there was an embankment in front of plaintiff's lot. It was held that the city was liable. In Schalle *v.* Omaha (street grade case), 23 Neb. 325, the damage for which compensation was allowed was the lowering of the street by the city, thereby making a cut in front of plaintiff's premises. It seems, though it is not clearly stated, that the grade was established then for the first time.

PENNSYLVANIA. — *Constitution*, art. xvi. § 8. "Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction." Under the above provision the legislature passed an act that "where the proper authorities of any borough have, or may hereafter *change the grade or lines of any street*, thereby causing damage to the owners of abutting property, without the consent of such owners, the court shall appoint commissioners to assess the damages." It was held, in favor of a church corporation, which had erected a church edifice prior to any adoption of a grade of the street by the borough, that a *change from the natural grade or surface* is within the act the same as a change from grade previously made by the authorities. New Brighton *v.* United Presbyterian Church (street grade case), 96 Pa. St. 331. The court avowedly proceeded on the doctrine of giving a liberal construction to this remedial statute provision, and it clearly did so. S. P. Hendrick's Appeal (street grade case), 103 Pa. St. 358; New Brighton Bor. *v.* Peirsol, 107 Pa. St. 280. Under the same provision, and the legislation of the State thereunder, the land-owner is entitled to compensation for land taken for opening a street, and in addition thereto, to the damages which will result from the cutting and grading of the street, if such grading has been done. If it is graded afterwards, the damages thereby occasioned may be subsequently appraised. Pusey *v.* Allegheny (street grade and opening), 98 Pa. St. 522. Under this provision a *county* is liable for consequential damages to private property injured, but not actually taken, in the erection of a county bridge. Chester County *v.* Brower, 117 Pa. St. 647. It is *self-executing* and extends to a county, although it is not in the strict technical sense a municipal corporation. *Ib.* A remedial statute giving damages for change of grade held not to be retroactive so as to authorize recovery of damages for injuries sustained prior to the Constitution of 1874. Folkenson *v.* Easton Bor., 116 Pa. St. 523. Right of action for consequential injuries under the provision accrues when the particular part of the work causing the injury is actually undertaken. O'Brien *v.* Pennsylvania Val. R. Co., 119 Pa. St. 184.

The meaning and object of the constitutional provision were fully considered in Pennsylvania R. Co. *v.* Marchant, 119 Pa. St. 541. The conclusion reached was that the words "injured or destroyed" mean a legal wrong or injury, and that while they relate to injuries which are usually termed consequential, nevertheless they are confined to such injuries to one's property as are actual, positive, and visible, the natural and necessary results of the original construction or enlargement, and of such certain character that the compensation therefor may be ascertained and paid, or secured, in advance, as provided in the Constitution; the purpose of the Constitution being to give a remedy for legal wrongs, not for such injuries as are *damnum absque injuria*, among which are those

casioned by defective roads and bridges under their control as public agencies, unless it is so provided by statute, while a different

which result from the use and enjoyment of a man's own property in a lawful manner without negligence and without malice. Applying these principles, it was held that where a railroad company had, under legislative authority, constructed its railroad on its own property into the heart of a city, without taking any portion of the property of the plaintiff, and without occupying any part of the streets on which the plaintiff's property abutted, it was not liable for the indirect injuries which he sustained merely as the result of the subsequent enlargement of its railroad in a lawful manner without negligence, unskilfulness, or malice; approving the like case of Pennsylvania R. Co. *v.* Lippincott, 116 Pa. St. 472; Marchant's Case approved in Montgomery *v.* Townsend, 84 Ala. 478, noted *supra*. Injunction refused to property owner to restrain the municipality from reconstructing and enlarging a culvert across the street, which it was alleged would cause an injury to his lot by the increased force and volume of water cast upon it. Scranton City's Appeal, 121 Pa. St. 97.

SOUTH DAKOTA. — *Constitution*, 1889, art. vi. § 13. "Private property shall not be taken for public use, or damaged, without just compensation, as determined by a jury, which shall be paid as soon as it can be ascertained and before possession is taken." Abutter held entitled to injunction restraining change of grade in absence of offer of city to compensate for damages sustained. Searle *v.* Lead, 10 S. Dak. 312. See also Whittaker *v.* Deadwood, 12 S. Dak. 608.

TEXAS. — *Constitution*, art. i. § 17. "No person's property shall be taken, damaged, or destroyed for or applied to public use, without adequate compensation being made, unless by the consent of such person."

In Gulf, Col. & S. F. R. Co. *v.* Eddins (railroad in street), 60 Tex. 656, the defendant railroad company had built a railroad in a street on which plaintiff was an abutting owner, thereby damaging his property. It was held that plaintiff was entitled to compensation. The same facts and rule in Gulf, Col. & S. F. R. Co. *v.* Fuller, 63 Tex. 467; and in Same *v.* Graves, 1 Tex. App. Civ., § 579. In Belt Line Street R. Co. *v.* Crabtree (railroad in street), 2 Tex. App. C. C., § 662, defendant railway company constructed its railroad in a street, throwing up an embankment from four to five feet high in front of plaintiff's premises, thus cutting off or obstructing access thereto. It was held that plaintiff was entitled to compensation. In Bounds *v.* Kirven (change of road to different class), 63 Tex. 159, a third-class road had been changed into a second-class road. A third-class road need be only twenty feet wide, and the owner of the land through and over which it passes may hang gates across the road to enclose his land, but a second-class road must be thirty feet wide, and there is no authority for any obstruction by gates or otherwise. It was held that this was a case for compensation. The facts seem to include both a taking and a damaging. See also Bradley *v.* State, 22 Tex. App. 330.

WEST VIRGINIA. — *Constitution*, art. iii. § 9. "Private property shall not be taken or damaged for public use without just compensation."

In Johnson *v.* Parkersburg (street grade case), 16 W. Va. 402, the grade of a street which had been established originally was raised by the city by filling in, so that there was an embankment left in front of plaintiff's premises. It was held that he was entitled to compensation. In Spencer *v.* Pt. Pleasant & O. R. Co. (railroad in street), 23 W. Va. 406, a railroad company, under municipal authority, built a railroad through a street on a trestle thirty feet high. The plaintiff, an abutting owner, had obtained an injunction, and the case came up on a motion to dissolve the injunction. The court granted the motion, but seemed to regard the case as the proper subject of an action at law for damages. In Hutchinson *v.* Parkersburg (street grade case), 25 W. Va. 226, the plaintiff was an abutting owner on a street which was formerly a turnpike. The charter under which the land was taken for the turnpike authorized the taking of a strip sixty feet wide, but provided that the road-bed should be

rule on this subject is generally held in respect of municipal corporations proper.

§ 1688 (997). **Unsafe Streets; Quasi Corporations.** — In the United States, *there is no common-law obligation* resting upon *quasi corporations*, such as counties, townships, and New England towns, to repair highways, streets, or bridges within their limits, and they are not obliged to do so unless by force of statute. Even when the legislature enjoins upon corporations of this character the duty to make and repair roads, streets, and bridges, and confers the power to levy taxes therefor, the general tenor of the decisions is to treat this as a *public*, and not a *corporate*, duty, and to regard such corporations, in this respect, as *public or State agencies*, and not liable to be sued civilly for damages caused by the neglect to perform this duty, unless the action be expressly given by statute.[1]

not more than eighteen feet wide. Afterwards the limits of the city of Parkersburg were extended so as to include that part of the turnpike opposite the plaintiff's premises. The turnpike became a public street, and the city proceeded to grade it in nearly or quite its entire width. The court held that if such grading, whether it left the street at the same height as the old turnpike road-bed or not, injured the plaintiff's property, he was entitled to compensation.

[1] *Ante*, §§ 37, 1157, note, 1638–1646, and cases cited; Lee County *v.* Yarbrough, 85 Ala. 590, 592, citing text; Sutton *v.* Carroll County Police Board, 41 Miss. 236; Larkin *v.* Saginaw County, 11 Mich. 88; Cooley *v.* Essex Co. Freeh., 27 N. J. L. 415, approving Sussex County *v.* Strader, 18 N. J. L. 108; Pray *v.* Jersey City, 32 N. J. L. 394; Ripley *v.* Essex County, 40 N. J. L. 45; Huffman *v.* San Joaquin County, 21 Cal. 426; Hedges *v.* Madison County, 6 Ill. 567; Detroit *v.* Blackeby, 21 Mich. 84, *per Campbell*, C. J.; McCutcheon *v.* Homer, 43 Mich. 483; McEvoy *v.* Sault Ste. Marie, 136 Mich. 172, 175; Soper *v.* Henry County, 26 Iowa, 264; Askew *v.* Hale County, 54 Ala. 639; Blaylock *v.* Muskogee, 117 Fed. Rep. 125; Colwell *v.* Waterbury, 74 Conn. 568; Moreton *v.* St. Anthony, 9 Idaho, 532; Goddard *v.* Lincoln, 69 Neb. 594. See Twist *v.* Rochester, 165 N. Y. 619; Custer *v.* New Philadelphia, 20 Ohio Cir. Ct. R. 177; Lentz *v.* Dallas, 96 Tex. 258. See also Barbour County *v.* Horn, 48 Ala. 566; Covington County *v.* Kinney, 45 Ala. 176; Sims *v.* Butler County, 49 Ala. 110; Wyandotte *v.* Zeitz, 21 Kan. 649; Hamilton County *v.* Mighels, 7 Ohio St. 109; McCutcheon *v.* Homer, 43 Mich. 483; Atchison *v.* Jansen, 21 Kan. 560; and see cases cited in that State in which counties are held responsible for safe condition of public bridges. Granger *v.* Pulaski County, 26 Ark. 37. The subject of implied liability is learnedly examined in Hill *v.* Boston, 122 Mass. 344, where the cases are fully collected and reviewed by *Gray*, C. J.; fully noted, *supra*, § 1642; followed Tindley *v.* Salem, 137 Mass. 171; People *v.* Esopus, 74 N. Y. 310; Carpenter *v.* Cohoes, 81 N. Y. 21; People *v.* Little Valley, 75 N. Y. 316; Manuel *v.* Cumberland County, 98 N. Car. 9; Chick *v.* Newberry County, 27 S. Car. 419, where a *statute making counties liable* for damages caused by defective highways, causeways, or bridges, was held not to render them liable for injuries caused by a *defective ferry-boat*, though the ferry connected the highway on opposite banks of a river. In Hartford County *v.* Hamilton, 60 Md. 340, a *county* was held in damages for injuries caused by a defective public road, under a statute requiring the county authorities to keep such roads in repair.

Commissioners of highways in *New York* are *liable individually* for an injury resulting from their neglect to

§ 1689 (998). **Unsafe Streets; Cities and Chartered Municipal Corporations.** — The general doctrine of the American courts, as we

repair a highway, if they have funds in their hands for that purpose; but they cannot bind the town for their misconduct or neglect. People *v.* Esopus, 75 N. Y. 316.

The distinctions adverted to in the text between the two classes of corporations in respect of implied liability, are well illustrated by the decisions in the State of *Illinois*. In Hedges *v.* Madison County, 6 Ill. 567, it was held that *counties were not liable* to a private action for defective highways. Subsequently it was held to be *otherwise as respects chartered cities* or ordinary municipal corporations. Browning *v.* Springfield, 17 Ill. 143, which case has been repeatedly followed in that State. *Post*, §§ 1708–1716, and cases cited. In Waltham *v.* Kemper, 55 Ill. 346, the question arose, whether towns in that State were under such a liability, and the court regarded them as standing on the same footing as counties, treating them as civil divisions of counties merely, and not liable to an action at common law for the neglect of officers. A statute giving the action is essential, and the court overruled the contrary holding in South Ottawa *v.* Foster, 20 Ill. 296; s. p. Russell *v.* Steuben, 57 Ill. 35; White *v.* Bond County, 58 Ill. 297 (defective bridge); Mechanicsburg *v.* Meredith, 54 Ill. 84; *ante*, § 1157; *post*, §§ 1640, 1708–1715. See Judge Thompson's valuable work on Negligence, chaps. xv. and xvi., where some of the leading cases are reprinted and annotated.

Bridges: Under a statute which provides that "an action may be maintained against a *county*, either upon contract or for an *injury* to the rights of the plaintiff arising from some act or omission of the county," it is held in *Oregon* that the county is liable for an *injury caused by the road supervisor's neglect to repair a defective bridge*, the county having the power to appoint and remove such supervisors. McCalla *v.* Multnomah County, 3 Oreg. 424; followed in Sheridan *v.* Salem, 14 Oreg. 328 (defective sidewalk); Eastman *v.* Clackamas County, 32 Fed. Rep. 24. See generally as to bridges and duty to repair, 2 Thomps. Neg. 770, 793–797; Index, tit. *Bridge*.

Where a *canal company* is by its charter required "to build and keep in good repair *bridges*" *where the canal should cross a road*, it is liable to a traveller for the injury caused by an insufficient bridge, though there be no wilful or actual negligence on the part of the company. Pennsylvania & O. Canal Co. *v.* Graham, 63 Pa. St. 290. For what defects liable. *Ib.; post*, § 1730, and note. It is not necessarily the duty of a municipal corporation to make the *bridges* within its corporate limits *absolutely secure*, or to *fully protect* the public from injury. It is the duty of such corporation to exercise ordinary prudence to accomplish such results. Grayville *v.* Whitaker, 85 Ill. 439. If a city undertakes to build a bridge it is bound to use due care to keep it in a reasonably safe condition for public travel. The rule that a municipal corporation acts judicially in selecting a *plan* for public improvements, and will not be liable for injuries caused by defects in the plan, held not to apply to bridges. Jordan *v.* Hannibal, 87 Mo. 673. Where the power of a city over a bridge within its limits is exclusive, a corresponding duty to keep such bridge in such repair as the safety and convenience of the public may require, necessarily results therefrom; and where a bridge over a canal within the city's limits is suffered to decay, and the city fails to erect another, the city will be liable to respond in damages to the representatives of one who was drowned in attempting to ford such canal. Lowery *v.* Delphi, 55 Ind. 250; *quære*. A bridge wholly within the limits of a city is, including its approaches, *a part of a street*, and requires the same care under the same liability. Eudora *v.* Miller, 30 Kan. 494; Atlanta *v.* Buchanan, 76 Ga. 585. A city must keep in repair a bridge within its limits originally built and maintained by a county as a part of the highway, and is liable for injuries caused by its neglect in not repairing it. Goshen *v.* Myers, 119 Ind. 196. A city is not bound to protect the entrance to a draw-bridge by a gate so constructed that a boy cannot climb over it or creep under it, provided it is sufficient to stop pedestrians. Maginnis *v.* Brooklyn, 26 N. Y. St. Rep. 689. A city

shall presently see, *in respect of municipal corporations proper*, has been to hold them civilly liable [1] for injuries from defective streets,

held not to be liable for defective canal-bridge approaches on State lands. Carpenter *v.* Cohoes, 81 N. Y. 21; s. c. 21 Alb. L. J. 374; Veeder *v.* Little Falls, 100 N. Y. 343; and distinguish Sewell *v.* Cohoes, 75 N. Y. 45; Brusso *v.* Buffalo, 90 N. Y. 679; New York *v.* Sheffield, 4 Wall. (U. S.) 189.

Canada statutes and decisions. The Municipal Act of Upper Canada contains the following very carefully framed section: "Sec. 531. Every such road, street, bridge, and highway shall be kept in repair by the corporation. The default of the corporation so to keep in repair shall be a misdemeanor, punishable by fine in the discretion of the court, and the corporation shall be further *civilly responsible for all damages sustained* by any person by reason of such default, but the action must be brought within three months after the damages have been sustained; and this section shall not apply to any road, street, bridge, or highway laid out without the consent of the corporation by by-law, until established and assumed by by-law." Harr. Munic. Man. (5th ed.) p. 486. The following notes of decisions under the statute are taken from the volume last quoted.

The phrase "kept in repair" is not to be construed as if it meant "construction" in the first instance. Queen *v.* Epsom Union Guard, 8 L. T. R. N. S. 383. The words "keeping in repair" should be construed with a reasonable attention to circumstances. A new side line or concession line opened in a township thinly scattered could scarcely be expected to be found in as perfect a condition as an old highway in a well-settled township. *Per Robinson*, C. J., in Colbeck *v.* Brantford Corp., 21 Up. Can. Q. B. 276. [See also Castor *v.* Uxbridge, 39 Up. Can. Q. B. 113; and additional cases in Harr. Munic. Man. (5th ed. by Mr. Joseph) pp. 487 *et seq.*] and in Biggar's Municipal Manual (Canada, 1900), 824 *et seq.*

It is no *defence* to an action against a municipal corporation for negligence in the non-repair of a road, that it appointed a proper overseer of highways, and gave him means and authority to keep the road in good order. The municipal corporation is, as it were, itself the overseer of the highway, and on this principle bound to keep it in repair. It has not only the duty thrown expressly upon it of keeping highways in repair, but has all necessary powers given it for enabling it to perform that duty. The corporation must at its peril answer for the consequences of the duty not being performed. The negligence of its officers or servants is no answer. *Per Robinson*, C. J., in Colbeck *v.* Brantford Corp., 21 Up. Can. Q. B. 276. Independently of the statute it would appear that there is a common-law duty cast on municipal corporations to repair and keep in repair the roads which are within their jurisdiction, and for which they have power to raise the requisite funds. See Wellington *v.* Wilson, 14 Up. Can. C. P. 299; s. c. 16 Up. Can. C. P. 124; Harrold *v.* Simcoe Ry. Co., 16 Up. Can. C. P. 43. But it is not their duty, either under the statute or at common law, to lay a plank from each man's house across a ditch to the street, and to keep such planks in repair. McCarthy *v.* Oshawa, 19 Up. Can. Q. B. 245. The *limitation as to time* (three months) applies only to acts of omission, *i. e.*, non-repair, but not to acts of commission, as negligently placing gravel on the sides of the road and taking no precaution to prevent persons passing along the road from running against these heaps, whereby a person so driving might run against the heaps and be injured. Rowe *v.* Leeds, 13 Up. Can. Q. B. 575. Where the section is applicable, no additional time is given to a legal representative to bring the action, owing to the death of the intestate, by reason of negligence within the meaning of the section.

[1] *Infra*, §§ 1708–1716, where the subject is discussed, the cases cited, and the result summed up. Morey *v.* Newfane, 8 Barb. (N. Y.) 645; People *v.* Hudson H. Com'rs, 7 Wend. (N. Y.) 474; Chidsey *v.* Canton, 71 Conn. 475; Riddle *v.* Merrimac River Canal Prop., 7 Mass. 166; Bigelow *v.* Randolph, 14 Gray (Mass.), 541; Snook *v.* Anaconda, 26 Mont. 128.

although the ground for the distinction — which gives an action if the injury happens within the limits of a municipality having control of the streets therein and denies it if it happens within the limits of a township or county having like control over the highways, and adequate means of discharging its public duties in respect thereto — is not as satisfactory to the mind as could be desired.[1] With few exceptions the courts have agreed in holding that these lower or more general forms of corporate organization, being regarded as mere *State* agencies, are not *impliedly* liable to such actions. There is somewhat more diversity of view respecting the implied liability of municipal corporations proper, where the control over streets exists, but no action for neglect is expressly given; still, the two classes of cases establish, upon authority, the distinction mentioned.

The difficulties in the way of maintaining this distinction have induced some courts to reject it. Thus in Indiana the liability of a municipal corporation proper for damages caused to travellers by defective streets, without a statute giving the action, is asserted.[2] The liability, says the court, "grows out of the power conferred upon the city over its streets and bridges, and its duty to keep them in reasonable repair, having the power to raise means for that purpose."[3] In the cases cited *the same doctrine was applied to counties in respect to county bridges*, the statute enacting that they "shall cause all bridges to be kept in repair," and providing the means to discharge this duty. The court refers to many of the conflicting cases

Turner *v.* Brantford Corp., 13 Up. Can. C. P. 109. The *statute begins to run* from the occurrence of the accident, not from the death. Miller *v.* North Fredericksburgh Corp., 25 Up. Can. Q. B. 31. So where plaintiff's mare fell through a bridge and was injured, but did not die for four months afterwards, when the action was brought, it was held to be too late. His damages, in the words of the statute, were then and from that time sustained. The subsequent death of the mare was merely additional evidence of the extent of his damages. The damage was not the less because he did not at the time know its full extent. *Ib.*

[1] Mr. Justice *McIver*, of South Carolina, says it is "absolutely impossible to perceive any good reason" for the distinction. Young *v.* Charleston, 20 S. Car. 116 (holding that there is no liability, in that State, upon municipal corporations for injuries caused by defects in streets unless imposed by statute. See also Chick *v.* Newberry County, 27 S. Car. 419). And in Eastman *v.* Clackamas County (*Oregon*), 32 Fed. Rep. 24, *Deady*, J., said the distinction was "without any substantial difference." In Arkadelphia *v.* Windham, 49 Ark. 139, *Battle*, J., said: "Such a distinction would be contrary to every principle of fairness, reason, and justice." *Post*, §§ 1715, 1716.

[2] Grove *v.* Ft. Wayne, 45 Ind. 429.

[3] House *v.* Montgomery County, 60 Ind. 580, *per Worden*, J.; followed in Morgan County *v.* Pritchett, 85 Ind. 68; Howard County *v.* Legg, 93 Ind. 523; State *v.* Gibson County, 80 Ind. 478 (holding also that *mandamus* will lie to compel a county to repair or replace a bridge). As to negligence in adopting an insufficient *plan* for a county bridge, see Ferguson *v.* Davis County, 57 Iowa, 601. As will be seen in the notes further on, the same view has been adopted in a few other States. *Infra*, §§ 1708–1716, and cases in notes. Carson *v.* Genesee, 9 Idaho, 244.

as to the liability of counties for defective bridges, and concludes that there is no satisfactory reason for a different rule, in respect to defective streets and highways, between a municipal corporation proper and a county, since both are created by the legislature for public purposes, and the ground of the action is the failure to perform a duty imposed by law, whereby the traveller suffers an injury. To a limited extent the same view has been elsewhere taken. It must be confessed that where the duty to repair is expressly enjoined by statute, but no action is expressly given, it is not easy to set forth clear grounds for the distinction as to the liability of cities and counties in respect of the duty to keep the streets and highways under their several jurisdictions in repair, whereby the former are held to an *implied* civil liability for damages caused by the neglect of this duty, and the latter are held not to be thus liable. Discarding this distinction, the courts in a few States have decided that counties and cities are equally free from implied civil liability in such cases.[1]

§ 1690 (999). **Unsafe Streets; Cases Classified.** — The *course of decision on this subject* throughout the Union is fully shown in the notes.[2] The cases may be grouped into the following classes: —

First. Where neither chartered cities nor counties or other *quasi* corporations are held to an implied civil liability. Only a few States have adopted this extreme view of exempting cities from liability in this respect.

Second. Where the reverse is held, and both chartered cities and counties are alike considered to be impliedly liable for their neglect of the duty in question. This doctrine prevails in a small number of States.

Third. Where municipal corporations proper, such as chartered cities, are held to an implied civil liability for damages caused to travellers for defective and unsafe streets under their control, but denying that such a liability attaches to counties or other *quasi* corporations as respects highways and bridges

[1] Detroit *v.* Blackeby, 21 Mich. 84; Navasota *v.* Pearce, 46 Tex. 525. A municipal corporation, having by its charter "exclusive control and power over its streets, alleys, and public grounds and highways," is not liable to an action by a citizen who has suffered injury by a negligent want of repair in its street, unless coupled with such powers is an express or implied condition that it shall be liable for such injuries. Navasota *v.* Pearce, 46 Tex. 525. Since overruled, and city held liable though not made so by statute. Galveston *v.* Posnanisky, 62 Tex. 118. Other cases to the same effect are cited, *infra*, §§ 1708–1716, and notes.

[2] *Ante*, §§ 1638–1648. *Post*, §§ 1691, 1708 *et seq.*, 1715, 1716.

under their charge. This distinction has received judicial sanction in a large majority of the States, where the legislation is silent in respect of corporate liability.

§ 1691 (1000). **Unsafe Highways and Streets; Liability of New England Towns and Cities.** — The difficulty of satisfactorily defining the grounds of the difference in the liability of the two classes of corporations is avoided in the New England States by the course of adjudication therein. It was decided, as we have seen, at an early day, that *towns* [1] were not liable to such actions unless the liability be created by statute. This doctrine has been maintained ever since, and it applies, as respects defective and unsafe ways, equally *to streets in cities and highways in towns.* It being established that there was *no common-law obligation* upon towns to respond for neglect of duty in respect of highways and bridges, the legislature of each of the New England States has imposed the duty upon towns to keep their highways in repair, so as to be safe and convenient for travellers, and has given, in terms, to persons injured by neglect to discharge this duty, an action against the town. The substance of *the statutes of the New England States* in this respect, and upon which the decisions to be referred to have been made, is given in the note.[2] Upon *neither towns nor cities,* in the view of the courts

[1] *Supra,* §§ 1639, 1641. As to nature of New England towns. *Ante,* § 40.

[2] *Massachusetts Statute.* — By the Revised Statutes, chap. xxv. § 1, "All highways, townways, causeways, and bridges within the bounds of any town" are required to "be kept in repair at the expense of such town, so that the same may be *safe and convenient for travellers,* with their horses, teams, and carriages, at all seasons of the year." By § 22, it is provided that "if any person shall receive any injury in his person or property by reason of any *defect or want of repair,* which has existed for the space of twenty-four hours in any highway," he may *recover compensation therefor.* And the same provision, with the exception of the limitation of twenty-four hours, is re-enacted in the statute of 1850, chap. v., and, in substance, in the General Statutes of 1860, chap. xliv. § 22, p. 247. By the Act of 1877, the liability is modified, it being made a condition of liability that the town "had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence," and that "the defect could have been prevented by reasonable care and diligence on the part of the town." Rooney *v.* Randolph, 128 Mass. 580; Hayes *v.* Cambridge, 138 Mass. 461; s. c. 136 Mass. 402; Hanscom *v.* Boston, 141 Mass. 242; Olsen *v.* Worcester, 142 Mass. 536. History of legislation traced by *Hoar,* J., in Stanton *v.* Springfield, 12 Allen (Mass.), 566; by *Gray,* C. J., in Hill *v.* Boston, 122 Mass. 344 (noted, *supra,* § 965); by *Allen,* J., in Post *v.* Boston, 141 Mass. 189; and by *C. Allen,* J., in Tindley *v.* Salem, 137 Mass. 171; Flanders *v.* Norwood, 141 Mass. 17.

Rhode Island. — Substantially the same. Construed, Providence *v.* Clapp, 17 How. 161.

Vermont Statute. — The language of the *Vermont* statute in force until 1880 was: "If any special damage shall happen to any person, his team, carriage, or other property, by means of the *insufficiency or want of repair* of any highway or bridge in any town, which such town is bound to repair," the town shall be liable. By the Act of 1882, the liability of the town is

of New England, is there any *implied or common-law* civil liability resulting from defective streets or sidewalks; *the liability is wholly statutory.*[1] The same rule prevails in some of the other

more limited than under the previous statute. It is not liable for defective condition of "winter roads." It is liable, as before, for defective bridges. Willard *v.* Sherborne, 59 Vt. 361.

Connecticut Statute. — The *Connecticut* statute in substance is that the several towns shall make and keep in *good and sufficient repair* all the needful highways and bridges, &c., and if *any person shall be injured,* in his person or property, through or by *means of a defect* in the road or bridge, he may recover damages of the town, &c.

New Hampshire Statute. — In *New Hampshire,* by the statute of February 27, 1786, it is provided, "that in case any special damage shall happen to persons or their teams or carriages by means of the *insufficiency or want of repair* of any highway or bridge in any town or parish, the party aggrieved shall recover his damage in an action against such town or parish. And the said town shall have a remedy over against the surveyor of highways through whose fault or neglect the same happened." Revised Statutes, chap. xlvii. § 1. See Act 1878, chap. 75, as to liability for defects caused by snow.

Maine Statute. — By the statute in *Maine* (Revised Statute of 1841, chap. xxv.), all highways, &c., are to be "*kept in repair and amended* from time to time, that the same may be *safe and convenient* for travellers," &c. In default thereof, the town in which such neglect of duty occurs is made liable. And any person receiving "any bodily injury," or suffering "any damage in his property, through any defect or want of repairs, . . . may recover, in a special action of the case, of the county, town, or persons who are by law liable to repair the same, the amount of damages thereby sustained, if such county, town, or person had *reasonable notice* of the defect or want of repair." By Act of 1882, towns are exempt from liability to persons on foot for injuries caused by snow or ice on the sidewalk, or by reason of its slippery condition. The town must have twenty-four hours' actual notice of the defect. Gurney *v.* Rockport, 93 Me. 360; Hurley *v.* Bowdoinham, 88 Me. 293; Carleton *v.* Caribou, 88 Me. 461. The maximum recovery is limited to $2000.

In a case where the alleged defect *was an awning projecting over the sidewalk,* Mr. Justice *Clifford* states the following as essential to a recovery under the statute of *Maine:* The highway must be one which the town is bound to keep in repair. It must have been defective at the time of the accident. The plaintiff must have been injured as alleged in the declaration. The town must have had reasonable notice of the defect prior to the injury. The plaintiff must have been in the exercise of ordinary care at the time of receiving the injury. The injury must have been occasioned solely by the defect, and not by any want of ordinary care on the part of the plaintiff. The question whether the way was out of repair or defective, or not, is one of fact for the jury. Travellers, it was held, may receive injuries while travelling upon defective highways, and such as are not occasioned by the defects or their own negligence, and still the town required to keep the same way in repair may not be liable for the injury. An injury may be produced by the united effect of a want of repair in a road, and some other cause, and the injured party not be entitled to recover from those whose duty it was to keep the way in repair. If an obstruction be left in a street by a responsible party, still, if the town, by its own neglect, allow the obstruction to remain until it is chargeable with notice, the town is liable to a person injured by reason of the existence of such obstruction. Merrill *v.* Portland, 4 Cliff. C. C. R. 138.

The terms "travel," "traveller," and "travelling," used in the statute, have no technical legal significance. Under "appropriate" instructions, it is for the jury to determine whether a person receiving an injury was "travelling upon the highway" within the meaning of the statute. Hardy *v.* Keene, 52 N. H. 370; Bliss *v.* South Hadley, 145 Mass. 91.

[1] It is the language of one of the most accomplished judges that ever sat upon the uniformly able supreme

States.[1] An important consequence is that every case of this character must be within the statute; and hence the liability of the town or city does not extend to persons not within the protection of the statute;[2] and hence, also, if it only gives a right of action

judicial bench of *Massachusetts*, speaking of this subject, that, "The liability of towns for defects in ways is wholly the creation of statutes, and is a liability strictly limited and peculiar." *Per Hoar*, J., Oliver *v.* Worcester, 102 Mass. 489, 496; Mower *v.* Leicester, 9 Mass. 247; Commonwealth *v.* Springfield, 7 Mass. 9; Brady *v.* Lowell, 3 Cush. (Mass.) 121, 124; Bacon *v.* Boston, 3 Cush. (Mass.) 174; Brailey *v.* Southborough, 6 Cush. (Mass.) 141; Smith *v.* Dedham, 8 Cush. (Mass.) 522; Hixon *v.* Lowell, 13 Gray (Mass.), 59, 64; Vinal *v.* Dorchester, 7 Gray (Mass.), 421, 422; Gregory *v.* Adams, 14 Gray (Mass.), 242; Hill *v.* Boston, 122 Mass. 344. "The obligations resting upon towns in relation to the support of highways and bridges is not imposed by the *common law*, but is *wholly* a creature of the statute." *Per Waite*, J., in Chidsey *v.* Canton, 17 Conn. 475, 478, approving Mower *v.* Leicester, 9 Mass. 247; Reed *v.* Belfast, 20 Me. 246, 248; Burritt *v.* New Haven, 42 Conn. 174. So, in *New Hampshire:* Farnum *v.* Concord, 2 N. H. 392, approved in Eastman *v.* Meredith, 36 N. H. 284; and note remarks of *Perley*, C. J., in the conclusion of his masterly opinion, pp. 298, 301. So, in *Maine:* Reed *v.* Belfast, 20 Me. 246, 248; Sanford *v.* Augusta, 32 Me. 536; Peck *v.* Ellsworth, 36 Me. 393. And *Vermont:* Baxter *v.* Winooki Turnp. Co., 22 Vt. 114, 123; Hyde *v.* Jamaica, 27 Vt. 442, 443, 457, *per Bennett*, J.; State *v.* Burlington, 36 Vt. 521, *per Poland*, C. J.; Parker *v.* Rutland, 56 Vt. 224; Buchanan *v.* Barre, 66 Vt. 129; French *v.* Boston, 129 Mass. 592. See also Kitredge *v.* Milwaukee, 20 Wis. 46.

[1] In *Michigan*, the statute (Pub. Acts, 1885, pp. 289, 291) providing a remedy for injuries sustained in streets, declares that *no common-law liability shall exist.* See McArthur *v.* Saginaw, 58 Mich. 357. This statute relates only to injuries from defective highways, streets, bridges, crosswalks, and culverts, and its application is restricted to such as are due to *defects from being out of repair, and not including those caused by accumulations of ice and snow.* McKellar *v.* Detroit, 57 Mich. 158. The *want of repair* must be the immediate cause of the injury; allowing a thing which forms no part of the street — as a boulder which has been dug out of it and left in the gutter — to remain for a time, is not such a "want of repair." Agnew *v.* Corunna, 55 Mich. 428; see also Burnham *v.* Byron, 46 Mich. 555; Grand Rapids *v.* Wyman, 46 Mich. 516; Detroit *v.* Blackeby, 21 Mich. 84; Detroit *v.* Putnam, 45 Mich. 263; Detroit *v.* Osborne, 135 U. S. 492; Roberts *v.* Detroit, 102 Mich. 64; McEvoy *v.* Sault Ste. Marie, 136 Mich. 172; Alberts *v.* Muskegon, 146 Mich. 210. The rule as stated in the text prevails also in *South Carolina*, Young *v.* Charleston, 20 S. Car. 116; Chick *v.* Newberry County, 27 S. Car. 419; *Texas*, Navasota *v.* Pearce, 46 Tex. 525, since overruled; Galveston *v.* Posnainsky, 62 Tex. 118; *California*, Winbigler *v.* Los Angeles, 45 Cal. 36; *Arkansas*, Arkadelphia *v.* Windham, 49 Ark. 139; *Wisconsin*, Weisenberg *v.* Winneconne, 56 Wis. 667. As to *Oregon*, see Eastman *v.* Clackamas County, 32 Fed. Rep. 24; and as to *New Jersey*, Pray *v.* Jersey City, 32 N. J. L. 394; Condict *v.* Jersey City, 46 N. J. L. 157; Wild *v.* Paterson, 47 N. J. L. 406; Vorrath *v.* Hoboken, 49 N. J. L. 285; Carter *v.* Rahway, 55 N. J. L. 177. A statute of *West Virginia* gives a remedy for any injury to any person caused by a public road or bridge being out of repair. See Sheff *v.* Huntington, 16 W. Va. 307.

[2] As the duty, under the statute of *Massachusetts*, is only towards *travellers*, it does not extend to the case of a person who is using the highway simply for the *purposes of play.* Blodgett *v.* Boston, 8 Allen (Mass.), 237. Commented on by *Hoar*, J., Higginson *v.* Nahant, 11 Allen (Mass.), 530, 535. Same principle, Stickney *v.* Salem, 3 Allen (Mass.), 374. Distinguished, see Britton *v.* Cummington, 107 Mass. 347; Stinson *v.* Gardiner, 42 Me. 248; Harper *v.* Milwaukee, 30 Wis. 365; Wilson *v.* Granby, 47 Conn. 59; Hunt *v.* Salem, 121 Mass. 294; Gulline *v.* Lowell, 144 Mass. 491; Shearm. &

when the defect has existed a certain length of time, this time must have elapsed when the injury happened, in order to make it actionable.[1]

§ 1692 (1001). **Same Subject; Construction of the New England Statutes.** — The judicial reports of the New England States abound with *decisions under these statutes* respecting *what constitutes an actionable defect, insufficiency, or want of repair in a street or highway;* what is required of towns in order to discharge their duty under the statute and escape liability; how much of the highway or street must be made safe and convenient; what degree of care is required of the plaintiff; what injuries result so directly and immediately from the defective or insufficient way as to be within the statute; and questions of a like character, the decisions concerning which are referred to below.

§ 1693 (1002). **Same Subject; How far the New England Decisions are generally applicable.** — These statutes, it will be perceived, are general in their language, and, in substance, impose the duty on towns (and they extend to cities as well) to make *their ways safe and convenient, and give an action for injuries* occasioned to the person or property of travellers by reason of *any defect or want of repair.* How far the duty they impose is coincident with the corresponding duty which in other States is held by the courts to rest by implica-

Red. Neg. (4th ed.) § 370, and cases; Bliss *v.* South Hadley (children on street for air and exercise), 145 Mass. 91. *Infra,* § 1694, note. An action does not, it seems, lie against the town in favor of a person who receives an injury from a defective highway *while using such highway for the express purpose of horse-racing, and matching his horse for speed against other horses. Aliter,* if the fast driving was merely incidental to travelling upon the highway for any of the legitimate purposes for which a highway is designed to be used. McCarthy *v.* Portland, 67 Me. 167.

[1] Brady *v.* Lowell, 3 Cush. (Mass.) 121. See also Merrill *v.* Portland, 4 Cliff. C. C. R. 138, noted *supra,* where the elements of the statutory liability are stated by *Clifford,* J.

"In *Massachusetts,*" says *Gray,* C. J., in Hill *v.* Boston, 122 Mass. 344, 357, "an act of the legislature *changing a town into a city* has never been considered as enlarging civil remedies for neglect of corporate duty, and it has been constantly held that a city, like a town, is not liable to an action for a defect in a highway, except so far as the right to maintain such an action has been clearly given by statute. Brady *v.* Lowell, 3 Cush. (Mass.) 121; Harwood *v.* Lowell, 4 Cush. 310; Hixon *v.* Lowell, 13 Gray (Mass.), 59, 64; Oliver *v.* Worcester, 102 Mass. 489. The same view has been taken in other New England States, and in *New Jersey, Michigan,* and *California.* Morgan *v.* Hallowell, 57 Me. 375, 378; Jones *v.* New Haven, 34 Conn. 1, 13; Hewison *v.* New Haven, 37 Conn. 475; Pray *v.* Jersey City, 32 N. J. L. 394; Detroit *v.* Blackeby, 21 Mich. 84; criticised and dissented from in Waltham *v.* Kemper, 55 Ill. 347; Winbigler *v.* Los Angeles, 45 Cal. 36." See also the cases cited in the preceding note. *Infra,* §§ 1717, 1718, as to statutory notice to city of defect.

tion upon municipal corporations proper, so as to make the adjudications in New England *precisely* applicable elsewhere, is a question perhaps not entirely clear. We lay before the reader, by giving the text of the statutes,[1] the data to enable him to form upon it his own judgment. We venture to remark, however, that it is probable these statutes, as construed, do impose in some respects a greater measure of liability than would elsewhere be held to exist by implication. Many of the questions, however, which have arisen in actions upon them are obviously general in their nature, — as, for example, the degree of care required of the plaintiff; what injuries may justly be regarded as proximately caused by the unsafe or insufficient highway; the evidence competent in such actions; and, to some extent, the rules to measure the recovery, — and the opinions of the courts of these States in deciding or discussing them may always be consulted with interest, and often with advantage, by the legal or judicial inquirer.

§ 1694 (1003). **Same Subject; Measure of Duty under New England Statutes.** — Generally speaking, it may, perhaps correctly, be said that, *under these statutes*, a town or city charged with the duty of keeping its highways or streets in repair *performs that duty when the travelled way is without obstruction or structural defects which endanger the safety of travellers, and is sufficiently level and smooth, guarded by railings where necessary, to enable persons, by the exercise of ordinary care, to travel with safety and convenience.*[2]

It is impossible to give, either generally or under these statutes, *a definition of actionable non-repair* which is applicable in all cases. Such non-repair in general terms may be said to be any *defect* in a highway which renders it unsafe for ordinary travel.[3] In the deter-

[1] *Ante*, § 1691, note.

[2] Hixon *v.* Lowell, 13 Gray (Mass.), 59, *per Hoar*, J.; Barber *v.* Roxbury, 11 Allen (Mass.), 318, *per Gray*, J. The language of the text held applicable where the charter duty was "that the streets of the city should be kept in *repair*," and the liability does not extend to a case where the injury is caused by an explosion of powder, between anvils, injuring a traveller on the streets. Campbell's Adm. *v.* Montgomery, 53 Ala. 527. In the following cases the court refused to rule, *as a matter of law*, that, upon the facts, the plaintiff could not recover for injuries received upon public streets. Bliss *v.* South Hadley, 145 Mass. 91 (children upon the street for air and exercise), *supra*, § 1691, note, and cases; Brackenbridge *v.* Fitchburg, 145 Mass. 160 (driving a blind horse on a dark and rainy night); Gulline *v.* Lowell, 144 Mass. 491 (child playing upon a bridge in his father's presence); Moynihan *v.* Whidden, 143 Mass. 287 (child returning to unguarded hole in sidewalk after having been ordered away); Gilbert *v.* Boston, 139 Mass. 313 (snow and ice on sidewalk). See Denver *v.* Cochran, 17 Colo. App. 72; Chicago *v.* Richardson, 75 Ill. App. 198; Ancoin *v.* New Orleans, 105 La. 271.

[3] Castor *v.* Uxbridge, 39 Up. Can. Q. B. 113; Hixon *v.* Lowell, 13 Gray (Mass.), 59; Barber *v.* Roxbury, 11

mination of this question the nature of the country, the character of its highways, and the care usually exercised in reference to such highways, must all be taken into consideration.[1]

Allen (Mass.), 318, 320; Hewison *v.* New Haven, 34 Conn. 136, 142.

[1] Hull *v.* Richmond, 2 W. & M. 337.

ILLUSTRATIONS *generally of what constitutes* NON-REPAIR *or* ACTIONABLE DEFECTS *in a highway.* O'Dwyer *v.* Northern Market Co., 24 D. C. App. 81; Carty *v.* Boeseke-Dawe Co., 2 Cal. App. 684; Pueblo *v.* Smith, 3 Colo. App. 386; White *v.* Trinidad, 10 Colo. App. 327; Seward *v.* Wilmington, 2 Marv. (Del.) 189; Peoria *v.* Gerber, 168 Ill. 318; Bloomington *v.* Mueller, 71 Ill. App. 268; Chicago Sanitary Dist. *v.* McGuirl, 86 Ill. App. 392; Decatur *v.* Hamilton, 89 Ill. App. 561; Normal *v.* Webb, 91 Ill. App. 183; Terre Haute *v.* Constans, 26 Ind. App. 421; Mt. Vernon *v.* Hoehn, 22 Ind. App. 282; Ford *v.* Des Moines, 106 Iowa, 94; Parmenter *v.* Marion, 113 Iowa, 297; Kansas City *v.* Gilbert, 65 Kan. 469; Kansas City *v.* Smith, 8 Kan. App. 82; Lawrence *v.* Davis, 8 Kan. App. 225; Iola *v.* Farmer, 72 Kan. 620; Henderson *v.* White (Ky.), 49 S. W. Rep. 764; Buck *v.* Biddeford, 82 Me. 433; Jones *v.* Deering, 94 Me. 165; Haggerty *v.* Lewiston, 95 Me. 374; Griffin *v.* Boston, 182 Mass. 409; Lynch *v.* Boston, 186 Mass. 148; Downey *v.* Boston, 184 Mass. 20; McEvoy *v.* Sault Ste. Marie, 136 Mich. 172; Cunningham *v.* Thief River Falls, 84 Minn. 21; Adams *v.* Thief River Falls, 84 Minn. 30; Bieber *v.* St. Paul, 87 Minn. 35; Leggett *v.* Watertown, 55 N. Y. App. Div. 321; Archer *v.* Mt. Vernon, 57 N. Y. App. Div. 32; Lloyd *v.* Walton, 57 N. Y. App. Div. 288; Brush *v.* New York, 59 N. Y. App. Div. 12; Bates *v.* Holbrook, 67 N. Y. App. Div. 25, 73 N. Y. Supp. 417; Walden *v.* Jamestown, 79 N. Y. App. Div. 433; Schall *v.* New York, 88 N. Y. App. Div. 64; Whittal *v.* New York, 64 N. Y. Supp. 250; Corson *v.* New York, 78 N. Y. App. Div. 481; Foy *v.* Winston, 135 N. Car. 439; Emery *v.* Philadelphia, 208 Pa. 492; McConway *v.* Philadelphia, 209 Pa. 236; Taylor *v.* Ballard, 24 Wash. 191; Kleiner *v.* Madison, 104 Wis. 339; De Pere *v.* Hibbard, 104 Wis. 666; Burroughs *v.* Milwaukee, 110 Wis. 478; Koepke *v.* Milwaukee, 112 Wis. 475; Radichel *v.* Kendall, 121 Wis. 560; Huffman *v.* Bayham, 26 Ont. App. (Can.) 514; Atkinson *v.* Chatham, 26 Ont. App. (Can.) 521.

Other specific instances relating to actionable defects. Cross-walk raised eight inches above roadway, Vandalia *v.* Ropp, 39 Ill. App. 344; a street crossing of plank, raised fourteen inches above the level of the sidewalk, Indianapolis *v.* Mitchell, 27 Ind. App. 589; timbers near crossing, Fairgrieve *v.* Moberly, 39 Mo. App. 31; slippery iron gutter, Lyon *v.* Logansport, 9 Ind. App. 21; building materials in street, Van Vranken *v.* Clifton Springs, 86 Hun (N. Y.), 67; pile of sand in street, Tiers *v.* New York, 74 Hun (N. Y.), 452; piling lumber in street is negligence, Senhenn *v.* Evansville, 140 Ind. 675; pipes piled in the street, Henderson *v.* Burke (Ky.), 44 S. W. Rep. 422; glass in roadway, El Paso *v.* Dolan (Tex. Civ. App.), 25 S. W. Rep. 669; broken glass lying with piles of other refuse in the street, Galveston *v.* Reagan (Tex. Civ. App.), 43 S. W. Rep. 48; fire plug, Thunborg *v.* Pueblo, 18 Colo. App. 80; hydrant, St. Germain *v.* Fall River, 177 Mass. 550; unguarded hydrant, Burnes *v.* St. Joseph, 91 Mo. App. 489; inequality in sidewalk, Labarre *v.* New Orleans, 106 La. 458; decayed condition of boards of a walk, Williams *v.* Hannibal, 94 Mo. App. 549; show case on sidewalk, Wells *v.* Brooklyn, 9 N. Y. App. Div. 61; obstruction two inches high on sidewalk, Baxter *v.* Cedar Rapids, 103 Iowa, 599; decayed wooden sidewalk, Evansville *v.* Frazer, 24 Ind. App. 628; discarded fruit rinds and decayed vegetables on sidewalk, city liable, Archer *v.* Johnson City (Tenn.), 64 S. W. Rep. 474; piles of earth placed in the streets in the course of making the usual improvements of the city are not unlawful defects, Swart *v.* District of Columbia, 17 D. C. App. 407; lamp posts, &c. no obstructions, Bureau Junction *v.* Long, 56 Ill. App. 458; trolley pole no defect, Kennedy *v.* Lansing, 99 Mich. 518; public pump no nuisance, Lostutter *v.* Aurora, 126 Ind. 436; fire plug four inches from curb is no obstruction, Horner *v.* Philadelphia, 194 Pa. St. 542; gutter eight inches wide and six

§ 1695 (1004). **Actionable Defects under the New England Statutes.** — Actionable defects under the New England statutes have been classified as follows:[1] —

inches deep not actionable, Wright *v.* Lancaster, 203 Pa. 276; two inches of mud no obstruction, O'Reilly *v.* Syracuse, 49 N. Y. App. Div. 538; barrel in a coal hole in sidewalk not a nuisance *per se*, Maltbie *v.* Bolting, 6 N. Y. Misc. 339.

It is *a question of fact altogether for a jury* to say whether the place alleged to be out of repair is dangerous, and, if so, from what cause; and if from a natural cause or process, whether the persons liable to repair the road could reasonably and conveniently, as regards expenditure and labor, have made the road *safe for use*. Caswell *v.* St. Mary's Pl. R. Co., 28 Up. Can. Q. B. 247, 254. The season of the year, the place of the accident, the hour of the day or night, the manner and nature of the accident, must all be taken into consideration in determining the question. See Castor *v.* Uxbridge, 39 Up. Can. Q. B. 113; Ringland *v.* Toronto, 23 Up. Can. C. P. 98; Hutton *v.* Windsor, 34 Up. Can. Q. B. 487; Green *v.* Danby, 12 Vt. 338; Rice *v.* Montpelier, 19 Vt. 470; Cassedy *v.* Stockbridge, 21 Vt. 391; Sessions *v.* Newport, 23 Vt. 9; Kelsey *v.* Glover, 15 Vt. 708; Merrill *v.* Hampden, 26 Me. 234; Providence *v.* Clapp, 17 How. (U. S.) 161; Fitz *v.* Boston, 4 Cush. (Mass.) 365; Johnson *v.* Haverhill, 35 N. H. 74; Winship *v.* Enfield, 42 N. H. 197; Pratt *v.* Amherst, 140 Mass. 167 (railing erected in street to change the course of travel); Talbot *v.* Taunton, 140 Mass. 552 (low bridge); Dubois *v.* Kingston, 102 N. Y. 219 (stepping-stone in sidewalk not an obstruction); Cincinnati *v.* Fleisher, 63 Ohio St. 229 (carriage block); Robert *v.* Powell, 168 N. Y. 411 (carriage stone on sidewalk, not actionable); Wolf *v.* District of Columbia, 21 D. C. App. 464 (carriage stone not an unlawful obstruction); Yeaw *v.* Williams, 15 R. I. 20 (posts marking line of curve in a street); Fritsch *v.* Allegheny, 91 Pa. St. 226 (dead horse in street); Schroth *v.* Prescott, 68 Wis. 678 (hole in sidewalk); Birmingham *v.* Starr, 112 Ala. 98; Marvin *v.* New Bedford, 158 Mass. 464; Dinsmore *v.* St. Louis, 192 Mo. 255; Beltz *v.* Yonkers, 148 N. Y. 67; Hamilton *v.* Buffalo, 173 N. Y. 72; Morroney *v.* New York, 49 N. Y. Misc. 307; Dallas *v.* Jones, 93 Tex. 38; Stege *v.* Milwaukee, 110 Wis. 484 (coal hole); Stoetzele *v.* Swearingen, 90 Mo. App. 588 (coal hole); Getzoff *v.* New York, 51 N. Y. App. Div. 450 (hole in sidewalk no defect); Hart *v.* Red Cedar, 63 Wis. 634; Baker *v.* Madison, 62 Wis. 137; Fopper *v.* Wheatland, 59 Wis. 623 (street too narrow around a curve on a hill). The cause of the accident may be either structural defect or inert matter left either upon or over the road. Davis *v.* Bangor, 42 Me. 522. In some cases it has been held that the defect must be such as to render the corporation liable to an indictment for a nuisance. Howard *v.* North Bridgewater, 16 Pick. 189; Merrill *v.* Hampden, 26 Me. 234; Ringland *v.* Toronto, 23 Up. Can. C. P. 98; Hutton *v.* Windsor, 34 Up. Can. Q. B. 487; Ray *v.* Petrolia, 24 Up. Can. C. P. 73; Boyle *v.* Dundas, 25 Up. Can. C. P. 420; Castor *v.* Uxbridge, 39 Up. Can. Q. B. 113. But however desirable that may be as a rule of decision, it has not, says Judge *Harrison*, been adopted in *Canada*. Burns *v.* Toronto, 42 Up. Can. Q. B. 560; Goldthwaite *v.* East Bridgewater, 5 Gray (Mass.), 61. It is not every nuisance which obstructs, hinders, or delays travellers on a highway which constitutes non-repair of the highway. Hewison *v.* New Haven, 34 Conn. 136, 140. The traveller may be obstructed by a concourse of people, by a crowd of carriages; his horse may be frightened by the discharge of guns, the explosion of fireworks, by the falling of a signboard insecurely fastened, by military music, by the presence of wild animals, and yet the highway not be in any legal sense out of repair. Hixon *v.* Lowell, 13 Gray (Mass.), 59; Davis *v.* Bangor, 42 Me. 522; French *v.* Brunswick, 21 Me. 29; Taylor *v.* Peckham, 8 R. I. 349; Jones *v.* Boston, 104 Mass. 75. "Any object in, upon, or near the travelled path, which would

[1] *Per Chapman*, J., in Keith *v.* Easton, 2 Allen (Mass.), 552, 553; Barber *v.* Roxbury, 11 Allen (Mass.), 318, 320, *per Gray*, J.; Sparhawk *v.* Salem, 1 Allen, 30; O'Dwyer *v.* Northern Market Co., 24 D. C. App. 81.

1. Want of railings.

2. Obstructions to the travelled path by rocks, stones, wood, timber, posts, snow, ice, &c.

3. Holes or excavations in the travelled path, or so immediately contiguous as to make the highway itself unsafe.

4. Defective bridges and causeways, insufficient to support travellers.

5. Awnings, and falling substances, the doctrine in respect of which is limited and peculiar, if not exceptional.

In a work general in its character, like the present, it is impracticable to notice at length the cases arising under these local statutes.[1] It must suffice briefly to refer to some of the more important of them. For convenience analogous decisions in other States, resting upon different statutes or upon general principles, are cited in the same connection. By recurring to the New England statutes heretofore given,[2] the precise force and value of the decisions upon them will be better seen, and, in the light of these decisions, the state of the law in this country upon the general question of the *implied liability of municipal corporations* in respect of defective and unsafe streets and ways, be better understood.[3]

necessarily obstruct or hinder one in the use of the road for the purpose of travelling thereon, or which, from its nature and position, would be likely to produce that result, would generally constitute a defect in the highway." Hewison *v.* New Haven, 34 Conn. 136, 140; Richmond *v.* Pemberton, 108 Va. 220, 226; Harrison Munic. Man. (5th ed.) 486; Biggar's Munic. Man. (Canada, 1900) 824 *et seq.*

Obstructions to the TRAVELLED *path.* Smith *v.* Davis, 22 D. C. App. 298; Streeter *v.* Marshalltown, 123 Iowa, 449; Glasgow *v.* Gillenwaters, 113 Ky. 140. Towns must remove actionable obstructions to the travelled path or route *by whomsoever placed there,* but "are not liable for obstructions in portions of the highway, not part of the travelled path, and not so connected with it that they will affect the security or convenience for travel of those using the travelled path." Smith *v.* Wendell, 7 Cush. (Mass.) 498, 500, *per Dewey,* J.; Shepardson *v.* Colerain, 13 Met. (Mass.) 55; Kellogg *v.* Northampton, 4 Gray (Mass.), 65; s. c. 8 Gray (Mass.), 504; Howard *v.* North Bridgewater, 16 Pick. (Mass.) 189; Cogswell *v.* Lexington, 4 Cush. (Mass.) 307; Hayden *v.* Attleborough, 7 Gray (Mass.), 338; Wheeler *v.* Westport, 30 Wis. 392; 2 Thomps. Neg. chap. xvi. p. 766; Hannibal *v.* Campbell, 86 Fed. Rep. 297; Prather *v.* Spokane, 29 Wash. 549; Arthur *v.* Charleston, 51 W. Va. 132.

[1] In the last edition of Shearman & Redfield on Negligence, the reader will find a useful chapter on the subject of liability for defective highways; and also in Thompson on Negligence, chap. xvi.

[2] *Supra,* § 1691, note.

[3] DECISIONS IN THE NEW ENGLAND STATES RESPECTING DEFECTIVE STREETS AND SIDEWALKS. *"Safe and convenient"; duty thus imposed, defined.* Raymond *v.* Lowell, 6 Cush. (Mass.) 524, 534. Reviewed, Hubbard *v.* Concord, 35 N. H. 52; Gregory *v.* Adams, 14 Gray (Mass.), 242, *per Merrick,* J.; Hixon *v.* Lowell, 13 Gray, 59, *per Hoar,* J.; Torphy *v.* Fall River, 188 Mass. 310; Church *v.* Cherryfield, 33 Me. 460; Johnson *v.* Haverhill, 35 N. H. 74, where the rule adopted by the Supreme Court as the proper construction of the statute is stated; Hubbard *v.* Concord, 35 N. H. 52. In Hardy *v.* Keene, 52 N. H. 370, *Foster,*

§ 1696 (1005). **Same Subject; Want of Railings or Barriers.** — If rails or barriers are, under the special circumstances, necessary for the proper security of travellers, the authorities charged with the duty of keeping the roads in repair and safe condition must, under the construction of the New England statutes, provide them.[1]

J., reviews the previous cases in that State, — Johnson *v.* Haverhill, 35 N. H. 74; Holl *v.* Manchester, 40 N. H. 410; Clark *v.* Barrington, 41 N. H. 44; Howe *v.* Plainfield, 41 N. H. 135; Palmer *v.* Portsmouth, 43 N. H. 265; and Ray *v.* Manchester, 46 N. H. 59, — and declares the court's satisfaction with their wisdom and justice. Davis *v.* Bangor, 42 Me. 522; Packard *v.* New Bedford (oblique gutter across street), 9 Allen (Mass.), 200; Keith *v.* Easton, 2 Allen (552), *per Chapman*, J. Compare Morse *v.* Richmond, 41 Vt. 435, and note; s. c. 8 Am. Law Reg. (N. S.) 81; Leicester *v.* Pittsford, 6 Vt. 245; Prindle *v.* Fletcher, 39 Vt. 255; and Clark *v.* Corinth, 41 Vt. 449, cited with approval by *Dixon*, C. J., in Ward *v.* Jefferson, 24 Wis. 342; Loan *v.* Boston, 106 Mass. 450; Post *v.* Boston, 141 Mass. 189 (cover of cesspool floating off); Hanscom *v.* Boston, 141 Mass. 242 (coal hole); Pratt *v.* Weymouth, 147 Mass. 245 (derrick used in repair of street held not an actionable defect under the statute); Davis *v.* Guilford, 55 Conn. 351 (gully in travelled highway); Witham *v.* Portland, 72 Me. 539 (depression in sidewalk before a basement window); Bennett *v.* Fifield, 13 R. I. 139 (object calculated to frighten horse). See also and compare Rea *v.* Sioux City, 127 Iowa, 615; Parrish *v.* Huntington, 57 W. Va. 286, compare Shearer *v.* Buckley, 31 Wash. 370. *Post*, § 1702.

[1] Palmer *v.* Andover, 2 Cush. (Mass.) 600, commented on in Rowell *v.* Lowell, 7 Gray (Mass.), 100, 102; Jones *v.* Waltham (falling into cattle-guards), 4 Cush. (Mass.) 299; Pittston *v.* Hart, 89 Pa. St. 389; Britton *v.* Cummington, 107 Mass. 347; Babson *v.* Rockport, 101 Mass. 93; Stevens *v.* Boxford, 10 Allen, 93; Haskell *v.* New Gloucester, 70 Me. 305. Liability of railroad company. *Ib.*, 202, *per Metcalf*, J.; Alger *v.* Lowell, 3 Allen (Mass.), 402; *Ib.* 38; Murphy *v.* Gloucester, 105 Mass. 470; Commonwealth *v.* Wilmington, 105 Mass. 599; Stockwell *v.* Fitchburg, 110 Mass. 305; Barnes *v.* Chicopee (defect thirty-four feet distant), 138 Mass. 67; Koester *v.* Ottumwa, 34 Iowa, 41; Burnham *v.* Boston (dangerous excavation), 10 Allen, 290; followed, in a case on similar facts, Orme *v.* Richmond, 79 Va. 86; Clark *v.* Richmond (unprotected area), 83 Va. 355; Harris *v.* Newbury, 128 Mass. 321; Muller *v.* Rutland, 55 Vt. 77; Olson *v.* Chippewa Falls, 71 Wis. 558; Klatt *v.* Milwaukee, 53 Wis. 196 (holding a city not liable for injuries happening when barrier had been removed without its knowledge); Stinson *v.* Gardiner, 42 Me. 248; Blake *v.* Newfield, 68 Me. 365; Willey *v.* Ellsworth, 64 Me. 57; Doherty *v.* Waltham (barriers removed by stranger in night-time), 4 Gray (Mass.), 596; Davis *v.* Hill, 41 N. H. 329; Hayden *v.* Attleborough, 7 Gray, 338; Freeport *v.* Isbell, 83 Ill. 440; Stack *v.* Portsmouth, 52 N. H. 221, 223. Commenting on the two cases last cited, Bassett *v.* St. Joseph, 53 Mo. 290.

Further illustrations; see Salem *v.* Webster, 192 Ill. 369; Normal *v.* Webb, 91 Ill. App. 183; Elwood *v.* Addison, 26 Ind. App. 28; Vincennes *v.* Specs (Ind. App.), 72 N. E. Rep. 531; Powers *v.* Boston, 154 Mass. 60; Sterling *v.* Detroit, 134 Mich. 22; Campbell *v.* Stanberry, 85 Mo. App. 159; Bowman *v.* Omaha, 59 Neb. 84; Dow *v.* Portsmouth, 70 N. H. 410; Hewitt *v.* Cleveland, 21 Ohio Cir. Ct. R. 505; O'Malley *v.* Parsons, 191 Pa. 612; Canfield *v.* East Stroudsburg, 19 Pa. Super. Ct. 649; Hutchison *v.* Summerville, 66 S. Car. 442; Bohl *v.* Dell Rapids, 15 S. Dak. 619; Corsicana *v.* Tobin, 23 Tex. Civ. App. 492; San Antonio *v.* Porter, 24 Tex. Civ. App. 444; Brown *v.* Bachman (Tex. Civ. App.), 72 S. W. Rep. 622; McClammy *v.* Spokane, 36 Wash. 339; Homewood *v.* Hamilton, 1 Ont. Law Rep. (Can.) 266; Whyler *v.* Bingham Rural Dist. L. R. [1901], 1 Q. B. 45; Halpin *v.* Kansas City, 76 Mo. 335. See Hey *v.* Philadelphia, 81 Pa. St. 44; Scott *v.* Montgomery, 95 Pa. St. 444; Pittston *v.* Hart, 89 Pa. St. 389; Williams *v.* Clinton (want of railing on embanked highway), 28 Conn.

The duty is not an absolute one. Thus towns are not necessarily bound to fence or to erect barriers to prevent travellers from getting outside of the road or way.[1] A municipal corporation may determine for itself to what extent it will guard against mere *possible* accidents, and, if it be not guilty of negligence, the judicial tribunals are not to say it shall suffer in damages for not giving to the public more complete protection, since that would practically take the administration of a municipal affair out of the hands to which it has been intrusted by law.[2] But, nevertheless, where a

264; Tolland *v.* Willington, 26 Conn. 587; Ward *v.* North Haven, 43 Conn. 148; Houfe *v.* Fulton, 29 Wis. 296; Toms *v.* Whitby, 35 Up. Can. Q. B. 195; s. c. 37 Up. Can. Q. B. 100. Duty to close or bar, by visible signs, if unsafe. Blaisdell *v.* Portland, 39 Me. 113; Loker *v.* Damon, 17 Pick. (Mass.) 284; Drury *v.* Worcester, 21 Pick. (Mass.) 44; Koester *v.* Ottumwa, 34 Iowa, 41; Kelly *v.* Columbus, 41 Ohio St. 263. When road or street regarded as *opened.* State *v.* Cornville, 43 Me. 427; Bowman *v.* Boston, 5 Cush. (Mass.) 1; Kellogg *v.* Northampton, 8 Gray (Mass.), 504; Bunch *v.* Edenton, 90 N. Car. 431; Delphi *v.* Lowery, 74 Ind. 520; Indianapolis *v.* Doherty, 71 Ind. 5; Wyandotte *v.* Gibson, 25 Kan. 236; Sinclair *v.* Baltimore, 59 Md. 592; Fitzgerald *v.* Berlin, 51 Wis. 81; Lewis *v.* Atlanta, 77 Ga. 756 (lights not placed upon obstruction as required by ordinance). A city held not liable for injuries caused by want of railings upon a bridge within its limits owned by the State. Carpenter *v.* Cohoes, 81 N. Y. 21. "A person who by night or day passes along a public street open to travel has a right to presume that it is in a safe condition; and if, in the exercise of reasonable care, he falls into an excavation in the street which was not adequately protected, and sustains injuries, he may, in a proper case, recover therefor." *Maxwell*, J., in Lincoln *v.* Walker, 18 Neb. 250, on rehearing of s. c. *Ib.* 244; Thompson on Neg. (Vol. ii., chap. xvi., pp. 770–777) collects many cases relating to the duty to erect guards and railings, and to light dangerous places.

[1] Sparhawk *v.* Salem, 1 Allen (Mass.), 30; Murphy *v.* Gloucester, 105 Mass. 470, and cases cited by *Morton*, J.; Puffer *v.* Orange, 122 Mass. 389; Barnes *v.* Chicopee, 138 Mass. 67; Nebraska City *v.* Campbell (want of railing), 2 Black, 590; Chicago *v.* Gallagher, 44 Ill. 295; Joliet *v.* Verley, 35 Ill. 58; Gilchrist *v.* Garden, 26 Up. Can. C. P. 1; Castor *v.* Uxbridge, 39 Up. Can. Q. B. 113; Wilson *v.* Halifax, L. R. 3 Ex. 114; Cornwell *v.* Metropolitan Com'rs of Sewers, 10 Ex. 771; Crafter *v.* Metropolitan Ry. Co., L. R. 1 C. P. 300; Adams *v.* Natick, 13 Allen (Mass.), 429; Warren *v.* Holyoke, 112 Mass. 362; Shearm. & Red. Neg. (4th ed.) § 356, and cases; Veeder *v.* Little Falls, 100 N. Y. 343 (an incorporated village held not liable for damages caused by the want of a railing upon land belonging to the State, though it had unlawfully appropriated the land for a street). In *Connecticut* a city is not under obligation to maintain railings in front of basement offices and shops. Beardsley *v.* Hartford, 50 Conn. 529. In *Iowa* cellar doors in sidewalks are not unlawful. If, when open, they can be seen readily by a pedestrian using due care, or if, in the night-time, they are lighted so as to be disclosed to such a person, the omission to place barriers about them is not, of itself, evidence of such negligence as will create liability, as a matter of law. Day *v.* Mt. Pleasant, 70 Iowa, 193.

[2] Lansing *v.* Toolan, 37 Mich. 152, criticised 2 Thomps. Neg. 736, note; Keyes *v.* Marcellus, 50 Mich. 439. Where a horse, becoming frightened, left the roadway and dragged a carriage up a grade of about twelve feet and over a curbstone eight inches high, crossed the sidewalk and fell down an embankment, *there being no rail or other barrier* on the outside of the walk, the city was held not to be liable. *Peckham*, J., said: "That which never happened before, and which, in its character, is such as not to naturally occur to prudent men to guard against its happening at all, cannot, when in

rail or barrier is reasonably necessary for the security of travellers on the road, which from its nature would otherwise be unsafe, and the erection of which would have prevented the injury, it is actionable negligence not to construct and maintain such a guard or barrier.[1]

§ 1697 (1006). **Same Subject; Ice and Snow in Streets; Slippery Sidewalks.** — The law does not require a municipal corporation to respond in damages for every injury that may be received on a public street.[2] The corporation is not bound to have its *streets or*

the course of years it does happen, furnish good ground for a charge of negligence in not foreseeing its possible happening, and guarding against that remote contingency." Hubbell *v.* Yonkers, 104 N. Y. 434. See also Chicago *v.* McKenna, 114 Ill. App. 270.

[1] Atlanta *v.* Wilson, 59 Ga. 544; Wilson *v.* Atlanta, 60 Ga. 473; Lower Macungie Tp. *v.* Merkhoffer, 71 Pa. St. 276; Newlin Tp. *v.* Davis, 77 Pa. St. 317; Scranton *v.* Dean, 2 Weekly Notes, 467; Alger *v.* Lowell, 3 Allen (Mass.), 402; Hey *v.* Philadelphia, 81 Pa. St. 44; Pittston *v.* Hart, 89 Pa. St. 389; Scott *v.* Montgomery, 95 Pa. St. 444; Keys *v.* Marcellas, 50 Mich. 439; O'Leary *v.* Mankato, 21 Minn. 65; Chicago *v.* Hislop, 61 Ill. 86; Chicago *v.* Wright, 68 Ill. 586; Chicago *v.* Hesing, 83 Ill. 204; Kennedy *v.* New York, 73 N. Y. 365; Hubbell *v.* Yonkers, 104 N. Y. 434; Carlisle *v.* Brisbane, 113 Pa. St. 544; Chicago *v.* Baker, 195 Ill. 54; Mt. Vernon *v.* Brooks, 39 Ill. App. 426; Chicago *v.* Seben, 62 Ill. App. 248; Canton *v.* Dewey, 71 Ill. App. 346; La Salle *v.* Evans, 111 Ill. App. 69; Fletcher *v.* Ellsworth, 53 Kan. 751; Louisville *v.* Keher, 117 Ky. 841; Carswell *v.* Wilmington, 2 Marv. (Del.) 360; Hyde *v.* Boston, 186 Mass. 115; Torphy *v.* Fall River, 188 Mass. 310; Sterling *v.* Detroit, 134 Mich. 22; Tarras *v.* Winona, 71 Minn. 22; Ball *v.* Independence, 41 Mo. App. 469; Kinney *v.* Tekemah, 30 Neb. 605; South Omaha *v.* Cunningham, 31 Neb. 316; Ott *v.* Buffalo, 131 N. Y. 594; Bennett *v.* Sing Sing, 60 Hun (N. Y.), 579; Tiers *v.* New York, 74 Hun (N. Y.), 452; Gable *v.* Toledo, 16 Ohio Cir. Ct. R. 515; Hutchison *v.* Summerville, 66 S. Car. 442; White *v.* Ballard, 19 Wash. 284. That it is not negligence *per se*, Staples *v.* Canton, 69 Mo. 592; Day *v.* Mt. Pleasant, 70 Iowa, 193.

In a case in New York, where the plaintiff's horse, which was attached to a cart and engaged in carting brick on a dock *owned by the city*, suddenly became unmanageable, and by reason of the neglect of defendant, a municipal corporation, to provide a proper string-piece on the dock, backed off the dock and was lost, the plaintiff doing all in his power to prevent the accident, it was held that it was the duty of the city to provide a string-piece or barrier to protect animals that were temporarily out of the control of the owner and unmanageable, as well as those that were docile and obedient, and that these facts were sufficient to create a liability. Kennedy *v.* New York, 73 N. Y. 365. *Ante*, §§ 1671, 1673. It was held to be negligence for a city to leave a ditch, filled with water five feet deep, bordering on a sidewalk in a public street, without any guards; and where a child five years old left the house of its parents and fell into the ditch and was drowned, the city was held liable. Chicago *v.* Hesing, 83 Ill. 204; Chicago *v.* Major, 18 Ill. 349; Indianapolis *v.* Emmelman, 108 Ind. 530; Orme *v.* Richmond, 79 Va. 86. See also Niblitt *v.* Nashville, 12 Heisk. (Tenn.) 684.

A city is not bound to provide *hitching posts*, and where it does so it is bound only to ordinary care in the selection and setting of them. Rockford *v.* Tripp, 83 Ill. 247. Where a horse became frightened and ran away, and frightened a team fastened to *post* provided by city, causing the horses to break the post and run away, and they ran over and injured a person in the street, *the damage too remote* to be actionable. *Ib.* See also Marble *v.* Worcester, 4 Gray (Mass.), 395.

[2] Quincy *v.* Barker, 81 Ill. 300; Coates *v.* Canaan, 51 Vt. 131; Chicago *v.* Bixby, 84 Ill. 82. A person passing

sidewalks so constructed as to secure absolute immunity from danger in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty, generally stated, is only to use due and proper care to see that its sidewalks are reasonably safe for persons exercising ordinary care and prudence. The *mere slipperiness of a sidewalk*, occasioned by ice or snow, not being accumulated so as to constitute an obstruction, is not ordinarily such a defect as will make the city liable for damages occasioned thereby.[1] Where there is snow upon a sidewalk, and it is rendered slippery, there is danger of injury from slipping and falling, even on the best constructed walks. At such times, there is imposed upon foot-travellers the necessity of exercising increased care;[2] and where the city uses reasonable diligence it will not be liable.[3] But in case no attempt

along a sidewalk with which he is familiar in the daytime, who walks upon a part which is obstructed by an accumulation of ice, and sustains an injury which he might have avoided by passing on either side of the obstruction, cannot recover for the injury. Quincy *v.* Barker, 81 Ill. 300; Aurora *v.* Pulfer, 56 Ill. 270; Schaefler *v.* Sandusky, 33 Ohio St. 246.

[1] Stanton *v.* Springfield, 12 Allen (Mass.), 566; Nason *v.* Boston, 14 Allen (Mass.), 508; Cook *v.* Milwaukee, 24 Wis. 270; Ward *v.* Jefferson, 24 Wis. 342; Cook *v.* Milwaukee, 27 Wis. 191; Chicago *v.* McGiven, 78 Ill. 347; Clark *v.* District of Columbia, 3 Mackey, 79; Broburg *v.* Des Moines, 63 Iowa, 523; Keith *v.* Brockton, 136 Mass. 119; Taylor *v.* Yonkers, 105 N. Y. 202; Chase *v.* Cleveland, 44 Ohio St. 505; Mauch Chunk *v.* Kline, 100 Pa. St. 119; Kinney *v.* Troy, 108 N. Y. 567; Kaveny *v.* Troy, *Ib.* 571; Seeley *v.* Litchfield, 49 Conn. 134; Grossenbach *v.* Milwaukee, 65 Wis. 31; Hill *v.* Fond du Lac, 56 Wis. 242; Stilling *v.* Thorp, 54 Wis. 528; Schroth *v.* Prescott, 63 Wis. 652; Chicago *v.* Richardson, 75 Ill. App. 198; Metzger *v.* Chicago, 103 Ill. App. 605; Columbus *v.* Neise, 63 Kan. 885; Newton *v.* Worcester, 169 Mass. 516; Wesley *v.* Detroit, 117 Mich. 658; Lichtenstein *v.* New York, 159 N. Y. 500; Rogers *v.* Rome, 96 N. Y. App. Div. 427; Russell *v.* Toledo, 19 Ohio Cir. Ct. R. 418; Wyman *v.* Philadelphia, 175 Pa. 117; Boyle *v.* Mahanoy City, 19 Pa. County Ct. R. 195; Lynchburg *v.* Wallace, 95 Va. 640; Calder *v.* Walla Walla, 6 Wash. 377; Beaton *v.* Milwaukee, 96 Wis. 416; De Pere *v.* Hibbard, 104 Wis. 666; Mueller *v.* Milwaukee, 110 Wis. 623. Other cases are cited, Shearm. & Red. Neg. (4th ed.) 363, and by Judge Thompson. 2 Neg. 784 *et seq.*

[2] Chicago *v.* McGiven, 78 Ill. 347; Womach *v.* St. Joseph, 168 Mo. 236; Kleng *v.* Buffalo, 156 N. Y. 700; Boyle *v.* Mahanoy City, 19 Pa. County Ct. R. 195.

[3] Battersby *v.* New York, 7 Daly (N. Y.), 16. *Allowing snow to lie on a macadamized road* does not, as a general rule, come under the idea of allowing a road to be out of repair. Stewart *v.* Woodstock & H. Pl. R. Co., 15 Up. Can. Q. B. 427; Chicago *v.* McDonald, 111 Ill. App. 436; Spillane *v.* Fitchburg, 177 Mass. 87; Shipley *v.* Proctor, 177 Mass. 498; Corey *v.* Ann Arbor, 124 Mich. 134; Harrington *v.* Buffalo, 121 N. Y. 147; McPherson *v.* Buffalo, 13 N. Y. App. Div. 502; O'Shaughnessey *v.* Middleport, 93 N. Y. App. Div. 93; Kopper *v.* Yonkers, 110 N. Y. App. Div. 747; Winne *v.* Albany, 61 Hun (N. Y.), 620; Dapper *v.* Milwaukee, 107 Wis. 88; D'Estimonville *v.* Montreal, 18 Rap. Jud. Que., C. S., 470.

A city cannot be held liable for injuries occurring by reason of *extraordinary* falls of snow, before it has had reasonable time to clear the streets and put them in a proper condition for travel. Clark *v.* District of Columbia, 3 Mackey, 79; Hayes *v.* Cambridge, 136 Mass. 402; McDonald *v.* Toledo, 63 Fed. Rep. 60; McAllister *v.* Bridgeport, 72 Conn. 733; Ayres *v.* Hammondsport, 130 N. Y. 665;

is made to remedy an unsafe sidewalk, and the weather is such that it could reasonably have been done, liability may attach.[1] A person who voluntarily attempts to pass over a sidewalk which he knows to be dangerous by reason of ice upon it, and which he might easily avoid, cannot ordinarily be regarded as exercising due prudence, and therefore cannot, if guilty of *contributory negligence*, maintain an action against the city to recover for injuries sustained by falling upon the ice, even if the city would otherwise have been liable.[2]

Kleng *v.* Buffalo, 156 N. Y. 700; Crawford *v.* New York, 174 N. Y. 518; Staley *v.* New York, 37 N. Y. App. Div. 598; Hawkins *v.* New York, 54 N. Y. App. Div. 258; O'Hara *v.* Brooklyn, 57 N. Y. App. Div. 176; Crawford *v.* New York, 68 N. Y. App. Div. 107; Foley *v.* New York, 95 N. Y. App. Div. 374; Betts *v.* Gloversville, 56 Hun (N. Y.), 639; O'Connor *v.* New York, 16 Daly (N. Y.), 58; Peard *v.* Mt. Vernon, 83 Hun (N. Y.), 250, aff'd 158 N. Y. 681; Scoville *v.* Salt Lake City, 11 Utah, 60; Lynchburg *v.* Wallace, 95 Va. 640; Koch *v.* Ashland, 88 Wis. 603; Ince *v.* Toronto, 27 Ont. App. (Can.) 410. That a highway was impassable for three months by reason of drifts of snow, held not to be, of itself, evidence of negligence on the part of a town. Burr *v.* Plymouth, 48 Conn. 460. City held liable in Dooley *v.* Meriden, 44 Conn. 117; Cloughessey *v.* Waterbury, 51 Conn. 405; Muncie *v.* Hey, 164 Ind. 570; Cincinnati *v.* Grebner, 25 Ohio Cir. Ct. R. 700.

[1] Congdon *v.* Norwich, 37 Conn. 414; Landolt *v.* Norwich, 37 Conn. 615; Dooley *v.* Meriden, 44 Conn. 117; Cloughessey *v.* Waterbury, 51 Conn. 405; Chicago *v.* Hislop, 61 Ill. 86; Boulder *v.* Niles, 9 Colo. 415; District of Columbia *v.* Frazer, 21 D. C. App. 154; Muncie *v.* Hey, 164 Ind. 570; Hodges *v.* Waterloo, 109 Iowa, 444; Rea *v.* Sioux City, 127 Iowa, 615; Huston *v.* Council Bluffs, 101 Iowa, 33; Templin *v.* Boone, 127 Iowa, 91; Magaha *v.* Hagerstown, 95 Md. 62; McGowan *v.* Boston, 170 Mass. 384; Reedy *v.* St. Louis Brew'g Ass'n, 161 Mo. 523; Pomfrey *v.* Saratoga, 104 N. Y. 459; Taylor *v.* Yonkers, 105 N. Y. 202; Bly *v.* Whitehall, 120 N. Y. 506; Keane *v.* Waterford, 130 N. Y. 188; Stapleton *v.* Newburgh, 9 N. Y. App. Div. 39; Walsh *v.* Buffalo, 17 N. Y. App. Div. 112; Haight *v.* Elmira, 42 N. Y. App. Div. 391; Beck *v.* Buffalo, 50 N. Y. App. Div. 621; Berger *v.* New York, 65 N. Y. App. Div. 394; Graham *v.* Poughkeepsie, 68 N. Y. App. Div. 262; White *v.* Manhattan R. Co., 82 N. Y. App. Div. 259; Moran *v.* New York, 98 App. Div. 301; Pymm *v.* New York, 111 N. Y. App. Div. 330; Hawley *v.* Gloversville, 74 N. Y. 513; Cresler *v.* Asheville, 134 N. Car. 311; Wyman *v.* Philadelphia, 175 Pa. 117; Miller *v.* Bradford, 186 Pa. St. 164; Salzer *v.* Milwaukee, 97 Wis. 471.

[2] Quincy *v.* Barker, 81 Ill. 300; Aurora *v.* Pulfer, 56 Ill. 270; Chicago *v.* Bixby, 84 Ill. 82; Schaefler *v.* Sandusky, 33 Ohio St. 246; Durkin *v.* Troy, 61 Barb. 437; Evans *v.* Utica, 69 N. Y. 166; Wilson *v.* Charlestown, 8 Allen (Mass.), 137; Belton *v.* Baxter, 54 N. Y. 245; Muncie *v.* Hey, 164 Ind. 570; Evans *v.* Philadelphia, 205 Pa. 193; Pennsylvania R. Co. *v.* Rathgeb, 32 Ohio St. 66. *Infra*, § 1712, and note.

In *the New England States*, under the statutes above referred to (*ante*, § 1691, note), requiring highways to be made "*safe* and convenient at *all* seasons," &c., it is held that towns and cities are liable for *defects and obstructions caused by snow and ice*, rendering them unsafe, the later decisions tending, however, to restrict their liability. Loker *v.* Brookline, 13 Pick. 343; Horton *v.* Ipswich, 12 Cush. 488; Hall *v.* Lowell (injury upon sidewalk covered with ice), 10 Cush. (Mass.) 260, 262, remarks of *Metcalf*, J.; Stanton *v.* Springfield (doctrine carefully stated by *Hoar*, J.), 12 Allen (Mass.), 566; Shea *v.* Lowell, 8 Allen (Mass.), 136; *Ib.* 137; O'Neill *v.* Lowell, 6 Allen (Mass.), 110; Street *v.* Holyoke, 105 Mass. 82, and cases cited by *Colt*, J., and note; Stone *v.* Hubbardston

The author ventures to remark that some of the reported judgments have imposed an unreasonable, if not impracticable, degree of care and diligence upon the municipal authorities in respect of slippery sidewalks caused by snow and ice, and the more recent legislation has limited and the later decisions obviously and justly tend to restrict the liability. Each case must depend upon its exact facts, and the foregoing general principles must be understood and applied in the light of these admonitory suggestions, and of the circumstances of the particular case, keeping in view also the statutory provisions of the State, if there are any, relating to the subject.[1]

The *owner or occupant* of the building is not liable in such cases to the person injured on the sidewalk in front thereof from natural accumulations of snow or ice.[2]

(when ice a defect), 100 Mass. 49, 57, and cases cited by *Gray*, J., Gilbert *v.* Roxbury, *Ib.* 185; Landolt *v.* Norwich, 37 Conn. 615; Blake *v.* Lowell, 143 Mass. 296; Smyth *v.* Bangor, 72 Me. 249. Liability extends to travelling *across* as well as passing *along* the sidewalk. Street *v.* Holyoke, 105 Mass. 82; Providence *v.* Clapp, 17 How. (U. S.) 161, construing statute of *Rhode Island*, which is substantially the same as that of *Massachusetts*. Green *v.* Danby, 12 Vt. 338; Barton *v.* Montpelier, 30 Vt. 650; Tripp *v.* Lyman (defect occasioned by *freezing and thawing*), 37 Me. 250; Durkin *v.* Troy, 61 Barb. (N. Y.) 437; Mosey *v.* Troy, *Ib.* 580, aff'd as Todd *v.* Troy, 61 N. Y. 506; Savage *v.* Bangor, 40 Me. 176; Hubbard *v.* Concord (descending icy sidewalk), 35 N. H. 52; *Ib.* 74; Hall *v.* Manchester, 40 N. H. 410.

As to liability elsewhere than in New England. McLaughlin *v.* Corry, 77 Pa. St. 109; Cook *v.* Milwaukee, 24 Wis. 270; s. c. 27 Wis. 191; Evans *v.* Utica, 69 N. Y. 166; Chicago *v.* Bixby, 84 Ill. 82; Quincy *v.* Barker, 81 Ill. 300; Ward *v.* Jefferson, 24 Wis. 342, construing statute of *Wisconsin;* Baltimore *v.* Marriott, 9 Md. 160; Atchison *v.* King, 9 Kan. 550; Collins *v.* Council Bluffs, 32 Iowa, 324; 7 Alb. L. J. 33, and note; Shearm. & Red. Neg. (4th ed.) §§ 363, 364; 2 Thomps. Neg. 784.

In *Illinois* it is held that a city, unless expressly authorized by the legislature, *cannot, by ordinance, compel a citizen to remove snow from the sidewalk in front of his premises*, any more than to remove obstructions from the middle of the street, as he has in both merely an interest common to all citizens. And the case is considered to be wholly unlike special assessments for permanent improvements adjoining certain lots specially benefited thereby. Gridley *v.* Bloomington, 88 Ill. 554; Chicago *v.* O'Brien, 111 Ill. 531, 532. Abutter not compellable in that State to keep sidewalks in repair. Chicago *v.* Crosby, 111 Ill. 538. But as to removal of snow, the contrary has, as we have seen (*ante*, chapter on Ordinances, § 713), been elsewhere held. Lincoln *v.* Janesch, 63 Neb. 707. *Post*, § 1704, note.

[1] Nebraska City *v.* Rathbone, 20 Neb. 288. "Several authorities treat the class of cases in question [for injuries caused by ice and snow] as involving want of repair and defects. But, in the absence of statutes which provide for them as such, it is not a natural construction, and the cases are more consistent which deal with these things as acts of negligence at common law. A great deal, however, may fairly depend on local usage in determining duties concerning highways in winter. Where it is customary to treat the removal of snow and ice as a regular part of highway management, the failure to look after it may be properly regarded as wrongful and negligent." *Per Campbell*, J., in McKellar *v.* Detroit, 57 Mich. 158. These observations of this distinguished judge place the subject in its just view.

[2] Kirby *v.* Boylston Market Assoc.,

§ 1698 (1007). **The Defect in Street must be the Proximate Cause of the Injury.** — The *defect in the highway or street,* whether it be snow and ice or whatever its nature, must be the *direct and proximate cause* of the special damage for which the corporation is sought to be made liable.[1] The ordinary rules as to *contributory negligence*

14 Gray (Mass.), 249; Jansen *v.* Atchison, 16 Kan. 358; Eustace *v.* Johns, 38 Cal. 3; Keokuk *v.* Keokuk Indep. School Dist., 53 Iowa, 352; Heeney *v.* Sprague, 11 R. I. 456, 502; Vandyke *v.* Cincinnati, 1 Disney, 532; Flynn *v.* Canton County, 40 Md. 312. But the *owner* is liable for an injury caused by *snow and ice falling from the roof.* Shipley *v.* Fifty Associates, 101 Mass. 251; Garland *v.* Towne, 55 N. H. 55; s. p. Hardy *v.* Keene, 52 N. H. 370; New Castle *v.* Kurtz, 210 Pa. 183; *post,* §§ 1697, 1705, note, 1726.

[1] Deverill *v.* Grand Trunk R. Co., 25 Up. Can. Q. B. 517; see also Cotton *v.* Wood, 8 C. B. N. S. 568; Toomey *v.* London, B. & S. C. R. Co., 3 C. B. N. S. 146; Cornman *v.* Eastern Counties R. Co., 4 H. & N. 781; Crafter *v.* Metropolitan Ry. Co., L. R. 1 C. P. 300; Jackson *v.* Hyde, 28 Up. Can. Q. B. 294; Henderson *v.* Barnes, 32 Up. Can. Q. B. 176; Agnew *v.* Corunna, 55 Mich. 428; Bluffton *v.* Mathews, 92 Ind. 213; Chicago & N. W. R. Co. *v.* Prescott, 59 Fed. Rep. 237; Denver *v.* Johnson, 8 Colo. App. 384; Macon *v.* Dykes, 103 Ga. 847; Vincennes *v.* Thuis, 28 Ind. App. 523; Knouff *v.* Logansport, 26 Ind. App. 202; Muncie *v.* Spence, 33 Ind. App. 599; Byerly *v.* Anamosa, 79 Iowa, 204; McClain *v.* Garden Grove, 83 Iowa, 235; Schnee *v.* Dubuque, 122 Iowa, 459; Watters *v.* Waterloo, 126 Iowa, 199; Union St. R. Co. *v.* Stone, 54 Kan. 83; Setter's Adm'r *v.* Maysville, 114 Ky. 60; Carlisle *v.* Secrest (Ky.), 75 S. W. Rep. 268; Bowes *v.* Boston, 155 Mass. 344; Block *v.* Worcester, 186 Mass. 526; Bleil *v.* Detroit St. Ry. Co., 98 Mich. 228; Monje *v.* Grand Rapids, 122 Mich. 645; Burrell *v.* Greenville, 133 Mich. 235; La Londe *v.* Peake, 82 Minn. 124; Cunningham *v.* Thief River Falls, 84 Minn. 21; Vogel *v.* West Plains, 73 Mo. App. 588; Murphy *v.* Leggett, 164 N. Y. 121; Twist *v.* Rochester, 165 N. Y. 619; Storey *v.* New York, 29 N. Y. App. Div. 316; Hamilton *v.* Buffalo, 55 N. Y. App. Div. 423; San Antonio *v.* Porter, 24 Tex. Civ. App. 444; Eskildsen *v.* Seattle, 29 Wash. 583; Hungerman *v.* Wheeling, 46 W. Va. 761; Aldrich *v.* Gorham, 77 Me. 287, where it was said that "in order to render a town or city liable on account of an accident happening on a highway, it must appear that the defect in the way was *the sole cause* of the injury." Flagg *v.* Hudson, 142 Mass. 280, holding that where a person is injured by collision with another vehicle while endeavoring to avoid a defect in the road, the defect is the *sole cause* of the injury and he may recover therefor. Where horses became *frightened at an ash heap* negligently left in the roadway, and ran upon and along a railroad track for a mile, where they were killed, it was held that, the facts being undisputed, the court should have instructed the jury that the negligent act of the township was the remote and not the proximate cause of the accident; and that where the facts are disputed the question is for the jury. West Mahanoy Tp. *v.* Watson, 116 Pa. St. 344; s. c. 112 Pa. St. 574; 2 Thomps. Neg. 765.

The rule as to proximate and remote causes is stated by *Paxson,* J., to be "that the injury must be the natural and probable consequence of the negligence, — such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act." Hoag *v.* Lake Shore & M. S. R. Co., 85 Pa. St. 293. West Mahanoy *v.* Watson, *supra.* Where, by reason of the want of ordinary care, there was a defective condition of guttering, curbing, and sidewalk, which, in conjunction with a heavy rainfall, became an active agent in producing damage to the foundation of a building on adjoining property, the city was held liable for the injury. Haney *v.* Kansas City, 94 Mo. 334.

Negligence is want, under the circumstances of the particular case, of due care. Tuttle *v.* Holyoke, 6 Gray (Mass.), 447; May *v.* Princeton, 11 Met. 442; Marble *v.* Worcester, 4

and its effect upon the right of recovery, apply to cases such as we are now considering. Adverting in this place to the subject in a general way, it may be stated that if the person injured knew of the defect or obstruction, and ought reasonably to have avoided it by going outside or around it, and did not, he cannot recover.[1] It

Gray (Mass.), 395; Adams *v.* Carlisle, 21 Pick. (Mass.) 146; Holman *v.* Townsend, 13 Met. (Mass.) 297, 299; Horton *v.* Ipswich, 12 Cush. (Mass.) 488; Lund *v.* Tyngsboro' (on leaping from carriage on near approach to defect), 11 Cush. (Mass.) 563; Tuttle *v.* Holyoke, 6 Gray (Mass.), 447; Sears *v.* Dennis, 105 Mass. 310; Stickney *v.* Maidstone, 30 Vt. 738, and cases cited by *Pierpont*, J.; Manderschid *v.* Dubuque, 29 Iowa, 73. Ordinary *iron gas box* in sidewalk with projecting rim, uncovered, may be an actionable defect. Loan *v.* Boston, 106 Mass. 450; Ayer *v.* Norwich (tent on road), 39 Conn. 376.

Defect causing team to be frightened; Meisner *v.* Dillon, 29 Mont. 116; Quinlan *v.* Philadelphia, 205 Pa. 309.

DECISIONS CONSTRUING NEW ENGLAND STATUTES (ANTE, § 1691, NOTE). Card *v.* Ellsworth, 65 Me. 547, where the cases are cited and reviewed by *Peters*, J.; Marble *v.* Worcester, 4 Gray (Mass.), 395; Cook *v.* Charlestown, 98 Mass. 80. Compare Morse *v.* Richmond, 41 Vt. 435; s. c. 8 Am. L. Reg. (N. S.) 81, and note of Judge *Redfield;* Clinton *v.* Howard, 42 Conn. 294; Bassett *v.* St. Joseph, 53 Mo. 290; Brown *v.* Glasgow, 57 Mo. 156; Bennett *v.* Fifield, 13 R. I. 139; Smith *v.* Sherwood Township, 62 Mich. 159 (hole in bridge). *Fright of team by accident, and injury thereto by a defect in the highway.* Davis *v.* Dudley, 4 Allen (Mass.), 557. Distinguished from Palmer *v.* Andover, 2 Cush. (Mass.) 600; and Howard *v.* North Bridgewater, 16 Pick. (Mass.) 189. Explained. Fogg *v.* Nahant, 98 Mass. 578; Jackson *v.* Bellevieu, 30 Wis. 250. See Manderschid *v.* Dubuque, 25 Iowa, 108, disapproving Davis *v.* Dudley, *supra*. *Whether injury caused jointly by defective road and defect in plaintiff's wagon, horse, or harness is actionable*, see conflicting views in *Vermont* and *Massachusetts* on the one hand, and *Maine* on the other. Hunt *v.* Pownal, 9 Vt. 418; Rowell *v.* Lowell, 7 Gray (Mass.), 100; Howard *v.* North Bridgewater, 16 Pick. (Mass.) 189; Marble *v.* Worcester, 4 Gray (Mass.), 395; Palmer *v.* Andover, 2 Cush. (Mass.) 600; Shepherd *v.* Chelsea, 4 Allen, 113; Fogg *v.* Nahant, 106 Mass. 278; s. c. 98 Mass. 578; Moore *v.* Abbott, 32 Me. 46; Farrar *v.* Greene, 32 Me. 574; Moulton *v.* Sanford, 51 Me. 127. Followed, Perkins *v.* Fayette, 68 Me. 152; and Aldrich *v.* Gorham, 77 Me. 287; following Moore *v.* Abbott, 32 Me. 46, which is denied to be law in Winship *v.* Enfield, 42 N. H. 197; Hall *v.* Kansas City, 54 Mo. 598; Lacon *v.* Page, 48 Ill. 499; Joliet *v.* Verley, 35 Ill. 58, 63; Aurora *v.* Pulfer, 56 Ill. 270; Baldwin *v.* Greenwood Turnp. Co., 40 Conn. 238; Cushing *v.* Bedford, 125 Mass. 526. See further cases cited, *infra;* also 2 Thomps. Neg. 778. *Burden of proof* to establish *contributory* negligence. See *infra*, § 1719.

[1] Schaefler *v.* Sandusky, 33 Ohio St. 246; Durkin *v.* Troy, 61 Barb. (N. Y.) 437; Evans *v.* Utica, 69 N. Y. 166; Wilson *v.* Charlestown, 8 Allen (Mass.), 137; Belton *v.* Baxter, 54 N. Y. 245; Pennsylvania Co. *v.* Rathgeb, 32 Ohio St. 66; Merrill *v.* Portland, 4 Cliff. C. C. R. 138; Iseminger *v.* York Haven Water & Power Co., 206 Pa. 591. In a case where the allegations of the party injured while crossing a gully in a street, were, that he saw the gully but believed it was reasonably safe, that he used due and ordinary care, and that there was no other safe road, it was held that these facts did not show contributory negligence, and that the question as to such negligence was one of fact for the jury. Albion *v.* Hetrick, 90 Ind. 545. Where an obstruction to a street, although originally the act of another, is so protracted as to possess an element of permanency, it is the duty of the municipal authorities to remove it and in the case of their failure to do so, the municipality may be charged with negligence in case of injury arising therefrom. Frank *v.* Warsaw, 198 N. Y. 463, aff'g 129 N. Y. App. Div. 936. See also Cohen *v.* New York, 113 N. Y. 532; Wells *v.* Brooklyn, 9 N. Y. App. Div. 61; s. c.

has been held that where two causes combine to produce the injury, both in their nature proximate, the one being the defect in the highway and the other some occurrence for which neither party is responsible, such as the accident of a horse running away beyond control, the corporation is liable, provided the injury would not have been sustained but for the defect in the highway.[1] There can be no recovery if the injury be caused by the unskilfulness or want of care on the part of the driver,[2] or if it can be shown that the plaintiff, by his own want of care, directly caused the accident.[3] The streets and sidewalks, it has been well remarked, are for the benefit of all conditions of people; and all have the right, in using them, to assume that they are in an ordinarily good condition, and to regulate their conduct upon that assumption. A person may walk or drive carefully in the darkness of the night, relying upon the belief that the corporation has performed its duty, and that the street or the walk is not in an unsafe condition.[4] He walks, it has

21 N. Y. App. Div. 626; s. c. 45 N. Y. App. Div. 623, aff'd 162 N. Y. 657.

[1] Toms *v.* Whitby, 37 Up. Can. Q. B. 100; Sherwood *v.* Hamilton, 37 Up. Can. Q. B. 410; Castor *v.* Uxbridge, 39 Up. Can. Q. B. 113; Merrill *v.* Portland, 4 Cliff. C. C. R. 138; Moulton *v.* Sanford, 51 Me. 127; Perkins *v.* Fayette, 68 Me. 152; Ring *v.* Cohoes, 77 N. Y. 83; Ehrgott *v.* New York, 96 N. Y. 264; Hampson *v.* Taylor, 15 R. I. 83, approving text. But see conflicting decisions on the point, *supra*. Shearm. & Red. Neg. (4th ed.) § 346, and cases, and chapter on Proximate Cause.

[2] Flower *v.* Adams, 2 Taunt. 314; Cassedy *v.* Stockbridge, 21 Vt. 391; Peoria Br. Assoc. *v.* Loomis, 20 Ill. 235; Alger *v.* Lowell, 3 Allen (Mass.), 402; Stuart *v.* Machiasport, 48 Me. 477; Cobb *v.* Standish, 14 Me. 198; Marriott *v.* Stanley, 1 M. & G. 568; Whitman *v.* Lewiston, 97 Me. 519. So if the accident really and substantially arose by reason of some defect in the plaintiff's wagon, harness, &c. Jenks *v.* Wilbraham, 11 Gray (Mass.), 142; Noyes *v.* Morristown, 1 Vt. 357; Allen *v.* Hancock, 16 Vt. 230; Bigelow *v.* Rutland, 4 Cush. (Mass.) 247; Moore *v.* Abbott, 32 Me. 46; Farrar *v.* Greene, 32 Me. 574; see also Clark *v.* Barrington, 41 N. H. 44; Tucker *v.* Henniker, 41 N. H. 317; Winship *v.* Enfield, 42 N. H. 197; Palmer *v.* Andover, 2 Cush. (Mass.) 600; Hunt *v.* Pownal, 9 Vt. 411, 418. A city held not liable for the death of a *runaway horse*, though it had neglected to erect barriers about the defect in the street which caused the accident. Moss *v.* Burlington, 60 Iowa, 438.

[3] Butterfield *v.* Forrester, 11 East, 60; Woolf *v.* Beard, 8 C. & P. 373; Smith *v.* Smith, 2 Pick. (Mass.) 621; Bridge *v.* Grand Junc. R. Co., 3 M. & W. 244; Waite *v.* N. E. Ry. Co., E. B. & E. 719; Baker *v.* Portland, 58 Me. 199; Tuff *v.* Warman, 2 C. B. N. S. 740; s. c. 5 C. B. N. S. 573; Witherley *v.* Regent's Canal Co., 12 C. B. N. S. 2; Bradley *v.* Brown, 32 Up. Can. Q. B. 463. The rule operates also in the case of children of tender age. Mangan *v.* Atterton, L. R. 1 Ex. 239; Singleton *v.* Eastern Counties Ry. Co., 7 C. B. N. S. 287. The question of contributory negligence arises when both parties are substantially at fault, and when the fault of each contributes to the disaster. *Per Cleasby*, B., in Gee *v.* Metropolitan Ry. Co., L. R. 8 Q. B. 177.

[4] Ward *v.* District of Columbia, 24 D. C. App. 524; Wilkins *v.* Wilmington, 2 Del. Super. 132; Salem *v.* Webster, 192 Ill. 369; Wilmette *v.* Brachle, 209 Ill. 621; Vieths *v.* Skinner, 47 Ill. App. 325; Strehmann *v.* Chicago, 93 Ill. App. 206; Savanna *v.* Trusty, 98 Ill. App. 277; Campbell *v.* Chicago, 100 Ill. App. 358; Chicago *v.* Gillette, 108 Ill. App. 455; McLeansboro *v.* Trammel, 109 Ill. App. 524; Chicago

been said, by a faith justified by law, and if his faith is unfounded, and he suffers an injury, the party in fault must respond in damages. So, one whose sight is dimmed by age, or a near-sighted person whose range of vision was always imperfect, or one whose sight has been injured by disease, may act on the assumption that the streets and ways are in a reasonably safe condition. Each, however, is bound to know that prudence and care are in turn required of him, and that if he fails in this respect any injury he may suffer is without redress.[1] Each case depends upon its own circumstances and each is a law unto itself.

§ 1699 (1008). **Liability for Injuries outside the Travelled Highway; Width to be kept in Repair; Right to go extra viam.** — "Although the highway be of varying and unequal width between fences, on each side, the right of passage or way, *prima facie* and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of all of it as the highway, and are not confined to the parts which may be metalled or kept in repair for the more convenient use of carriages or foot-passengers."[2] In general, however, the duty to keep in

v. Harris, 113 Ill. App. 633; Citizens' St. R. Co. *v.* Ballard, 22 Ind. App. 151; Louisville *v.* Keher, 117 Ky. 841; Pierce *v.* Wilmington, 2 Marv. (Del.) 306; Campbell *v.* Boston, 189 Mass. 7; Perrette *v.* Kansas City, 162 Mo. 238; Haxton *v.* Kansas City, 190 Mo. 53; Hitt *v.* Kansas City, 110 Mo. App. 713; Brush *v.* New York, 59 N. Y. App. Div. 12; Godfrey *v.* New York, 104 N. Y. App. Div. 357; Gribben *v.* Metropolitan St. R. Co., 84 N. Y. Supp. 196; Ohliger *v.* Toledo, 20 Ohio Cir. Ct. R. 142; Gillard *v.* Chester, 212 Pa. 338; Gallamore *v.* Olympia, 34 Wash. 379; Lemman *v.* Spokane, 38 Wash. 98.

[1] Davenport *v.* Ruckman, 37 N. Y. 568, 573, *per Hunt*, C. J., whose language slightly altered is given in the text; Weed *v.* Balston, 76 N. Y. 329; Garbanati *v.* Durango, 30 Colo. 358; Bath *v.* Blake, 97 Ill. App. 35; Covington S. M. & Mfg. Co. *v.* Drexilius, 120 Ky. 493; Lorenz *v.* New Orleans, 114 La. 802; Ham *v.* Lewiston, 94 Me. 265; Deland *v.* Cameron, 112 Mo. App. 704; Fox *v.* Clarke, 25 R. I. 515; Parrish *v.* Huntington, 57 W. Va. 286; Blind plaintiff: Franklin *v.* Harter, 127 Ind. 446; Hill *v.* Glenwood, 124 Iowa, 475; Foy *v.* Winston, 126 N. Car. 381; Homewood *v.* Hamilton, 1 Ont. Law Rep. (Can.) 266. It is not, however, too much to ask of persons of defective sight greater care than is required of persons free from such infirmity. Winn *v.* Lowell, 1 Allen (Mass.), 177; Smith *v.* Wildes, 143 Mass. 556; Sleeper *v.* Sandown, 52 N. H. 244; see also Bridges *v.* North London R. Co., L. R. 6 Q. B. 377, 397; Hutton *v.* Windsor, 34 Up. Can. Q. B. 487. No person is required to have perfect vision, or to be vigilant in the discovery of defects which ought not to exist. Thompson *v.* Bridgewater, 7 Pick. (Mass.) 188. No person is in fault in neglecting to observe and avoid a defect not so plain and obvious as to be necessarily observable by one in the possession of ordinary faculties, travelling at an ordinary pace. Cox *v.* Westchester Turnp. Co., 33 Barb. 414; Frost *v.* Waltham, 12 Allen (Mass.), 85. Further as to elements of actionable defect in the highway or street, see Vicksburg *v.* Hennessy, 54 Miss. 363; s. p. Lane *v.* Crombie, 12 Pick. (Mass.) 177; Moore *v.* Abbott, 32 Me. 46; Rusch *v.* Davenport, 6 Iowa, 443.

[2] Queen *v.* United Kingdom Tel.

repair only extends to the road actually used for travel, provided it is wide enough to be safe, and is, in its actual condition, reasonably safe for travellers who use due care.[1] The duty of municipal corporations to keep the roads and streets in repair extends as much to *sidewalks* for the use of pedestrians as to the travelled way for the use of carriages.[2] Where an ordinary public highway is out

Co., 3 F. & F. 74, *per Martin*, B.; Tutill *v.* West Ham L. Bd. of H., L. R. 8 C. P. 447; Queen *v.* Fitzgerald, 39 Up. Can. Q. B. 297; Harrison Munic. Man. (5th ed.) 488–497, and cases; Biggar Munic. Man. (Canada, 1900) 824 *et seq.*; Augusta *v.* Tharpe, 113 Ga. 152; Odon *v.* Dobbs, 25 Ind. App. 522; Thuis *v.* Vincennes, 35 Ind. App. 350; Maysville *v.* Guilfoyle, 110 Ky. 670, 62 S. W. Rep. 493; Glasgow *v.* Gillenwater, 113 Ky. 140; Kossman *v.* St. Louis, 153 Mo. 293; Coffey *v.* Carthage, 186 Mo. 573; Burnes *v.* St. Joseph, 91 Mo. App. 489; Deland *v.* Cameron, 112 Mo. App. 704. But see King *v.* Ft. Ann, 180 N. Y. 496.

[1] Tisdale *v.* Norton, 8 Met. (Mass.) 388; Smith *v.* Wendell, 7 Cush. (Mass.) 498; Shepardson *v.* Colerain, 13 Met. 55; Kellogg *v.* Northampton, 4 Gray (Mass.), 65; s. c. 8 Gray (Mass.), 504; Howard *v.* North Bridgewater, 16 Pick. (Mass.) 189; Hayden *v.* Attleborough, 7 Gray (Mass.), 338; Coggswell *v.* Lexington, 4 Cush. (Mass.) 307; Sparhawk *v.* Salem, 1 Allen (Mass.), 30; Richards *v.* Enfield, 13 Gray (Mass.), 344; Rowell *v.* Lowell, 7 Gray (Mass.), 100; Keith *v.* Easton, 2 Allen (Mass.), 552; Campbell *v.* Race, 7 Cush. (Mass.) 408, and authorities cited; Morse *v.* Belfast, 77 Me. 44; Kelley *v.* Columbus, 41 Ohio St. 263; Rankin *v.* Smith, 63 Ill. App. 522; Ruppenthal *v.* St. Louis, 190 Mo. 213; Fockler *v.* Kansas City, 94 Mo. App. 464; Sweet *v.* Poughkeepsie, 97 N. Y. App. Div. 82; Emery *v.* Philadelphia, 208 Pa. 492; Rhyner *v.* Menasha, 97 Wis. 523; Fitzgerald *v.* Berlin, 64 Wis. 203. "Where there is no visible boundary to the line of the street, and a portion of the roadway travelled on is so near the actual line (although really outside thereof) as to induce the belief in any one exercising reasonable care that he is within such line, if such portion is for any reason rendered dangerous for travel, and the city has notice thereof in due time, and such danger can be remedied by the exercise of reasonable care, . . . and the city neglects to guard it, we see no reason why it should not be held liable to one who is injured outside of such limits under such circumstances, he being himself free from any neglect contributing to the injury." *Peckham*, J., in Jewhurst *v.* Syracuse, 108 N. Y. 303. Further, as to width to be kept in repair. 2 Thomps. Neg. 766. *Post*, § 1707.

[2] Burns *v.* Toronto, 42 Up. Can. Q. B. 560; Hutton *v.* Windsor, 34 Up. Can. Q. B. 487; Ray *v.* Petrolia, 24 Up. Can. C. P. 73; Boyle *v.* Dundas, 25 Up. Can. C. P. 420; Bacon *v.* Boston, 3 Cush. (Mass.) 174; Lowell *v.* Spaulding, 4 Cush. (Mass.) 275, 277; Drake *v.* Lowell, 13 Met. 292; Hart *v.* Brooklyn, 36 Barb. (N. Y.) 226; Kirby *v.* Boylston Market Assoc., 14 Gray (Mass.), 249; Manchester *v.* Hartford, 30 Conn. 118; Hubbard *v.* Concord, 35 N. H. 52, 54. So to street crossings. Raymond *v.* Lowell, 6 Cush. (Mass.) 524; Coombs *v.* Purrington, 42 Me. 332; Barker *v.* Savage, 45 N. Y. 191. But it is not a duty to plank from each man's house across a ditch to the street, and keep such planks in repair. McCarthy *v.* Oshawa, 19 Up. Can. Q. B. 245. *Post*, § 1704, as to *sidewalks*.

Under the statute of *Michigan*, cities are responsible for injuries caused by defects in the carriageways or streets proper and cross-walks, but not for those caused by defects in sidewalks. O'Neil *v.* Detroit, 50 Mich. 133; Detroit *v.* Putnam, 45 Mich. 265.

WIDTH TO BE KEPT IN REPAIR UNDER THE NEW ENGLAND STATUTES (*ante*, § 1691, NOTE) AS CONSTRUED BY THE COURTS. Norton *v.* Kramer, 180 Mo. 536. *Infra*, §§ 1702, 1707; Howard *v.* North Bridgewater, 16 Pick. (Mass.) 189, recognized in Shepardson *v.* Colerain, 13 Met. (Mass.) 55, 59; Bacon *v.* Boston, 3 Cush. (Mass.) 174, relating to width of sidewalk, and distinguished from Howard *v.*

of repair, the public have a temporary right to go on the adjoining land for the purpose of travel.[1] So sidewalks and street-crossings are constructed for the use of foot-passengers; but if these happen to be obstructed, or to be in such a dangerous condition as to deter an ordinarily prudent man from using them, then one may walk elsewhere. If he does so however without sufficient reason, and is injured, his injury cannot be imputed to the negligence of the city.[2]

North Bridgewater, 16 Pick. (Mass.) 189; Smith *v.* Wendell, 7 Cush. (Mass.) 498; Kellogg *v.* Northampton, 4 Gray (Mass.), 65, 8 Gray (Mass.), 504; Mochler *v.* Shaftsbury, 46 Vt. 580. Whether *wide* enough to be *safe* is for the jury; so, whether it should be made safe and convenient its whole width. Johnson *v.* Whitefield, 18 Me. 286; Aldrich *v.* Pelham, 1 Gray (Mass.), 510; Savage *v.* Bangor, 40 Me. 176; Craig *v.* Sedalia, 63 Mo. 417; Perkins *v.* Fayette, 68 Me. 152; Dickinson *v.* Maine Tel. Co., 46 Me. 483; Morse *v.* Belfast, 77 Me. 44; see also Brown *v.* Glasgow, 57 Mo. 156, 157; Monongahela City *v.* Fischer, 111 Pa. St. 9; Scranton *v.* Hill, 102 Pa. St. 378; Keyes *v.* Marcellus, 50 Mich. 439; Durant *v.* Palmer, 29 N. J. L. 544. If a street is opened for travel throughout its entire width, it is the duty of the city to keep the entire width in a reasonably safe condition. Stafford *v.* Oskaloosa, 57 Iowa, 748. Compare Fulliam *v.* Muscatine, 70 Iowa, 436; Crystal *v.* Des Moines, 65 Iowa, 502. *Infra*, § 1707, note. Shearm. & Red. Neg. (4th ed.) §§ 351, 352, and cases; 2 Thomps. Neg. 766, and cases. *Infra*, § 1702. The obligation to keep in repair is only as "against such accidents as are likely to, and actually do" occur in using a highway for the purpose of travel. Sykes *v.* Pawlet, 43 Vt. 446.

Liability for Latent Defects. Prindle *v.* Fletcher, 39 Vt. 255, 257. Cited with approval, 24 Wis. 342. See 26 Wis. 56; Powell *v.* Bowen, 92 Ill. App. 453; Mattoon *v.* Worland, 97 Ill. App. 13; Matthews *v.* Toledo, 21 Ohio Cir. Ct. R. 69.

[1] Carrick *v.* Johnston, 26 Up. Can. Q. B. 65. But see Arnold *v.* Holbrook, L. R. 8 Q. B. 96. Right to go *extra viam*, Campbell *v.* Race, 7 Cush. (Mass.) 408, 410, and cases. Reed *v.* Schuylkill Haven, 22 Pa. Super. Ct. 27; Dallas *v.* Moore (Tex. Civ. App.), 74 S. W. Rep. 95.

[2] O'Laughlin *v.* Dubuque, 42 Iowa, 539; Scranton *v.* Hill, 102 Pa. St. 378; Zettler *v.* Atlanta, 66 Ga. 195; Alline *v.* Le Mars, 71 Iowa, 654. A city is not bound to provide approaches from private property to its streets, nor liable for injuries caused by its failure to guard such approaches. Goodin *v.* Des Moines, 55 Iowa, 67, where plaintiff fell from private property into a street which had been recently excavated. Where a street was fenced up by the city after over twenty years' use, and the plaintiff was compelled to go round by reason of the fence, it was held that he was specially damaged and the city liable to him in damages. Beaudean *v.* Cape Girardeau, 71 Mo. 392. In *Massachusetts* an injury received by traveller *outside of the road*, though the road itself was dangerous, is not within the statute, of which the words are "injury *by reason* of any defect" in the highway. (*Ante*, § 1691, note.) Tisdale *v.* Norton, 8 Met. 388. Nor ordinarily actionable. Sparhawk *v.* Salem, 1 Allen, 30. The doctrine in *Massachusetts* is, that the damage, in order to be actionable, must be occasioned by causes entirely within the highway. Richards *v.* Enfield, 13 Gray (Mass.), 344, 346, *per Bigelow*, J., citing and following Rowell *v.* Lowell, 7 Gray, 100. See also Keith *v.* Easton, 2 Allen, 552; Baltimore *v.* Branman, 14 Md. 227; Bassett *v.* St. Joseph, 53 Mo. 290, 301, a well-considered case; Stone *v.* Attleborough, 140 Mass. 328; Stockwell *v.* Fitchburg, 110 Mass. 305; Sullivan *v.* Boston, 126 Mass. 540; Lowe *v.* Clinton, 136 Mass. 24; Aston *v.* Newton, 134 Mass. 507; Augusta *v.* Tharpe, 113 Ga. 152; Morehouse *v.* Dixon, 39 Ill. App. 107; Mt. Carmel *v.* Guthridge, 52 Ill. App. 632; Temby *v.* Ishpeming, 140 Mich. 146; Ringelstein *v.* San Antonio (Tex. Civ. App.),

§ 1700 (1009). **Defective Streets; User of Land as Street; Estoppel.** — There have been many cases where the injury has occurred *upon property used as a highway or street which has never been legally laid out or dedicated as such*, and the municipality has sought to defend upon this ground. But where the corporation has treated a piece of land within the limits of the municipality as a public street, taking charge of it, as such, it is chargeable with the same duties as though it were legally laid out; and it is liable for damages by reason of neglect to keep the same in safe condition for travel. It is, under such circumstances, estopped to claim that it is not a legal highway; and it is affected with the consequences of the knowledge and acts of its officers and agents.[1]

21 S. W. Rep. 634; Dallas *v.* Moore (Tex. Civ. App.), 74 S. W. Rep. 95; Brabon *v.* Seattle, 29 Wash. 6.

[1] Coates *v.* Canaan, 51 Vt. 131; James *v.* Portage City, 48 Wis. 677; Kitredge *v.* Milwaukee, 20 Wis. 46; Weisenberg *v.* Appleton, 26 Wis. 56; Harper *v.* Milwaukee, 30 Wis. 365; Colby *v.* Beaver Dam, 34 Wis. 285; Prideaux *v.* Mineral Point, 43 Wis. 513; Sewell *v.* Cohoes, 75 N. Y. 45; Todd *v.* Troy, 61 N. Y. 506; Conrad *v.* Ithaca, 16 N. Y. 158; Weet *v.* Brockport, 16 N. Y. 161; Hyatt *v.* Rondout Trs., 44 Barb. 385; Houfe *v.* Fulton, 34 Wis. 608; Stark *v.* Lancaster, 57 N. H. 88; Aurora *v.* Colshire, 55 Ind. 484; Phelps *v.* Mankato, 23 Minn. 277; Manderschid *v.* Dubuque, 25 Iowa, 108; Matthews *v.* Barraboo, 39 Wis. 674; Johnson *v.* Milwaukee, 46 Wis. 568; Kelly *v.* Fond du Lac, 31 Wis. 179; Seward *v.* Milford, 21 Wis. 485; Gallagher *v.* St. Paul, 28 Fed. Rep. 305; Potter *v.* Castleton, 53 Vt. 435; Seward *v.* Wilmington, 2 Marv. (Del.) 189; Decatur *v.* Besten, 169 Ill. 340; Chicago *v.* Baker, 195 Ill. 54; Roodhouse *v.* Christian, 55 Ill. App. 107; Mt. Morris *v.* Kanode, 98 Ill. App. 373; Frankfort *v.* Coleman, 19 Ind. App. 368; Huntington *v.* McClurg, 22 Ind. App. 261; Byerly *v.* Anamosa, 79 Iowa, 204; Harrison *v.* Ayrshire, 123 Iowa, 528; Lamb *v.* Cedar Rapids, 108 Iowa, 629; Brown *v.* Chillicothe, 122 Iowa, 640; Atchison *v.* Mayhood, 69 Kan. 672; Topeka *v.* Cook, 72 Kan. 595; Madisonville *v.* Pemberton's Adm'r (Ky.), 75 S. W. Rep. 229; Bromley *v.* Bodkin (Ky.), 77 S. W. Rep. 696; Hutchings *v.* Sullivan, 90 Me. 131; Ogle *v.* Cumberland, 90 Md. 59; D'Amico *v.* Boston, 176 Mass. 599; O'Neil *v.* West Branch, 81 Mich. 544; Face *v.* Ionia, 90 Mich. 104; Will *v.* Mendon, 108 Mich. 251; Belyea *v.* Port Huron, 136 Mich. 504; Graham *v.* Albert Lea, 48 Minn. 201; Maus *v.* Springfield, 101 Mo. 613; Meiners *v.* St. Louis, 130 Mo. 274; Downend *v.* Kansas City, 156 Mo. 60; Walker *v.* Point Pleasant, 49 Mo. App. 244; Schenck *v.* Butler, 50 Mo. App. 106; Golden *v.* Clinton, 54 Mo. App. 100; Garnett *v.* Slater, 56 Mo. App. 207; Boyd *v.* Springfield, 62 Mo. App. 456; Hill *v.* Sedalia, 64 Mo. App. 494; Rusher *v.* Aurora, 71 Mo. App. 418; Holding *v.* St. Joseph, 92 Mo. App. 143; O'Malley *v.* Lexington, 99 Mo. App. 695; May *v.* Anaconda, 26 Mont. 140; Chadron *v.* Glover, 43 Neb. 732; South Omaha *v.* Powell, 50 Neb. 798; Collett *v.* New York, 51 N. Y. App. Div. 394; Dennis *v.* Elmira Heights, 59 N. Y. App. Div. 404; McCormick *v.* Amsterdam, 63 Hun (N. Y.), 632, 18 N. Y. Supp. 272; May *v.* Brooklyn, 19 N. Y. Supp. 670; Greenberg *v.* Kingston, 67 Hun (N. Y.), 653; Neal *v.* Marion, 129 N. Car. 345; Toledo *v.* Nitz, 23 Ohio Cir. Ct. R. 350; Musick *v.* Latrobe, 184 Pa. St. 375; Wall *v.* Pittsburg, 205 Pa. 48; Still *v.* Houston, 27 Tex. Civ. App. 447; Winchester *v.* Carroll, 99 Va. 727; Newport News *v.* Scott's Adm'r, 103 Va. 794; Taake *v.* Seattle, 16 Wash. 90; Prather *v.* Spokane, 29 Wash. 549; McKnight *v.* Seattle, 39 Wash. 516; Hanley *v.* Huntington, 37 W. Va. 578. But see Crawford *v.* Griffin, 113 Ga. 562; Horey *v.* Haverstraw, 124 N. Y. 273; Millikin *v.* Bowling Green, 9 Ohio Cir. Ct. R. 493; Williams *v.* Nashville, 106 Tenn. 533. *Closed street* need not be kept safe for travel. Jones *v.* Collins, 177 Mass. 444; Cart-

§ 1701 (1010). **Lighting Streets, as connected with Defects therein.** — A corporation which by its charter has the power to lay out, improve, *light, and keep its streets in order*, is liable in damages at the suit of an individual who sustains injuries by reason of the neglect of such corporation to keep its streets in a safe condition.[1] The grant of power in the charter of a city to the council to lay out streets, is a grant to the corporation, and is of such a character as to prevent its exercise by any other person or body.[2] A city is under no obligation to light its streets with lamps, and simply neglecting to light the streets is not a ground of liability.[3] But where it assumes to light a street, and does it so negligently that a person is injured in consequence by falling into an excavation in the night-time, the character of the light may be shown as a circumstance to establish negligence.[4] A person employed and paid by

wright *v.* Belmont, 58 Wis. 370; Davis *v.* Fulton, 52 Wis. 657; Cronin *v.* Delavan, 50 Wis. 375; Estelle *v.* Lake Crystal, 27 Minn. 243 (a platform, erected by a private person, used by the public as a part of the street with the knowledge of the municipal authorities).

By merely *permitting* the public to use a sidewalk which is not within the limits of a recognized street, a city will not render itself liable for injuries sustained by reason of its defective condition. Bishop *v.* Centralia, 49 Wis. 669; Leggett *v.* Watertown, 93 N. Y. App. Div. 80. Where a city in enclosing a common placed the fence so that a strip remained along a public street, such strip being afterwards paved and used as a sidewalk for more than twenty years, it was held, in an action for an injury caused by a defect in it, that it had become by prescription a part of the street, for defects in which the city was liable. Veale *v.* Boston, 135 Mass. 187. A village in Illinois was held liable for injuries sustained on a sidewalk built and maintained by it upon *private property* within its limits. *Magruder*, J.: "Having assumed to perform the same duty in regard to it as though it was a part of one of the streets, they were bound to use the same degree of vigilance as they exercised in reference to other sidewalks within the limits of the corporation," citing text. Village of Mansfield *v.* Moore, 124 Ill. 133. The use of a road for many years for public travel and its recognition by town officers as a highway were held sufficient to make the town liable, under a statute, for injuries sustained by reason of its negligence in failing to keep the road in proper repair. Ivory *v.* Deerpark, 116 N. Y. 476; *infra*, § 1704, note.

But the principle stated in the text does not apply where a bridge and its approaches belong to the *State* as part of its public works, for in such case the city has no right to enter upon or repair the same, and hence it is not liable for an injury caused thereby to a traveller, although used by the public as a highway, with the acquiescence of the State. Where there is no duty and no power there can be no liability. Carpenter *v.* Cohoes, 81 N. Y. 21; Veeder *v.* Little Falls, 100 N. Y. 343; Brusso *v.* Buffalo, 90 N. Y. 679.

[1] Noble *v.* Richmond, 31 Gratt. (Va.) 271; followed, Clark *v.* Richmond, 83 Va. 355; Gordon *v.* Richmond, 83 Va. 436; Barnes *v.* District of Columbia, 91 U. S. 540. See cases cited *infra*.

[2] *Ib.*, cases *supra*.

[3] Randall *v.* Eastern R. R., 106 Mass. 276; Gaskins *v.* Atlanta, 73 Ga. 746; Lyon *v.* Cambridge, 136 Mass. 419; Wolf *v.* District of Columbia, 21 App. D. C. 464; Oliver *v.* Denver, 13 Colo. App. 345; Daytona *v.* Edson, 46 Fla. 463; Chicago *v.* Apel, 50 Ill. App. 132; Vincennes *v.* Thuis, 28 Ind. App. 523; Vincennes *v.* Spees, 35 Ind. App. 389; McHugh *v.* St. Paul, 67 Minn. 441; Canavan *v.* Oil City, 183 Pa. St. 611; Bohl *v.* Dell Rapids, 15 S. Dak. 619; Collier *v.* Ft. Smith, 73 Ark. 447.

[4] Freeport *v.* Isbell, 83 Ill. 440.

one who has contracted to light and take care of street-lamps is not a servant or agent of the corporation, and if, while engaged in his work, he suffers an injury from an actionable defect in a highway, he can maintain an action therefor against the corporation, if free from contributory negligence.[1]

§ 1702 (1011). **Defects and Obstructions calculated to frighten Animals.** — For an object in a public street calculated to frighten horses ordinarily gentle, and which causes an accident resulting in an injury, municipal corporations have been held liable, if they have been guilty of negligence in allowing it to remain for an unreasonable time. The decisions to this effect generally rest upon statutory provisions and involve a construction thereof. But such objects may come within the notion of a public nuisance, which it is the duty of the municipality to remove *as incident to its duty to keep its streets in a safe condition,* for failure to discharge which it may be liable to any one specially injured thereby.[2] Where there is a defect or object in a street which is calculated to frighten horses and an injury occurs by reason thereof without the fault of the driver, the corporation, if it has been negligent in respect thereof, is liable;[3] but objects outside the travelled way, and not

See also Butler *v.* Bangor, 67 Me. 388. Davoust *v.* Alameda, 149 Cal. 69; Columbus *v.* Sims, 94 Ga. 483; Chicago *v.* McDonald, 57 Ill. App. 250; Schmidt *v.* Chicago, 107 Ill. App. 64; Baltimore City *v.* Beck, 96 Md. 183; Dickinson *v.* Boston, 188 Mass. 595; Van Wie *v.* Mt. Vernon, 26 N. Y. App. Div. 330; Winchester *v.* Carroll, 99 Va. 727. But see Wolf *v.* District of Columbia, 21 App. D. C. 464; McFeeters *v.* New York, 102 N. Y. App. Div. 32.

[1] Eaton *v.* Woburn, 127 Mass. 270; s. p. Kimball *v.* Cushman, 103 Mass. 194; Johnson *v.* Boston, 118 Mass. 44.

[2] Chicago *v.* Hoy, 75 Ill. 530; McKee *v.* Bidwell, 74 Pa. St. 218; Crissey *v.* Hestonville M. & F. Pass. Ry. Co., 75 Pa. St. 83; Fritsch *v.* Allegheny, 91 Pa. St. 226; Rushville *v.* Adams, 107 Ind. 475; Crawfordsville *v.* Smith, 79 Ind. 308; Bennett *v.* Fifield, 13 R. I. 139. *Infra,* § 1705.

[3] Cushing *v.* Bedford (bright red-colored drinking-troughs), 125 Mass. 526. A city held not to be liable for damages resulting from a horse becoming frightened at an implement run by steam, to repair a street, and without negligence. Sparr *v.* St. Louis, 4 Mo. App. 572. In the absence of express legislative authority a city cannot lawfully grant to a street *railway company the right to operate a "steam" motor along its streets,* and if it does so it may be liable for injuries sustained by a traveller on the street whose team is frightened by the steam motor. Stanley *v.* Davenport, 54 Iowa, 463, citing text. *Ante,* § 1248, note. Turner *v.* Buchanan, 82 Ind. 147. See *supra,* § 1630, and note; 2 Thomps. Neg. 778; Cooley, Torts, 617; District of Columbia *v.* Moulton, 182 U. S. 577; McMulkin *v.* Chicago, 92 Ill. App. 331; Elgin *v.* Thompson, 98 Ill. App. 358; Butman *v.* Newton, 179 Mass. 1; Halstead *v.* Warsaw, 43 N. Y. App. Div. 39; Hoffart *v.* West Turin, 90 N. Y. App. Div. 348; Ouverson *v.* Grafton, 5 N. Dak. 281; Nocks *v.* Whiting, 126 Iowa, 405. Steam roller in use no obstruction. Lane *v.* Lewiston, 91 Me. 292.

The following may be mentioned as a few from the many cases mostly but not wholly arising under the New England statutes (*ante,* § 1691, note), as to what have been held to be *particular defects or obstructions. A pile of stones.* Bigelow *v.* Weston, 3 Pick.

near enough to the line of public travel to interfere with or incommode travellers, are not defects in the highway.[1] It is not

(Mass.) 267; Smith *v.* Wendell, 7 Cush. (Mass.) 498; Kellogg *v.* Northampton, 4 Gray, 65; Foreman *v.* Canterbury, L. R. 6 Q. B. 214. *A rock.* Card *v.* Ellsworth, 65 Me. 547. *Sticks of timber, logs, &c.* Castor *v.* Uxbridge, 39 Up. Can. Q. B. 113; Springer *v.* Bowdoinham, 7 Me. 442; Snow *v.* Adams, 1 Cush. (Mass.) 443; Johnson *v.* Whitefield, 18 Me. 286; Davis *v.* Bangor, 42 Me. 522; Gorham *v.* Cooperstown, 59 N. Y. 660. *A tent.* Ayer *v.* Norwich, 39 Conn. 376. *A portable furnace.* Rushville *v.* Adams, 107 Ind. 475. *Pile of lumber.* North Manheim *v.* Arnold, 119 Pa. St. 380. *Steam thresher.* Burrell Township *v.* Uncapher, 117 Pa. St. 353. *Steam motor.* Stanley *v.* Davenport, 54 Iowa, 463; *ante,* § 1248, note. *A steam roller and engine.* Young *v.* New Haven, 39 Conn. 435. *Pole.* Mochler *v.* Shaftsborough, 46 Vt. 580; Turner *v.* Buchanan, 82 Ind. 147. *But not a broken-down wagon.* Rounds *v.* Stratford, 26 Up. Can. C. P. 11. *Posts.* Soule *v.* Grand Trunk R. Co., 21 Up. Can. C. P. 308; Coggswell *v.* Lexington, 4 Cush. (Mass.) 307. But see McComber *v.* Taunton, 100 Mass. 255. See, further, Ray *v.* Manchester, 46 N. H. 59. *Holes or excavations.* Reed *v.* Northfield, 13 Pick. (Mass.) 94; Congreve *v.* Morgan, 5 Duer (N. Y.), 495; Doherty *v.* Waltham, 4 Gray (Mass.), 596; Willard *v.* Newbury, 22 Vt. 458; Batty *v.* Duxbury, 24 Vt. 155; Murphy *v.* Gloucester, 105 Mass. 470; Ghenn *v.* Provincetown, *Ib.* 313. *Loose planks, projections, or other inequalities of surface.* Irwin *v.* Bradford, 22 Up. Can. C. P. 19, 421; Hall *v.* Manchester, 40 N. H. 410; Winn *v.* Lowell, 1 Allen, 177; Raymond *v.* Lowell, 6 Cush. (Mass.) 524; Hubbard *v.* Concord, 35 N. H. 52; Smith *v.* Wendell, 7 Cush. (Mass.) 498. *An ash pile.* Ring *v.* Cohoes, 77 N. Y. 83. *Machinery left on roadside.* Bennett *v.* Lovell, 12 R. I. 166. As to *rope extended across the street* being an obstruction or defect. French *v.* Brunswick, 21 Me. 29. But see Barber *v.* Roxbury, 11 Allen (Mass.), 318, that it is not. "*Obstructions," or want of repairs, defined* by *Bartlett,* J. Ray *v.* Manchester, 46 N. H. 59. Loaded wagons *standing* on a street under care of a driver not a "defect or want of repair" of streets. Davis *v.* Bangor, 42 Me. 522.

Any object upon or near the travelled way, which in its nature is calculated to frighten horses of ordinary gentleness, may be held, under some circumstances, to constitute a defect in the way itself. Morse *v.* Richmond, 41 Vt. 435; Chamberlain *v.* Enfield, 43 N. H. 356; Winship *v.* Enfield, 42 N. H. 197; Lund *v.* Tyngsboro', 11 Cush. (Mass.) 563; Dimock *v.* Suffield, 30 Conn. 129; Hewison *v.* New Haven, 34 Conn. 136. But see Horton *v.* Taunton, 97 Mass. 266; Kingsbury *v.* Dedham, 13 Allen (Mass.), 186; Cook *v.* Charlestown, *Ib.* 190, note; Keith *v.* Easton, 2 Allen (Mass.), 552. See also Corby *v.* Hill, 4 C. B. N. S. 556; Pickhard *v.* Smith, 10 C. B. N. S. 470; Tarry *v.* Ashton, L. R. 1 Q. B. Div. 314; Soule *v.* Grand Trunk R. Co., 21 Up. Can. C. P. 308; Vars. *v.* Grand Trunk R. Co., 23 Up. Can. C. P. 143; Crawfordsville *v.* Smith, 79 Ind. 308. The onus is on the plaintiff to give affirmative evidence of negligence. Lester *v.* Pittsford, 7 Vt. 158; Perin *v.* Concord R. Co., 44 N. H. 223. Evidence to show that other horses besides the plaintiff's were frightened at the object is admissible. Darling *v.* Westmoreland, 52 N. H. 401. The jury are not to infer a defect on the highway at a particular time and place *merely from the fact that an injury was sustained* at that time and place. Church *v.* Cherryfield, 33 Me. 460; Sherman *v.* Kortright, 52 Barb. (N. Y.) 267; Collins *v.* Dorchester, 6 Cush. (Mass.) 396; Packard *v.* New Bedford, 9 Allen (Mass.), 200; Calkins *v.* Hartford, 33 Conn. 57. But see Kearney *v.* London, B. & S. C. Ry. Co., L. R. 5 Q. B. 411; Feital *v.* Middlesex R. R. Co., 109 Mass. 398; Mullen *v.* St. Johns, 57 N. Y. 567; Harrison's Munic. Manual (5th ed.), 486 *et seq.*; Biggar's Munic. Man. (Canada, 1900) 824 *et seq.*

[1] Farrell *v.* Oldtown, 69 Me. 72; Bartlett *v.* Kittery, 68 Me. 358; Rounds *v.* Stratford, 26 Up. Can. C. P. 11; Nichols *v.* Athens, 66 Me. 402. Thus where the wrought part of a highway was sufficiently smooth and wide for safe transit, a traveller's horse, meeting cows with boards on their horns, became frightened and ran the wagon against a blasted rock lying outside

requisite, as we have already seen, that a highway, *in its whole width* as located, should be fitted for travel. It is sufficient if it be of suitable width, and in good condition for the needs of the public.[1]

§ 1703 (1011 *a*). **Exhibitions and Displays in Public Streets; Licenses and Permits therefor.** — Under the principle which has already been referred to[2] that no liability attaches to a municipal corporation for its failure to enact ordinances for the safety of the public, or for the failure of its officers to perform police duties, it has been held that a city is not under any liability to a person who is *injured by a discharge of fireworks* or any other display or exhibition *in the public streets* conducted by individuals without any authority or permit or express license from the municipality,[3]

the wrought part, but inside the highway limit, it was held that the town was not liable for the consequent injury to the traveller. Perkins *v.* Fayette, 68 Me. 152, approving Moulton *v.* Sanford, 51 Me. 127; s. p. Rockford *v.* Tripp, 83 Ill. 247; Marble *v.* Worcester, 4 Gray (Mass.), 395. Compare Blake *v.* Newfield, *Ib.* 365; Shearm. & Red. Neg. (4th ed.) §§ 350, 351, and cases; 2 Thomps. Neg. 766, and cases.

[1] *Supra*, § 1699; *post*, § 1707; Farrell *v.* Oldtown, 69 Me. 72; Perkins *v.* Fayette, 68 Me. 152; Seeley *v.* Litchfield, 49 Conn. 134; Jordan *v.* New York, 26 N. Y. Misc. 53; Shearm. & Red. Neg. (4th ed.) § 352. A new side line or concession line, opened in a township thinly scattered, could scarely be expected to be found in as perfect a condition as an old highway in a well-settled township. Colbeck *v.* Brantford, 21 Up. Can. Q. B. 276; Queen *v.* Epsom Union Guard., 8 L. T. N. S. 383; O'Connor *v.* Otonabee Tp., 35 Up. Can. Q. B. 73.

[2] *Ante*, §§ 1626–1629. As to the power of the city to permit displays and exhibitions in the public streets, see *ante*, § 1174.

[3] Ball *v.* Woodbine, 61 Iowa, 83; Robinson *v.* Greenville, 42 Ohio St. 625; Norristown *v.* Fitzpatrick, 94 Pa. 121; O'Rourke *v.* Sioux Falls, 4 S. Dak. 47.

In *Massachusetts*, a city was, under the circumstances of the case, held not to be liable for an injury caused by a horse taking fright from an exhibition of an animal known as the "Sacred Ox." Cole *v.* Newburyport, 129 Mass. 594. The case just cited was decided on demurrer to the declaration, which in substance alleged that the city, by its clerk, duly authorized, contracted with the owners of an animal known as the "Sacred Ox," authorizing them to erect a booth on Market Square, and to occupy the highway for the use and exhibition of the animal for the consideration of $2.50 a day; that the mayor and aldermen of the city, by the city ordinances, are authorized to grant permission to maintain tents and booths in public places and upon the public highways for the purpose of exhibition, and are authorized to lease and grant permission to use the same; that the ox was also of an uncouth and strange shape and appearance, and was caparisoned in a gaudy and strange manner, so that he was an object of terror to horses and cattle; that the plaintiff's cart and horse were lawfully travelling along Merrimac Street, the horse being well broken and kind and being driven by a safe and experienced driver, who exercised due caution, and near Market Square met the ox, which was being led back and forth on the highway for his usual and necessary exercise, and that the horse was frightened by the odor and frightful appearance and caparison of the ox, and ran and overturned the cart, damaging it so that it was substantially destroyed, and seriously injuring the horse. The defendant demurred. The demurrer was sustained, on the ground that at the time of the accident the ox was not in the place for the use of which

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the city received compensation, nor in charge of any agent of the city, and the city was not responsible for the fright while both animals were travelling along the highway. Shearm. & Red. Neg. (4th ed.) §§ 263, 358; 2 Thomps. Neg. 778.

In *Michigan*, where there is no liability on the part of a municipality for tort in connection with the maintenance of the streets in the absence of a statutory provision therefor, it was held that the statute requiring municipal corporations to keep their streets in a condition reasonably safe and fit for travel did not render a village liable for personal injuries by *permitting horse-racing on a street* which was in proper condition and safe for travel. McCarthy *v.* Munising, 136 Mich. 622.

[1] Fifield *v.* Phœnix, 4 Ariz. 283; Bartlett *v.* Clarksburg, 45 W. Va. 393.

A city had passed an ordinance which *permitted coasting on certain streets*. It was held that the city was not liable for injury sustained by a traveller as a result of the coasting. The court said that coasting on a public street was not necessarily a public nuisance; and, as under some circumstances, it would be proper to allow it, it was discretionary with the council to determine whether it should be permitted, and the city was not liable under the rule which exempts the city from liability for the exercise of legislative discretion. Burford *v.* Grand Rapids, 53 Mich. 98. A city by ordinance appointed agents and made contracts for a Fourth of July celebration. As a part of the celebration five or six unbroken horses were raced on the public streets and in consequence plaintiff was injured. It was held that the *use of the public streets for horse-racing* was illegal; and also that as the city had no statutory authority to contract for the celebration, the ordinance and contracts made or purporting to be made by its authority were void as wholly *ultra vires*, and that the city was not liable. Marth *v.* Kingfisher, 22 Okla. 602. The mayor, pursuant to authority conferred upon him, granted a permit to *fire gun-powder in an anvil* on a lot in connection with a Fourth of July celebration.
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But in other jurisdictions it is held that where the municipal authorities have, by ordinance or by express license or permit granted pursuant to ordinance, allowed the streets of a city to be used for a purpose which is in law *a nuisance per se and illegal,* and the streets are thereby rendered unsafe and dangerous and in consequence persons lawfully using the streets or their property are damaged, the city is liable in damages on the ground that it has authorized an illegal use to be made of the streets which rendered them dangerous and unsafe.[1]

the prohibition; that the person firing the cannon was not the city's agent; and that no liability attached.

A city ordinance prohibited the use or exhibition of *fireworks* within the city without a permit. Subsequently the city passed another ordinance suspending the operation of the prohibitory ordinance during the period from December 25 to January 1. Fireworks were discharged by individuals and plaintiff's building was burned. It was held that *no liability attached to the city,* the prohibitory ordinance being regarded as a mere police regulation for the failure to enforce which no liability attached to the city. Hill *v.* Charlotte, 72 N. Car. 55. City held to have no authority to provide for a display of fireworks on the Fourth of July and therefore held *not answerable* in damages for the negligence of its agents in conducting a display ordered by the council. Love *v.* Raleigh, 116 N. Car. 296. The discharge of *fireworks at a suitable place* when not prohibited by statute or municipal regulation, is not unlawful. Dowell *v.* Guthrie, 99 Mo. 653. On the question whether the noise of fireworks is a nuisance, see Walker *v.* Brewster, L. R. 5 Eq. 25.

[1] Van Cleef *v.* Chicago, 240 Ill. 318, aff'g 144 Ill. App. 488; Wheeler *v.* Ft. Dodge, 131 Iowa, 566; Shinnick *v.* Marshalltown, 137 Iowa, 72 (rope placed across street by direction of mayor); Speir *v.* Brooklyn, 139 N. Y. 6 (display of fireworks); Landau *v.* New York, 180 N. Y. 48, rev'g 93 N. Y. App. Div. 613; Johnson *v.* New York, 186 N. Y. 139, rev'g 109 N. Y. App. Div. 821 (license for automobile speed contest); Walker *v.* New York, 107 N. Y. App. Div. 351 (display of fireworks); Richmond *v.* Smith, 101 Va. 161; Little *v.* Madison, 42 Wis. 643 (licensing exhibition of wild animals).

New York Decisions: In Speir *v.* Brooklyn, 139 N. Y. 6, an ordinance permitted the mayor to issue permits for displays of fireworks. A permit was issued for the discharge of fireworks at the junction of two narrow streets of a large city completely built up, and where any misadventure in managing the discharge would be likely to result in injury to persons or property. The display was of considerable magnitude and the explosives, especially the rockets, were heavily charged. The court held that the trial court was justified in finding that the discharge of fireworks, under the circumstances, constituted a nuisance, although it doubted whether a discharge of fireworks in the streets of a city or village amounted to a nuisance *per se* as held by some cases. See Jenne *v.* Sutton, 43 N. J. L. 257; Conklin *v.* Thompson, 29 Barb. (N. Y.) 218. In Landau *v.* New York, 180 N. Y. 48, rev'g 93 N. Y. App. Div. 613, the city passed resolutions *suspending all ordinances* relating to the discharge of fireworks during an election campaign. A political association, on the evening of the election, conducted a discharge of fireworks at Madison Square. The people stood closely crowded in the park and on both sides of Madison Avenue. The fireworks were arranged in the middle and on the west side of Madison Avenue. Some of the fireworks exploded causing injuries resulting in the death of the plaintiff's intestate. The court declared that fireworks exhibited on an extensive scale in a crowded thoroughfare in the midst of a large city where a vast multitude of people is assembled, if not a nuisance as matter of law, might properly be found to be such as a matter of fact, and reversed the judgment dismissing the complaint, holding that, as the city had authorized the display, it

But in connection with the liability of municipal corporations to persons injured by displays of fireworks and other licensed ex-

might under the facts be liable for the death of the plaintiff's intestate. In Crowley *v.* Rochester Fire Works Co., 183 N. Y. 353, rev'g 95 N. Y. App. Div. 13, the court held that while a discharge of fireworks in a street of a densely populated city may constitute a nuisance *per se*, it is not necessarily illegal to exhibit a display of fireworks *in an open space like a park* where, if conducted with care, no danger to persons or property is involved. In Melker *v.* New York, 190 N. Y. 481, the cause of an action arose out of the same display of fireworks as that involved in the Landau case, *supra*. The trial court submitted to the jury the question whether or not the discharge of fireworks constituted a nuisance, and instructed the jury that if the discharge was a nuisance the defendant was liable. The jury returned a verdict for the defendant. Under the appellate practice of New York courts, the Court of Appeals could not review the finding of the jury that the discharge of fireworks did not constitute a nuisance in fact, and it held that the discharge did not constitute a nuisance *per se*, that being a question dependent entirely upon the facts and circumstances attending the discharge, and the court affirmed the judgment for the defendant. A display of fireworks *in a city park* is not a nuisance *per se*. A municipality which licenses such an exhibition is not liable, if the licensee in giving the exhibition injures another by negligence. De Agramonte *v.* Mt. Vernon, 112 N. Y. App. Div. 292.

Some of the New York decisions appear to hold municipalities liable for the acts of contractors and others who have excavated the city streets or deposited building material or street-paving material therein under a license or authority from the city. See Godfrey *v.* New York, 104 N. Y. App. Div. 357, aff'd 185 N. Y. 563; Parks *v.* New York, 111 N. Y. App. Div. 836, aff'd 187 N. Y. 555. But it may be doubted whether these decisions should not be regarded as proceeding rather upon the ground that the city, being charged with notice of the obstruction, had failed to perform its duty to see that the obstacle was properly lighted, or was so maintained by the contractor as not to endanger the public safety. In Buckley *v.* New York, 135 N. Y. App. Div. 512, it was held that where a city licenses a plumber to make an excavation in a public street to repair a sewer the excavation is not a nuisance *per se*, so as to make the city a joint actor with the plumber in making the excavation and therefore liable to a person injured.

In Little *v.* Madison, 42 Wis. 643, cited *supra*, the city had licensed or authorized an *exhibition of wild animals*, in consequence of which plaintiff's horses took fright and plaintiff was injured. It was held, reversing the trial court, that the city was liable on the theory that the city had authorized the use of the street for purposes which were dangerous and unsafe. But on second appeal, after a second trial of the case, these views were modified. See Little *v.* Madison, 49 Wis. 605. On the second appeal the court held that a city is not liable for mere nonfeasance or omission on the part of its officers in respect of their police duties; that a license from the city to exhibit wild animals, specifying no place for such exhibition, is a license to exhibit in some suitable place and the fact that the licensee makes the exhibit in a public street, and is permitted to do so by the negligence of the city officers, does not render the city liable for injuries resulting therefrom. Plaintiff, passing along a street, was injured by the firing of a gun from the inside of a *shooting gallery*, which was near the street and which had been licensed by the city. It was held that the city was not liable; that it was not a case of defect, want of repair or insufficiency of the street within the meaning of the Wisconsin statute. Hubbell *v.* Viroqua, 67 Wis. 343. A city had granted the privilege of making an exhibition in the city streets. A part of the exhibit consisted in what was known as a "slide for life," in which an acrobat slid down a wire suspended from the roof of the court house to a telegraph pole at or near the ground. The acrobat fell from the wire and the plaintiff, a pedestrian, was hurt. It was held that the city was liable. Wheeler *v.* Ft. Dodge, 131 Iowa, 566.

A *platform* sixty-four feet long,

hibitions in the city streets and public places, it should be noted that, in some jurisdictions, the injured person is regarded as assuming the risks incident to the display or exhibition, if he is present expressly for the purpose of watching the display or exhibition, and is not a mere casual spectator whose attention might naturally be drawn to any remarkable occurrence on the highway, and who might therefore loiter for a short time without losing his rights as a traveller.[1]

§ 1704 (1012). **Defective Sidewalks.** — The liability of a city or town *for actionable defects extends*, as already remarked, to sidewalks, they being deemed to constitute part of the street.[2] Where

twelve feet wide and six feet high, *erected in a street* for use in connection with a carnival, with liberty to maintain and use the same for twelve consecutive days and which daily attracts large crowds, is a nuisance *per se;* and a city which, without legislative authority, authorizes by ordinance the erection of such a nuisance in one of its streets is liable in damages for injuries resulting therefrom. Richmond *v.* Smith, 101 Va. 161. See also to the same effect, Van Cleef *v.* Chicago, 240 Ill. 318, aff'g 144 Ill. App. 488, where the city had authorized the holding of a street fair and the construction of a platform and building in the street in connection therewith. When, on the occasion of a carnival or public celebration, a *city permits* in the public ways *the firing of cannon*, it is liable for accidents which may be occasioned thereby, although the cannon may be under the control of the organizers of the celebration. Forget *v.* Montreal, 4 Montreal L. R. (Superior Ct.) 77. A city, without authority, assumed to grant to an individual the right to obstruct one of its streets by leaving therein, when not in use, a wagon, and it was held that the city must be regarded as maintaining a nuisance so long as the obstruction was continued by reason of and under the license, and that the city was liable for damages naturally resulting therefrom to a third person. Cohen *v.* New York, 113 N. Y. 532. City held liable for injuries caused by the frightening of plaintiff's horse by *a steam motor* used upon a street railway by the permission of the city council, the city having no power to authorize or permit the use of steam motors upon its streets. Stanley *v.* Davenport, 64 Iowa, 463. A village granted a permit to move a *large steamboat* through the village streets. Plaintiff was hurt as the result of his horse taking fright at the steamboat. It was held that the village was liable. Cairncross *v.* Pewaukee, 78 Wis. 66. But it is to be noted that in this case the ground of liability appears to have been the fact that the city permitted the steamboat to remain stationary in the streets an unreasonable time. An *abutting property owner* placed his *heating apparatus underneath the sidewalk*, under circumstances charging the city with notice of the fact that it was so placed. The ordinances permitting the owner to use the space beneath the sidewalk were not complied with. The boiler exploded. In an action against the city for personal injuries, it was held that the plaintiff, a traveller upon the highway, established a *prima facie* case of negligence against the city, by showing the fact of the explosion, the fact that the city was charged with knowledge of the unlawful use of the space beneath the sidewalk, and that the plaintiff's injuries resulted from the explosion. Beall *v.* Seattle, 28 Wash. 593.

[1] Scanlon *v.* Wedger, 156 Mass. 462; Frost *v.* Josselyn, 180 Mass. 389; Johnson *v.* New York, 186 N. Y. 139. But see *contra*, Van Cleef *v.* Chicago, 240 Ill. 318, aff'g 144 Ill. App. 488. The mere fact that the plaintiff was present at a display of fireworks was held not to show or to tend to show contributory negligence. Dowell *v.* Guthrie, 99 Mo. 653. See also Bradley *v.* Andrews, 51 Vt. 530.

[2] *Ante*, § 1699. Studley *v.* Oshkosh, 45 Wis. 380; Furnell *v.* St. Paul,

the charter of a city gives it the power to cause sidewalks to be kept in repair, and makes adequate provision for so doing, the ex-

20 Minn. 117; Warren *v.* Wright, 3 Ill. App. 602; Rockford *v.* Hilderbrand, 61 Ill. 155; Chicago *v.* Langlass, 66 Ill. 361; Chicago *v.* Crooker, 2 Ill. App. 279; Atlanta *v.* Perdue, 53 Ga. 607; Chicago *v.* McCarthy, 75 Ill. 602; Moore *v.* Minneapolis, 19 Minn. 300; Market *v.* St. Louis, 56 Mo. 189; Barnes *v.* Newton, 46 Iowa, 567; Higert *v.* Greencastle, 43 Ind. 574; O'Neil *v.* New Orleans, 30 La. An. 202; Bacon *v.* Boston (a deep opening made by adjoining owner for cellar window), 3 Cush. (Mass.) 174; Lowell *v.* Spaulding, 4 Cush. 275; *Ib.* 277; Kirby *v.* Boylston Market Assoc., 14 Gray (Mass.), 249; Manchester *v.* Hartford, 30 Conn. 118; Birmingham *v.* Tayloe, 105 Ala. 170; Columbus *v.* Anglin, 120 Ga. 785; Griffen *v.* Lewiston, 6 Idaho, 231; McLean *v.* Lewiston, 8 Idaho, 472; Sciota *v.* Norton, 63 Ill. App. 530; Boswell *v.* Wakley, 149 Ind. 64; Earl *v.* Cedar Rapids, 126 Iowa, 361; Muncie *v.* Hey, 164 Ind. 570; Covington *v.* Johnson (Ky.), 69 S. W. Rep. 703; Hesselbach *v.* St. Louis, 79 Mo. 505; Hill *v.* Sedalia, 64 Mo. App. 494; Lincoln *v.* O'Brien, 56 Neb. 761; Lehn *v.* Brooklyn, 143 N. Y. 674; Dougherty *v.* Horseheads, 73 Hun (N. Y.), 443; Kirk *v.* Homer, 77 Hun (N. Y.), 459; Rimby *v.* Philadelphia, 208 Pa. 119; Gillard *v.* Chester, 212 Pa. 338; Brown *v.* Towanda, 24 Pa. Super. Ct. 378; Bryant *v.* Orangeburg, 70 S. Car. 137; Sherman *v.* Williams, 77 Tex. 310; Alliance *v.* Campbell, 6 Ohio Cir. Dec. 762. See also Atchison *v.* Jansen, 21 Kan. 560; Hubbard *v.* Concord, 35 N. H. 52, reviewing Raymond *v.* Lowell, 6 Cush. (Mass.) 524; Boucher *v.* New Haven, 40 Conn. 456. A cover made partly of glass and partly of iron, forming a portion of the surface of a sidewalk in a city, and so changed by wear as to become smooth and slippery, on which a traveller using due care slips and falls, solely by reason of its smoothness, is such a defect in a highway as to render a city liable. Cromarty *v.* Boston, 127 Mass. 329; Morse *v.* Boston, 109 Mass. 446; Kellogg *v.* Janesville, 34 Minn. 132; Noonan *v.* Stillwater, 33 Minn. 198; Nanticoke Boro' *v.* Warne (rotten sidewalk), 106 Pa. St. 373; Beazan *v.* Mason City, 58 Iowa, 233; Thomas *v.* Brooklyn, 58 Iowa, 438; Smalley *v.* Appleton, 70 Wis. 340; Stack *v.* Portsmouth, 52 N. H. 221, and *defining measure of duty, as respects sidewalks.* Duty as respects *crossings, foot-passengers, where to cross.* Augusta *v.* Tharpe, 113 Ga. 152; McLeansboro *v.* Trammel, 109 Ill. App. 524; Olathe *v.* Mizee, 48 Kan. 435; Baker *v.* Grand Rapids, 111 Mich. 447; Dallas *v.* Webb, 22 Tex. Civ. App. 48; Danville *v.* Robinson, 99 Va. 448; Olive *v.* Westmount, 16 Rap. Jud. Que., C. S., 426; Raymond *v.* Lowell, 6 Cush. (Mass.) 524; Brady *v.* Lowell, 3 *Ib.* 121. A *bridge over a drain* at a street-crossing which had been habitually used by passengers along the sidewalk, was considered a part of the sidewalk, and the city held liable for injuries caused by defects in it. Atlanta *v.* Champe, 66 Ga. 659. *Ante*, § 1700, and note.

Where a sidewalk is constructed by a private person, without the authority or direction of the city, the city will be liable for injuries sustained by reason of defects in it, if it has assumed jurisdiction over it — as, by ordering the owner to repair it, or by permitting it to be used as a part of the continuous sidewalk of a travelled thoroughfare. Plattsmouth *v.* Mitchell, 20 Neb. 228; Russell *v.* Canastota, 98 N. Y. 496 (giving notice to an abutting owner to repair a sidewalk does not release the municipal corporation from liability). A municipal corporation held liable for an injury sustained by reason of a defective sidewalk constructed without its authority, the defect having existed a sufficient length of time to charge it with notice. Saulsbury *v.* Ithaca, 94 N. Y. 27. While a city having a power to construct sidewalks may adopt one already constructed, it must do so by a corporate act; but where the *plan* of a sidewalk has been changed by an owner of adjoining property without objection by the city, its omission to take any action in reference to it, after notice, cannot constitute a defence in its favor to an action brought by one who has received injury by reason of defects in the walk. Urquhart *v.* Ogdensburgh, 97 N. Y. 238. Right of *foot-travellers* to travel *along and across street.* *Ib.*;

ercise of the power, according to the prevailing judgment of the courts, follows as a duty. In such case the city is liable for actionable defects in sidewalks, although the charter requires the lot-owner to build the sidewalks, and imposes a penalty for his failure in this regard. The abutting owner is not bound to keep the sidewalk in repair unless by virtue of the requirement of a statute, and is not responsible to travellers for defects therein not caused by himself.[1] The lot-owner has been held not liable over to the city for damages resulting to passers-by from the non-repair of a sidewalk in respect of which he was under no legal obligation to make

Coombs *v.* Purrington, 42 Me. 332; Bacon *v.* Boston, 3 Cush. (Mass.) 174; Barker *v.* Savage, 45 N. Y. 191; Robinson *v.* Western Pac. R. Co., 48 Cal. 409. *What inequalities in surface actionable.* Raymond *v.* Lowell, 6 Cush. (Mass.) 524; Hubbard *v.* Concord, 35 N. H. 52; Smith *v.* Wendell, 7 Cush. 498; Winn *v.* Lowell, 1 Allen, 177; Lacon *v.* Page, 48 Ill. 499; Loan *v.* Boston, 106 Mass. 450; Wolf *v.* District of Columbia, 21 App. D. C. 464; Lebarre *v.* New Orleans, 106 La. 458; Higgins *v.* Glens Falls, 124 N. Y. 666; Hogan *v.* Watervliet, 42 N. Y. App. Div. 325; Tubesing *v.* Buffalo, 51 N. Y. App. Div. 14; Kellow *v.* Scranton, 195 Pa. St. 134; Morris *v.* Philadelphia, 195 Pa. St. 372. See as to gross negligence, Chicago *v.* Langlass, 66 Ill. 361. As to ordinary care and diligence, see Warren *v.* Wright, 3 Ill. App. 602.

A walk crossing an alley is a "cross-walk" and not a "sidewalk" within the meaning of the statute of *Michigan* imposing liability for injuries caused by defective streets, &c. Pequinot *v.* Detroit, 16 Fed. Rep. 211. Proof that others have passed over an obstruction in a sidewalk without injury is not admissible, nor is proof (as here) that the construction of a plank crossing was the same as that of other crossings in the city. Bauer *v.* Indianapolis, 99 Ind. 56. One who had *full knowledge* of an obstruction in a sidewalk, held not entitled to recover for an injury caused by it, though the accident occurred when by reason of darkness it was difficult to see it. Indianapolis *v.* Cook, 99 Ind. 10. For illustrations of faulty construction of cross-walks see Whitney *v.* Milwaukee, 57 Wis. 639; Schroth *v.* Prescott, 63 Wis. 652, 68 Wis. 678; Stilling *v.* Thorp, 54 Wis. 528; Hill *v.* Fond du Lac, 56 Wis. 242; Grossenbach *v.* Milwaukee, 65 Wis. 31; Shearm. & Red. Neg. (4th ed.) § 353, and cases; 2 Thomps. Neg. 781–784, where the extent of the duty to repair sidewalks and cross-walks is considered. McLeansboro *v.* Trammel, 109 Ill. App. 524; Weisse *v.* Detroit, 105 Mich. 482; Heiss *v.* Lancaster, 203 Pa. 260 (cross-walk).

[1] Moore *v.* Gadsden, 87 N. Y. 84; s. c. on another appeal, 93 N. Y. 12. These two decisions hold that although by an ordinance in the nature of a police regulation the abutting owner is required to remove ice and snow within a fixed time, he is not thereby made liable for injuries caused by his neglect to comply with the ordinance. Hill *v.* Fond du Lac, 56 Wis. 242; Knupfle *v.* Knickerbocker Ice Co., 84 N. Y. 488; Webster *v.* Beaver Dam, 84 Fed. Rep. 280; Lord *v.* Mobile, 113 Ala. 360; Mt. Carmel *v.* Blackburn, 53 Ill. App. 658; Covington *v.* Johnson (Ky.), 69 S. W. Rep. 703; Lancaster *v.* Walter (Ky.), 80 S. W. Rep. 189; Campbell *v.* Boston, 189 Mass. 7; Fuller *v.* Jackson, 82 Mich. 480; Shippy *v.* Au Sable, 85 Mich. 280; Baustian *v.* Young, 152 Mo. 317; Lincoln *v.* Pirner, 59 Neb. 634; Krebs *v.* Heitmann, 104 N. Y. App. Div. 173; Sammins *v.* Wilhelm, 6 Ohio Cir. Ct. Rep. 565; Collins *v.* Schmidt, 11 Ohio Dec. 103; Wyman *v.* Philadelphia, 175 Pa. 117; New Castle *v.* Kurtz, 210 Pa. 183; Sneeson *v.* Kupfer, 21 R. I. 460; Dallas *v.* Jones (Tex. Civ. App.), 54 S. W. Rep. 606; McKinney *v.* Brown (Tex. Civ. App.), 81 S. W. Rep. 88; Fife *v.* Oshkosh, 89 Wis. 540. But see Shietart *v.* Detroit, 108 Mich. 309; Weller *v.* McCormick, 47 N. J. L. 397. *Ante*, § 1697, note. Markin *v.* Crumbie, 14 N. Y. Misc. 439. But see Lincoln *v.* Janesch, 63 Neb. 707.

the repairs, and which was not defective by reason of any obstruction caused or other act done by him.[1]

§ 1705 (1013). **Unsafe Streets and Public Places; Awnings and Falling Substances.** — In connection with the subject of streets and sidewalks may be considered the liability of a municipal corporation *for injuries to travellers by reason of falling substances*, such as awnings, cornices, snow, and ice from roofs and the like, or by reason of the fall of rotten poles or trees in the streets or public places. Municipal corporations have sometimes been held liable for personal injuries suffered by travellers on the street, sidewalks, and public squares from the fall of dangerous substances. *The ground of the liability is negligence.*[2] The courts have in some cases based the liability on statute provisions respecting keeping streets in repair or safe and convenient for travel, and in other cases on the duty of the corporation in this regard based upon general principles. On the one ground or the other, it is generally held to be a corporate duty to keep the streets of a city in such repair that they may be safely travelled. The duty is not limited to the road-bed. A permanent wooden awning or roofing, covering the sidewalk of a street, and resting for support upon wooden posts bedded in the street, if insecurely supported, so as to be dangerous to persons using street, is a defect in the street which the city is bound to repair. Such a structure made for private purposes, if unauthorized, is an encroachment upon the public street, and a nuisance, which it is the duty of the city officers, after notice, express or implied, of the danger, to remove. If such a structure exists by authority of the city, the city is liable for any defect arising from want of proper supervision or from negligence in its construction, and in such case there may be such liability, although there be no external indication of danger.[3] The power of a city

[1] Keokuk *v.* Keokuk Indep. Sch. Dist., 53 Iowa, 352; s. c. 5 N. W. Rep. 503; Kirby *v.* Boylston Market Assoc., 14 Gray (Mass.), 249; Flynn *v.* Canton County, 40 Md. 312; Heeney *v.* Sprague, 11 R. I. 456; Eustace *v.* Johns, 38 Cal. 3; Jansen *v.* Atchison, 16 Kan. 358; Moore *v.* Gadsden, 93 N. Y. 12; Russell *v.* Canastota, 98 N. Y. 496; Hartford *v.* Talcott, 48 Conn. 525; Betz *v.* Limingi, 46 La. An. 1113; Campbell *v.* Boston, 189 Mass. 7; Baustian *v.* Young, 152 Mo. 317; Blackwell *v.* Hill, 76 Mo. App. 46; Rochester *v.* Campbell, 123 N. Y. 405; Lincoln *v.* O'Brien, 56 Neb. 761. Lot-owner held primarily liable for lack of repair of the street. Devine *v.* Fond du Lac, 113 Wis. 61. Charter provisions giving the city an action over against the owner of the adjacent lot. Rockford *v.* Hilderbrand, 61 Ill. 155. *Post*, §§ 1725, 1727; Shearm. & Red. Neg. (4th ed.) §§ 301, 343, 384, 701, and cases.

[2] *Infra*, § 1706. Denver *v.* Sherret, 88 Fed. Rep. 226; Cincinnati *v.* Frazer, 18 Ohio Cir. Ct. R. 50. As to the right of abutting owners to construct and maintain awnings, see *ante*, § 1186.

[3] Hume *v.* New York, 74 N. Y.

over its streets, as well as the corresponding right of the public to use them in safety, extends upward indefinitely for the purpose of their preservation, use, and enjoyment; and the duty of a city in this respect is commensurate with its power.[1] A close study of

264; s. p. Pedrick *v.* Bailey, 12 Gray (Mass.), 161; Drake *v.* Lowell, 13 Met. (Mass.) 292; Day *v.* Milford, 5 Allen (Mass.), 98; Norristown *v.* Moyer, 67 Pa. 355; s. p. New York *v.* Furze, 3 Hill (N. Y.), 612; Hutson *v.* New York, 9 N. Y. 163; Davenport *v.* Ruckman, 37 N. Y. 568; Requa *v.* Rochester, 45 N. Y. 129; Janell *v.* Wilmington, 4 Penn. (Del.) 454; Columbus *v.* Anglin, 120 Ga. 785; Leary *v.* Yonkers, 95 N. Y. App. Div. 126; Grove *v.* Fort Wayne, 45 Ind. 429. Approved, House *v.* Montgomery County, 60 Ind. 580. It is a question of negligence. If no negligence on part of city, there is no liability, as if there was good reason to suppose the awning safe and its fall was caused by a heavy weight of snow. Hume *v.* New York, *supra*. Larson *v.* Grand Forks, 3 Dak. 307; Langan *v.* Atchison, 35 Kan. 318; Bohen *v.* Waseca, 32 Minn. 176 (where the awning hung from a building; holding that the failure of a city to pass an ordinance requiring the abatement of such nuisances will not absolve it from liability); Duffy *v.* Dubuque, 63 Iowa, 171. *Ante*, § 1626, *et seq.*

[1] Grove *v.* Ft. Wayne (projecting cornice), 45 Ind. 429. In this case *Worden*, C. J., says: "We have recently decided, in the case of Higert *v.* Greencastle, 43 Ind. 574, that cities in *Indiana*, organized under the general law, having plenary power over streets, and having the power of taxation sufficient for that purpose, are bound to keep the streets, including the sidewalks, in a reasonably safe condition for travel in the ordinary modes, and in default of doing so are liable in damages to persons injured by the neglect. We need not enter again upon the discussion of that subject. We may remark, however, that this is the established doctrine of the Supreme Court of the United States, of New York, Pennsylvania, and many other States, while in the Eastern States it is held that towns are not thus liable unless made so by statute. See collection of cases in Dillon on Municipal Corporations. [*Infra*, § 1708.] In the case of Detroit *v.* Blackeby, 21 Mich. 84, it was held, Judge *Cooley* dissenting, that such liability does not exist in the absence of a statute imposing it. We are disposed to follow the general current of authorities and decisions of our own court, without entering upon any critical examination of the foundation on which they rest. But we may observe that the act for the incorporation of cities, &c., provides that 'the common council shall have exclusive power over the streets, highways, alleys, and bridges within such city,' and also that they may collect an *ad valorem* tax, for general purposes, on all property within the city, &c., not exceeding a stated per centum. When cities organize under this act, thus investing themselves with exclusive power over the streets, and with ample power of taxation for general purposes, under which must be included street improvement purposes, *a duty devolves upon them to exercise the powers granted so far as to make the streets reasonably convenient and safe;* and if they fail to do so, it does not seem at all unreasonable that they should respond in damages to any one injured by their neglect of this duty." (*Infra*, § 1708.) The learned judge, after reviewing the leading cases in the New England States, adds: "These *decisions of the New England States*, based, as they are, upon statutes prescribing the duties and liabilities of towns, while they are valuable for their intrinsic worth, and as emanations from learned judicial tribunals, cannot be held as controlling, in the absence of such statutes, except so far as the reasoning is based upon general principles of the law, and not upon particular statutory regulations."

In this case it was held by the Supreme Court of Indiana that the *cornice of a building which projects over a sidewalk in a city*, and which is being constructed in such a manner as to be dangerous to persons using the sidewalk, is a nuisance; that the city has power, under the statute, to abate such a structure; and if it fails to do so, after notice to the proper authorities of its dangerous character, and

the decisions, which are fully referred to in the notes, some of which rest upon statute provisions and others on general principles

takes no precaution to prevent injury to parties using the sidewalk, it will be liable in damages to a person injured by its fall. In a subsequent case in *Indiana*, *Elliott*, C. J., said that the case of Grove *v.* Ft. Wayne, *supra*, "carried the principle on which it proceeds to the utmost verge, and only decides that a person travelling on a public street may recover (of the city, if it is negligent) for an injury caused by the fall of an overhanging cornice." Anderson *v.* East, 117 Ind. 126, 129, distinguishing Grove *v.* Ft. Wayne, and holding that a city is not liable for the fall of an unsafe wall causing damages to another building situate *upon private property;* there being no statute declaring the liability, and the city not being charged with the duty of protecting private property, its default was not in respect of a ministerial or corporate duty, but only in respect of its public powers and duties, and hence such default was not the ground of an implied liability for damages. Falling tree. Chase *v.* Lowell, 151 Mass. 422.

Liability for falling substances further illustrated. The statute of *Massachusetts*, before cited (*ante*, § 1691, note), is held to extend to *injuries caused by defective awnings projected over the sidewalk*, and where the defect or want of repair in the projection is of a nature to render its continuance dangerous to the public safety. Drake *v.* Lowell, 13 Met. (Mass.) 292; Day *v.* Milford, 5 Allen (Mass.), 98. The question is close, and is admitted to reach the utmost limit of corporate liability, and the liability is regarded as exceptional. *Per Chapman*, J., in Keith *v.* Easton, 2 Allen (Mass.), 552; Barber *v.* Roxbury, 11 Allen (Mass.), 318. See opinion of *Clifford*, J., in Merrill *v.* Portland, 4 Cliff. C. C. 138, as to municipal liability for falling awning; Grove *v.* Ft. Wayne, 45 Ind. 429. And it was held in Hixon *v.* Lowell, 13 Gray (Mass.), 59, that a city was not liable where the only defect in the street is the *projection from the roof* of a building not owned by the city *of a mass of ice and snow* which had gradually accumulated there until it overhung the travelled way and rendered the passing beneath dangerous. Muncie *v.* Hey, 164 Ind. 570. Nor is a city liable for injury sustained by a traveller on a sidewalk by the falling on him of a *sign suspended over the sidewalk* by the adjoining proprietor, and insecurely fastened, although the city had notice of the position and unsafe condition of the sign. Jones *v.* Boston, 104 Mass. 75; s. p. Salisbury *v.* Herchenroder, 106 Mass. 458. Compare West *v.* Lynn, 110 Mass. 514 (where city was held liable, the sign being to some extent supported on the sidewalk). Nor by the *falling of an iron weight* attached to a flag which was suspended across the street by third persons. Hewison *v.* New Haven, 34 Conn. 136. Some of the later cases cited follow Hixon *v.* Lowell, 13 Gray (Mass.), 59, in preference to Drake *v.* Lowell, 13 Met. (Mass.) 292, and state the distinction which, in Hixon *v.* Lowell, the court thought it easier to feel than to express. 6 Am. Law Rev. 566. But is it easy either to feel or express the distinction? And does not the difficulty come from holding that the *statute* embraced a case like Drake *v.* Lowell? See Jones *v.* New Haven (falling of dead limb from tree in public square), 34 Conn. 1; Salisbury *v.* Herchenroder, 106 Mass. 458. Liability for injury by *fall of derrick* on highway. Hardy *v.* Keene, 52 N. H. 370; distinguished, Cain *v.* Syracuse, 95 N. Y. 83. *Rotten pole in street.* Norristown *v.* Moyer, 67 Pa. St. 355. *Tree in street.* Vosper *v.* New York, 49 N. Y. Superior Court, 296; Jones *v.* New Haven, *infra*. *Owner, and not tenant*, responsible for safety of awning; and if the town is held liable, it may recover over from the owner. Milford *v.* Holbrook, 9 Allen (Mass.), 17; Lowell *v.* Short, 4 Cush. (Mass.) 275; *Ib.* 277; Shipley *v.* Fifty Associates, 106 Mass. 194; *infra*, §§ 1726, 1727. In *New York:* Hume *v.* New York, 74 N. Y. 264; Taylor *v.* Peckham, 8 R. I. 349. See Garland *v.* Towne, 55 N. H. 55. When owner is not liable. Leonard *v.* Storer, 115 Mass. 86; Clancy *v.* Byrne, 56 N. Y. 129.

Liability for injuries received on a street by the fall of an unsafe wall. In *Georgia*, a city corporation, with the usual power to keep streets in repair and to remove buildings and obstructions thereon, was considered to have

and in respect of which there is some want of harmony, is necessary to a thorough understanding of the subject which is discussed in this section.

§ 1706 (1015). **Negligence the Basis of Liability; Runaway Horses.** — But a municipal corporation, even in those States which assert an implied liability for damages caused by a failure to keep its streets in repair, is liable in respect of *defects caused by others only on the ground of negligence.* The liability is not that of a guarantor of the safety of the traveller. The corporate authorities are only bound to use reasonable skill and diligence in making the streets and sidewalks safe and convenient for travel. They are under no obligation

the power, which it was bound to exercise, to remove any nuisance which rendered the use of the street dangerous, such as a deep pit dug near the sidewalk, or an unsafe wall adjoining it; and it was held to be liable to a person injured by the fall of a high brick wall of a burnt house, on private property, at the line of the sidewalk, if it was negligent in the discharge of its duty to have the wall abated or made secure. The court admitted that if the wall was firm and had been thrown down by a tempest, there would be no liability. Parker *v.* Macon, 39 Ga. 725; Savannah *v.* Waldner, 49 Ga. 316. But, in *Louisiana*, a precisely opposite conclusion, as to the liability of a corporation for the falling of an unsafe wall, was reached in Howe *v.* New Orleans, 12 La. An. 481.

In *Missouri*, a city, though required to keep its streets in a reasonably safe condition for travellers, is not liable for injuries caused by the fall of an unsafe wall, to one who was not at the time using the street for any purpose. Kiley *v.* Kansas City, 87 Mo. 103. In that State, however, the rule that a city is liable for injuries resulting from the fall of a wall rendered unsafe by fire, when its condition was known or could have been known by the exercise of ordinary care, is well settled. Kiley *v.* Kansas City, *supra;* Grogan *v.* Broadway Foundry Co., 87 Mo. 321.

In Jones *v.* New Haven, 34 Conn. 1, it was held that a city, with power to protect and regulate trees in the squares and streets, and which had by ordinance prohibited any interference by others with such trees, was liable for an *injury caused by the falling of a dead limb* which the city had *negligently* allowed to remain upon a tree in the public square. The decision, however, is rested by the court upon general principles, and not upon the duty to keep streets and ways in repair. *Supra*, §§ 1673, 1694, and note. See observations of *Hoar*, J., in Hixon *v.* Lowell, 13 Gray (Mass.), 59, 63. Faulty construction of roof, causing precipitation of snow and ice on traveller. Shipley *v.* Fifty Associates, 106 Mass. 194.

A municipality is liable for an injury caused by the *fall of a liberty pole* in a street, erected by citizens years previously, though the neglect of the corporation to remove it was not wilful, and it had no notice that the pole was insecure, and although it was in a part of the street which did not obstruct public travel. Norristown *v.* Moyer, 67 Pa. St. 355; *ante*, § 1132. City liable for obstruction caused by *rope stretched across street* and fastened to stakes set in the street, without placing any sign of warning to travellers. Chicago *v.* Fowler, 60 Ill. 322. See Wheeler *v.* Ft. Dodge, 131 Iowa, 566, noted *ante*, § 1703. Where an injury was caused by the *blowing over of part of an old roof* which had been leaning against a tree, the person injured standing at the time with one foot upon the sidewalk and the other upon an adjoining lot while he was drawing water from a hydrant, it was held that he was lawfully using the street and that the city was guilty of negligence. Duffy *v.* Dubuque, 63 Iowa, 171; Shearm. & Red. Neg. (4th ed.) 354, and cases.

to provide for everything that *may* happen upon them, but only for such things as ordinarily exist or such as may reasonably be expected to occur.[1] They are not bound to keep the streets in such condition that a traveller thereon may with safety run his horses at a furious rate of speed or drive thereon unmanageable horses, nor are they bound to keep them in such condition that damage may not be caused thereon by horses which have escaped from the control of their driver and are running away.[2]

§ 1707 (1016). **Width to be kept in Repair.**— Nor, as already incidentally stated,[3] is a municipal corporation bound to keep *all of its streets and all parts of the street* in good repair. When it opens a street and invites public travel, it must be made reasonably safe for such use;[4] but this does not necessarily imply as a matter of

[1] *Ante*, § 1705, and note. Columbus *v.* Ogletree, 96 Ga. 177; Olney *v.* Riley, 39 Ill. App. 401; Willis *v.* Newbern, 118 N. Car. 132.

[2] Ring *v.* Cohoes, 77 N. Y. 83, where the subject is clearly presented by *Earl*, J.; Moulton *v.* Sandford, 51 Me. 127; Nichols *v.* Athens, 66 Me. 402; Perkins *v.* Fayette, 68 Me. 152; Davis *v.* Dudley, 4 Allen (Mass.), 557, 558; Titus *v.* Northbridge, 97 Mass. 258; Fogg *v.* Nahant, 98 Mass. 578; Murdock *v.* Warick, 4 Gray (Mass.), 178; Dreher *v.* Fitchburg, 22 Wis. 675; Houfe *v.* Fulton, 29 Wis. 296; Rockford *v.* Hildebrand, 61 Ill. 155; Hungerman *v.* Wheeling, 46 W. Va. 761; Hunt *v.* New York, 109 N. Y. 134 (not liable for damages caused by an *explosion of gas* in manhole of a steam-heating company's pipe); Turner *v.* Newburgh, 109 N. Y. 301 (loose stone on cross-walk). They are not bound to keep streets passable for horses which have escaped from their owners. Moss *v.* Burlington, 60 Iowa, 438. *Infra*, §§ 1708, 1712. When a *horse by reason of fright, disease, or viciousness* becomes actually uncontrollable, so that his driver cannot stop him or direct his course, or regain control over his movements, and in this condition comes upon a defect in the highway by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. Titus *v.* Northbridge, 97 Mass. 258; Stone *v.* Hubbardston, 100 Mass. 49, 54; *ante*, §§ 1696, 1698, note. In some of the States the rule is that when an accident occurs from a negligent defect in the highway, the fact that the horse was at the time uncontrollable, or running away, furnishes no defence to an action for the injury. Baldwin *v.* Greenwoods Turnp. Co., 40 Conn. 238; Hull *v.* Kansas City, 54 Mo. 601; Hunt *v.* Pownal, 9 Vt. 418; Winship *v.* Enfield, 42 N. H. 197; Hey *v.* Philadelphia, 81 Pa. St. 44; Sherwood *v.* Hamilton, 37 Up. Can. Q. B. 410; Ring *v.* Cohoes, 77 N. Y. 83; *ante*, §§ 1698, note, 1699.

[3] *Ante*, § 1699.

[4] That a *street opened for travel has not been improved and graded* is no defence in actions caused by defects in it. Murphy *v.* Indianapolis, 83 Ind. 76. As to the liability arising from the *plan* of a street creating an unsafe condition, it was said by *Valentine*, J., in Gould *v.* Topeka, 32 Kan. 485, where part of a street consisted of a high and narrow embankment not guarded by railings or barriers, and not lighted at night (see *ante*, § 1696): "In our opinion, a city has no more right to plan or create an unsafe and dangerous condition of one of its public streets than it has to plan or create a public or common nuisance; and it is admitted that it has no right to do this." In such a case, if the court can say as a matter of law, that the plan was dangerous and unsafe, the city should be held for damages resulting to individuals; but if different persons, upon the facts, might have different opinions as to the condition of the street for safety, the city ought to have the benefit of the doubt. The presumption is in favor of the city. Gould *v.* Topeka, *supra;* see *post*, §§ 1739 *et seq.*,

law that the *whole width* of the street must be in good condition.[1] Whether the street was wide enough to be safe; whether it was in a reasonably safe condition for public use by travellers who use ordinary care to avoid injury, are almost always questions for the jury.[2]

§ 1708 (1017). **Unsafe Streets; Result as to Implied Liability summed up.**— It may be fairly deduced from the many cases upon this subject referred to below and in the preceding sections and notes, that, in the absence of a statute expressly imposing the duty and declaring the liability, *municipal corporations proper*, having the powers ordinarily conferred upon them respecting bridges, streets, and sidewalks within their limits, owe to the public the duty to keep them in a reasonably safe condition for use in the usual mode by travellers, and are liable in a civil action for special injuries resulting from neglect to perform this duty.[3] Such duty and lia-

as to liability for defective plan of sewers.

[1] Birch *v.* Charleston L. H. & Power Co., 113 Ill. App. 229; Ely *v.* St. Louis, 181 Mo. 723. But see Atlanta *v.* Milam, 95 Ga. 135; Wilmette *v.* Brachle, 209 Ill. 621; Powers *v.* St. Joseph, 91 Mo. App. 55; Fockler *v.* Kansas City, 94 Mo. App. 464. A city is required to keep in repair a *sidewalk* for its *entire* width. Springfield *v.* Burns, 51 Ill. App. 595. A city is required to keep the whole of its sidewalk in a reasonably safe condition for travel. Goins *v.* Moberly, 127 Mo. 116.

[2] Bassett *v.* St. Joseph, 53 Mo. 290; Brown *v.* Glasgow, 57 Mo. 156, 157; Fulliam *v.* Muscatine, 70 Iowa, 436; Wellington *v.* Gregson, 31 Kan. 99 (quoting and approving the text); Tritz *v.* Kansas City, 84 Mo. 632; Hill *v.* Glenwood, 124 Iowa, 475; Cummings *v.* New Rochelle, 38 N. Y. App. Div. 583. In Monongahela City *v.* Fischer, 111 Pa. St. 9, *Paxson*, J., said: "In the closely built up portions of a town or city the duty of the authorities to keep the entire street and sidewalks in a safe condition may be conceded. . . . But this has never been held to be the rule as regards country roads." Duty of keeping in repair extends to a street so opened as to invite public travel thereon, whether the street has been fully brought to grade, or formally declared open or not. Lindholm *v.* St. Paul, 19 Minn. 245; followed in Treise *v.* St. Paul, 36 Minn. 526. On this general subject see *ante*, § 1699, and cases cited in the notes. Craig *v.* Sedalia, 63 Mo. 417.

In the case last cited, in which the *accident was ascribed to a ridge in the middle of the street* about six inches high, two feet in width, and sloping gently to the surface of the street, the rest of the street being in good repair and unobstructed, *Hough*, J., well observes: "Every defect or imperfection in the streets of a city is not actionable. It must appear that under the particular circumstances of the case, it was the duty of the city to have removed the obstruction, or repaired the defect which occasioned the injury, and that the person complaining was at the time in the exercise of ordinary care." 63 Mo. 419. There is ordinarily no liability *where the accident is caused by a hole or gully in a part of the street not travelled*, and where the travelled portion is of sufficient width, and in a safe condition. Brown *v.* Glasgow, *supra*. *Infra*, § 1711. In *Iowa* it is held that if a street is opened for travel its entire width the city is bound to keep it in a reasonably safe condition from sidewalk to sidewalk. Crystal *v.* Des Moines, 65 Iowa, 502; Stafford *v.* Oskaloosa, 57 Iowa, 748; Stafford *v.* Oskaloosa, 64 Iowa, 251. Compare Fulliam *v.* Muscatine, 70 Iowa, 436; *supra*, § 1699, and notes.

[3] Enforcing this duty by *mandamus:* see *ante*, § 1493. By *indictment: ante*, §§ 1597, 1600. See generally Curry *v.* Mannington, 23 W. Va. 14, citing the

bility are considered to exist, without a statute giving an action, when the following conditions concur: —

1. The *place* in question, whether bridge, sidewalk, or street, must be one which it is the duty of the corporation to repair or keep in a reasonably safe condition; and this *duty* (to keep in repair), if not specifically enjoined, must arise upon a just construction of the charter or statutes applicable to the corporation.

2. This duty or burden must appear, upon a fair view of the charter or statutes, to be imposed or to rest upon the *municipal corporation, as such,* and not upon it as an agency of the State, or upon its officers as independent public officers.[1] (This, however, in general, appears sufficiently where the municipality sought to be made liable exists under a special charter or general act which confers upon it peculiar powers and privileges as respects streets, their control and improvement, not possessed throughout the State at large under its general enactments concerning ways.)

3. The *power to perform the duty* of maintaining the streets in a reasonably safe condition, by authority to levy taxes or impose local assessments for the purpose, must be (as it almost always is) conferred upon the corporation.[2]

text; Wilson *v.* Wheeling, 19 W. Va. 323; Denver *v.* Dunsmore, 7 Colo. 328; Denver *v.* Dean, 10 Colo. 375; Shearer *v.* Buckley, 31 Wash. 370.

[1] Text approved, Williams *v.* Shelby County Tax. Dist., 16 Lea (Tenn.), 531, holding that *the Taxing District of Shelby County,* though a municipal corporation, was not liable, under the act creating it, for property injured in an accident caused by its failure to keep the streets in repair.

[2] Weightman *v.* Washington, 1 Black (U. S.), 39 (corporate liability for unsafe bridge); distinguished from Providence *v.* Clapp, 17 How. (U. S.) 161; and from Russell *v.* Devon County, 2 T. R. 661, 667; and approving Henley *v.* Lyme Regis, 5 Bing. 91; s. c. 3 Barn. & Ad. 77; s. c. 2 Cl. & Fin. 331; Barnes *v.* Dist. of Columbia, 91 U. S. 540; Cleveland *v.* King, 132 U. S. 295; Omaha *v.* Olmsted (hole in sidewalk), 5 Neb. 446. Text cited and approved in Jansen *v.* Atchison, 16 Kan. 358; Campbell, Adm. *v.* Montgomery, 53 Ala. 527; Oliver *v.* Kansas City, 69 Mo. 79; Craig *v.* Sedalia, 63 Mo. 417; Richmond *v.* Courtney, 32 Gratt. (Va.) 792; Centreville *v.* Woods, 57 Ind. 192; Albritton *v.* Huntsville, 60 Ala. 486; Rankin *v.* Buckman, 9 Oreg. 253, approving text. Weightman *v.* Washington, above cited, was followed by Nebraska City *v.* Campbell, 2 Black, 590, where a city corporation, with control over streets, and power to levy taxes to keep them in repair, which left a bridge on a street over a creek defective and unsafe for *want of side-railing,* was held liable for damages happening in consequence. See also Chicago *v.* Robbins, 2 Black (U. S.), 418, s. c., again 4 Wall. (U. S.) 657; New York *v.* Sheffield (stump in sidewalk), 4 Wall. (U. S.) 189. This case, which was somewhat peculiar in its circumstances, was tried before Mr. Justice *Nelson* at the circuit. When the evidence was in, the learned judge charged the jury, whereupon the counsel for the city handed up a long series of requests to charge, which his Honor, without reading, directed to be given to the clerk and filed. His judgment was affirmed. See also Hutson *v.* New York, 9 N. Y. 163, s. c. 5 Sandf. 289. *Mason,* J., admits existence of cases of contrary bearing where the means to keep in repair are limited, but regards them as not applicable, since the city of New York "is possessed of the most ample powers in this respect." *Ib.* 170. See s. c. 6 Sandf. (N. Y. Superior

§ 1709. Implied Liability; Basis of Municipal Responsibility; Prior Written Notice of Defect. — In some instances statutes

Court) 289, and exposition of the ground on which it was decided by *Denio*, J., 9 N. Y. 456, 458, in Griffin *v.* New York. And see also Lloyd *v.* New York, 5 N. Y. 369; New York *v.* Furze, 3 Hill (N. Y.), 612. Approved by *Selden*, J., 16 N. Y. 162, note; 9 N. Y. 168; *Ib.* 458. Explained, 1 Denio, 595; 32 N. Y. 165; Conrad *v.* Ithaca, 16 N. Y. 158; Weet *v.* Brockport, *Ib.* 161, and review of cases in the learned opinion of *Selden*, J.; Storrs *v.* Utica, 17 N. Y. 104, and cases cited; Davenport *v.* Ruckman, 37 N. Y. 568, in which *Hunt*, C. J., declares that the liability of the corporation of the city of New York extends to injuries arising from the *omission of the duty to repair*, as well as to those arising from some act done by it. Requa *v.* Rochester, 45 N. Y. 129; Clemence *v.* Auburn, 66 N. Y. 334; Diveny *v.* Elmira, 51 N. Y. 506; Saulsbury *v.* Ithaca, 94 N. Y. 27; Ehrgott *v.* New York, 96 N. Y. 264; Nelson *v.* Canisteo, 100 N. Y. 89; Pettengill *v.* Yonkers, 116 N. Y. 558; Erie *v.* Schwingle, 22 Pa. St. 384. The text cited and approved, Fort Wayne *v.* Dewitt, 47 Ind. 391, 397; Higert *v.* Greencastle, 43 Ind. 574; Richmond *v.* Courtney, 32 Gratt. (Va.) 792; Centreville *v.* Woods, 57 Ind. 192. *Wilful* neglect not essential to liability; and as to defence of want of funds, and want of means to raise them, see remarks of *Black*, C. J., 22 Pa. 389.

As to bridges, see *ante*, §§ 1157, 1158, 1640, and Index, tit. *Bridge*. A city must keep in repair a bridge within its limits originally built and maintained by a county as a part of the highway, and is liable for injuries caused by its neglect in not repairing it. Goshen *v.* Myers, 119 Ind. 196; Blake *v.* St. Louis, 40 Mo. 569; Smith *v.* St. Joseph, 45 Mo. 449; St. Paul *v.* Kirby (injury to child), 8 Minn. 154; St. Paul *v.* Seitz, 3 Minn. 297; Topeka *v.* Tuttle, 5 Kan. 425; Atchison *v.* King, 9 Kan. 550; State *v.* Murfreesboro, 11 Humph. 217, *per McKinney*, J.; Smoot *v.* Wetumpka, 24 Ala. 112. See Davis *v.* Montgomery, 51 Ala. 139; Campbell's Adm. *v.* Montgomery Council, 53 Ala. 527; Montgomery *v.* Wright, 72 Ala. 411; Browning *v.* Springfield, 17 Ill. 143; Joliet *v.* Verley, 35 Ill. 58; Bloomington *v.* Bay, 42 Ill. 503; Chicago *v.* Gallagher, 44 Ill. 295; Chicago *v.* Johnson, 53 Ill. 91; Decatur *v.* Fisher, *Ib.* 407. The principle is adhered to. Chicago *v.* Fowler, 60 Ill. 322, and Centralia *v.* Scott, 59 Ill. 129; Peru *v.* French, 55 Ill. 317; Rockford *v.* Hildebrand, 61 Ill. 155; *ante*, § 1687, note; Hey *v.* Philadelphia, 81 Pa. St. 44; Rusch *v.* Davenport (defective bridge), 6 Iowa, 443; Rowell *v.* Williams, 29 Iowa, 210; Ellis *v.* Iowa City, *Ib.* 229; Soper *v.* Henry County, 26 Iowa, 264; McCullom *v.* Black Hawk County, 21 Iowa, 409; Huff *v.* Poweshick County, 60 Iowa, 529; Pease *v.* Dayton (defective bridge), 4 Ohio St. 80; Tallahassee *v.* Fortune, 3 Fla. 19; Baltimore *v.* Marriott (ice on pavement), 9 Md. 160, 174; Baltimore *v.* Pendleton, 15 Md. 12; Baltimore *v.* Brannan (accident in a place not public), 14 Md. 227; Shartle *v.* Minneapolis, 17 Minn. 308 (defective bridge); Cleveland *v.* St. Paul, 18 Minn. 279; Moore *v.* Minneapolis, 19 Minn. 300; Furnell *v.* St. Paul, 20 Minn. 117; O'Leary *v.* Mankato, 21 Minn. 65; Staples *v.* Canton, 69 Mo. 592, approving text; McDonough *v.* Nevada City, 6 Nev. 90; Hines *v.* Lockport, 5 Lans. (N. Y.) 17; Covington *v.* Bryant, 7 Bush, 248; Wheeler *v.* Westport (what is a defect?), 30 Wis. 392; *ante*, § 1687; Burns *v.* Elba, 32 Wis. 605; Koester *v.* Ottumwa (insufficient barricade), 34 Iowa, 41.

In *Ohio*, a city is liable for negligence in not keeping its streets in a reasonably safe condition. Cleveland *v.* King, 132 U. S. 295, construing the legislation of that State as to the nature and extent of municipal duty and liability. A statute providing that a city should not be held liable for damages caused by obstructions in streets unless actual notice of such obstruction should have been given to the city at least twenty-four hours *previous* to the damages or injury, held not unconstitutional as depriving the injured party of his remedy; it is a lawful exercise of legislative power to impose conditions upon the liability of a city for injuries, &c. McNally *v.* Cohoes, 53 Hun (N. Y.), 202; affirmed, 127 N. Y. 350. In MacMullen *v.* Middletown, 187 N. Y. 37, and in Goddard *v.* Lincoln, 69 Neb. 594, a statutory requirement of a *written* notice of the defect to the city previous

have been enacted in States in which the doctrine of the implied liability of municipal corporations is recognized, declaring that such municipalities shall not be liable for a defect in the city streets *unless written notice of the defect* should have been given to the municipality a prescribed time prior to the occurrence of the damage or injury. In these cases the power of the legislature to attach this qualification to the implied liability of the municipality has been disputed, but the courts have sustained the legislative authority to so enact, and have elucidated the precise ground upon which the implied liability exists. These decisions recognize the fact that a municipal corporation is the creature of the legislature and its rights, duties, and liabilities are to be measured by the statutes under which it exists. The liability of the municipality for a defect

to the injury was held not unconstitutional. *Infra*, §§ 1709, 1717, 1718, as to notice to the city. The rule as to *implied* liability of municipal corporations for damages caused by their failure to keep their streets and sidewalks in a safe condition, was vigorously assailed by counsel in Jansen *v.* Atchison, 16 Kan. 358; but the court adhered to its former decisions, remarking that although the reasons given for the rule might not be entirely satisfactory, yet it had been so generally approved, and was on the whole so just, that it ought not to be overthrown. Ground of implied liability in *Indiana*, *ante*, § 1705, note.

The principles stated in the text find some support in the general reasons on which the judgments in several important recent cases in England rest. Foreman *v.* Canterbury, L. R. 6 Q. B. 214; Mersey Dock Cases, L. R. 1 H. L. 93; s. c. 11 H. of L. Cases, 687. *Contra*. In *New Jersey* the view is taken that the duty of a city in respect to the repair of its streets is a *public duty* (not a corporate one), and that the neglect to perform it will not give a private remedy without an express statute. Pray *v.* Jersey City, 32 N. J. L. 394, reaffirming Sussex County *v.* Strader (*quasi* corporation), 18 N. J. L. 108; Condict *v.* Jersey City, 46 N. J. L. 157. Compare Durant *v.* Palmer, 29 N. J. L. 544. See also Detroit *v.* Blackeby, 21 Mich. 84; s. c. 9 Am. L. Reg. (N. S.) 670, with note. In *Maryland*, the other extreme is held, and counties are liable without an express statute to a private action in respect of defective roads, on the ground that a public duty is enjoined with the means of performance, and that the public have a remedy for neglect by indictment, and a party specially injured by action. Anne Arundel County *v.* Duckett, 20 Md. 468; Calvert County *v.* Gibson, 36 Md. 229; Baltimore *v.* Pendleton, 15 Md. 12; *ante*, § 1638, note. See Brown *v.* Jefferson County, 16 Iowa, 339, assuming liability of *counties* for defective bridges. But see Soper *v.* Henry County, 26 Iowa, 264, and Rigony *v.* Schuylkill, 103 Pa. St. 382, for discussion of question.

In *Pennsylvania* the duty and liability as to maintaining highways and bridges in repair is statutory. The statute enacts that "all roads shall be kept in repair at the expense of the township." It is the duty of the county commissioners by statute to repair all bridges. Liability in damages for neglect of such duty is held to follow as a consequence. Rigony *v.* Schuylkill County, 103 Pa. St. 382; Rapho *v.* Moore, 68 Pa. St. 404. And an action will lie to recover damages for an injury sustained by reason of the negligence of its officials to keep its roads and streets in proper repair. Pittsburgh & B. Pass. Ry. Co. *v.* Pittsburgh, 80 Pa. St. 72; McLaughlin *v.* Corry, 77 Pa. St. 109; Dean *v.* New Milford, 5 W. & S. 545; Allentown *v.* Kramer, 73 Pa. St. 406; Newlin *v.* Davis, 77 Pa. St. 317; Fritsch *v.* Allegheny, 91 Pa. 226. In *Illinois* civil townships not thus liable. Russell *v.* Steuben, 57 Ill. 35; White *v.* Bond County, 58 Ill. 297.

is implied from the provisions of the statutes, such as provisions charging the municipality with the duty of keeping the streets in proper condition, and rests upon the proposition that the municipal corporation, under a grant from the sovereign power, has agreed expressly or impliedly to do certain things, and its neglect to do them exposes it to public prosecution or to a private action by any person injured thereby. But this doctrine or rule of responsibility does not prevent the legislature, which creates the municipal corporation, from validly denying, in the exercise of its conceded general powers of control, the right to maintain a private action against it for an injury to the individual, or the power of the legislature to restrict that right by any regulation which it deems proper. Hence, these statutory provisions are valid, and no recovery can be had against the municipality in the absence of proof of written notice of the defect prescribed by the statute.[1]

[1] Schigley *v.* Waseca, 106 Minn. 94; Goddard *v.* Lincoln, 69 Neb. 594; MacMullen *v.* Middletown, 187 N. Y. 37, rev'g 112 N. Y. App. Div. 81.

The liability of a city for injuries resulting from defective streets and sidewalks rests exclusively upon express or implied provisions of the statute, and the legislature may limit such liability or remove it entirely. A statute declaring that cities shall not be liable, *unless notice in writing of the defect* causing the injury shall have been filed with the city clerk at least five days before the injury occurred, held constitutional. Goddard *v.* Lincoln, 69 Neb. 594. *Albert*, Com'r, said: "A city is a creature of the legislature; its rights, duties and liabilities are to be measured by the statute under which it exists. Early in the history of this State, a city was held liable for injuries resulting from the defective condition of its streets, on the ground that it had exclusive control of such streets, and the legislature had placed ample means at its disposal to maintain its streets in safe condition. Omaha *v.* Olmstead, 5 Neb. 446. The principle announced in that case has since been frequently applied. Aurora *v.* Cox, 43 Neb. 727; Lincoln *v.* O'Brien, 56 Neb. 761; Beatrice *v.* Reid, 41 Neb. 214. As the liability in such cases must rest on some express or implied provision of the statute, it is clear that the legislature may place such limitations upon it as it may deem proper, or, for that matter, take it away entirely. . . . The plaintiff contends that the section quoted contravenes the bill of rights, which gives to every person a remedy for any injury done him in his lands, goods, person, or reputation. The constitutional provision invoked was not intended to guarantee indemnity against injury of every species, but only such as result from the invasion or infringement of a legal right, or the failure to discharge a legal duty or obligation. While the charter of cities of the first class imposes upon such cities the duty of keeping their walks in a reasonably safe condition, by the provisions of section 110, such duty does not become imperative or active, until the notice therein provided has been given in the manner and for the time therein specified. Such duty and its correlative right, as we have seen, rest exclusively on the statute. It was competent for the legislature to relieve such cities from the duty of maintaining their walks, and from all liability for injuries resulting from their unsafe condition. If the right to recover for such injuries might have been withheld entirely, one seeking to recover for such injuries certainly cannot complain of the conditions with which the legislature has seen fit to accompany the right." In Goodrich *v.* University Place, 80 Neb. 774, it was claimed that the decision of the court in Goddard *v.* Lincoln, 69 Neb. 594, *supra*, had changed the rule of implied liability adopted by the courts of *Nebraska*, and that a city was not liable for a defective street, unless

§ 1710 (1018). **Author's Comments on the Doctrine of Implied Liability.** — Where the *duty to keep streets in repair is, in terms, en-*

expressly made so by statute. But the court declared that its decision in Goddard *v.* Lincoln, *supra*, did not necessarily lead to that result, and reaffirmed Omaha *v.* Olmstead, 5 Neb. 446, which held that the making, improving, and repairing of streets by a municipal corporation relate to its corporate interests only, and that the municipality is liable for its failure to perform its duty, when it has the exclusive control of the streets and ample means to do so. Citing Plattsmouth *v.* Mitchell, 20 Neb. 228; Ponca *v.* Crawford, 23 Neb. 662; Wahoo *v.* Reeder, 27 Neb. 770; Ord *v.* Nash, 50 Neb. 335; Brown *v.* Pierce, 78 Neb. 623; Burke *v.* South Omaha, 79 Neb. 793. See also Ruth *v.* Omaha, 82 Neb. 846.

In MacMullen *v.* Middletown, 187 N. Y. 37, the Appellate Division of the Supreme Court held that the legislature could *not constitutionally require written notice* of the existence of a defect in the city streets as a condition precedent to the liability of the municipality, but the Court of Appeals held to the *contrary*. After referring to the fact that municipal corporations are the creatures of the legislature, *Gray*, J., said, "The charter of the defendant made the common council commissioners of highways for the city. They were charged with the duty of keeping the streets in proper condition and were empowered to require the owners and occupants of buildings, or lots, to clean the snow and ice from the sidewalks. That these provisions of the charter would make the municipality responsible for the acts of its officials, as corporate agents, in the absence of any restrictive clause, may be regarded as having been settled by the decision of this court in the case of Conrad *v.* Ithaca, 16 N. Y. 158, the authority of which has been repeatedly recognized since. Ehrgott *v.* New York, 96 N. Y. 264, 265; Ryan *v.* New York, 177 N. Y. 271, 288. The doctrine of municipal liability, thus settled, rested upon the proposition that the municipal corporation, for a consideration received from the sovereign power, has agreed, expressly or impliedly, to do certain things, and its neglect to do them exposes it to public prosecution, or to a private action by any person injured thereby. But this doctrine, or rule, of responsibility furnishes no satisfactory reason why the legislature, which creates this public corporation, may not validly, in the exercise of its conceded general powers of control, deny to the individual the right to maintain a private action against it, or restrict the right by any regulation, which it deems proper. . . . Where the charter voices the will of the legislature, upon the subject of the responsibility of the political agency of the State to answer to the complaint of a private individual, it announces a rule of conduct, which is to govern the relations of the municipality with its citizens. No right is thereby taken away; but relative rights are defined, which are to be binding upon those who choose to remain residents of the municipality. Legislative restriction, or regulation, is especially justifiable where the provision has relation to the performance of duties, which, as in this case, though for the corporate benefit, are, also, of public interest. The power of control over streets and highways was delegated by the legislature to the common council of the city, as its representative, in the interest of a better governmental policy. It might have reserved the performance of a duty so important to the general public to an independent body, as a convenient way of exercising the governmental functions. If, in investing the municipality with the duty, the legislature should regard its performance as partaking of a governmental nature and should relieve it of responsibility for breaches, could it properly be said to have violated any constitutional rights of the citizens? I think not, and if the view of the learned court below is right, that the provision in this charter was equivalent to a denial of any remedy for an injury sustained through a failure of the defendant to keep its streets in good order, then I hold that its enactment was a valid exercise of legislative power."

A provision making the liability of a municipal corporation dependent upon prior *written* notice of the defect may be inserted in a charter prepared on behalf of the municipality by a

joined upon the corporate authorities, and they are supplied with the means to perform it, there is little difficulty, we think, in holding the corporation liable, on the general principles of the law without an express statute declaring the liability, to a civil action by any one specially injured by its neglect to discharge this specific duty.[1] But where the duty to repair is not specifically enjoined, and an action for damages caused by defective streets is not expressly given, still both the duty and the liability, if there be nothing in the charter or in legislation of the State to negative the inference, have often, and in our judgment properly, been deduced from the intrinsic nature of the special powers conferred upon the corporation to open, grade, improve, and *exclusively control* public streets within their limits, and from the means which, by taxation and local assessments, or both, the law places at its disposal to enable it to discharge this duty.[2]

§ 1711 (1019). **Extent of the Liability.** — From what has already been said, that negligence is the ground of the liability,[3] it follows that a municipal corporation *is not an insurer against accidents* upon

board of freeholders and adopted by the votes of the citizens. Schigley *v.* Waseca, 106 Minn. 94.

For *instances where prior written notice* of the existence of a defect was prescribed by statute as a condition of the liability of the municipality and sustained without discussion of the constitutional question, see Smyth *v.* Bangor, 72 Me. 249; Rogers *v.* Shirley, 74 Me. 144; Hurley *v.* Bowdoinham, 88 Me. 293; Littlefield *v.* Webster, 90 Me. 213; Emery *v.* Waterville, 90 Me. 485; Gurney *v.* Rockport, 93 Me. 360; Winsor *v.* Tripp, 12 R. I. 454; Allen *v.* Cook, 21 R. I. 525; Houston *v.* Isaacks, 68 Tex. 116; Houston *v.* Vatter, 32 Tex. Civ. App. 298; Still *v.* Houston (Tex. Civ. App.), 66 S. W. Rep. 96.

[1] Montgomery *v.* Wright, 72 Ala. 411; Delger *v.* St. Paul, 14 Fed. Rep. 567; Hall *v.* Norwalk, 65 Conn. 310; Greensboro *v.* McGibbony, 93 Ga. 672; Maus *v.* Springfield, 101 Mo. 613; Farquar *v.* Roseburg, 18 Oreg. 271; Sutton *v.* Snohomish, 11 Wash. 24. It is held in *New York* that the absence of necessary funds, or the legal means of procuring them, will excuse the performance of the duty. Hines *v.* Lockport, 50 N. Y. 236. Affirmed, Weed *v.* Balston, 76 N. Y. 329. Want of funds as an excuse for neglect, see Shearm. & Red. Neg. § 277. "It has been so uniformly and frequently held by the courts of this State that a municipal corporation, having power to maintain and control streets, is bound to exercise ordinary and reasonable care and diligence to see that they are kept in a reasonably safe condition for public travel, that a general rule to that effect may now be considered as established and to be applicable, whether the act or omission complained of and causing the injury was that of the municipal corporation or some third party." *Danforth*, J., Nelson *v.* Canisteo, 100 N. Y. 89. Where the city voluntarily assumes the duty to build sidewalks, gutters, &c., it is liable, if negligent, for want of repair. Alton *v.* Hope, 68 Ill. 167. See Haskell *v.* Penn Yan, 5 Lans. (N. Y.) 43. If, by statute, a city is required to keep its streets in proper repair generally, without being limited to proper repair for *travellers* only, and it has the power and means to do so, it may be held responsible for damages sustained by persons using it for pleasure, recreation, or through mere idle curiosity, as in this case, where a child was injured while rolling a hoop. Chicago *v.* Keefe, 114 Ill. 222.

[2] Albritton *v.* Huntsville, 60 Ala. 486, citing and approving text; Denver *v.* Dunsmore, 7 Colo. 328; Lorence *v.* Ellensburgh, 13 Wash. 341.

[3] *Ante*, § 1706.

the streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient, we think, if the streets (which include sidewalks and bridges thereon) *are in a reasonably safe condition for travel in the ordinary modes,* by night as well as by day; and whether they are so or not is a practical question to be determined in each case by its particular circumstances.[1]

[1] Blake *v.* St. Louis, 40 Mo. 569, 571, *per Wagner,* J.; Smith *v.* St. Joseph, 45 Mo. 449; Bassett *v.* St. Joseph, 53 Mo. 290; Craig *v.* Sedalia, 63 Mo. 417; Beaudean *v.* Cape Girardeau, 71 Mo. 392; Tritz *v.* Kansas City, 84 Mo. 632. *Supra,* § 1707. Text cited and approved, Richmond *v.* Courtney, 32 Gratt. 792; Centreville *v.* Woods, 57 Ind. 192; Seward *v.* Milford, 21 Wis. 485; Landolt *v.* Norwich, 6 Am. L. Reg. (N. S.) 383; Furnell *v.* St. Paul, 20 Minn. 117; Atchison *v.* Jansen, 21 Kan. 560; Vicksburg *v.* Hennessy, 54 Miss. 363, 391; Leicester *v.* Pittsford, 6 Vt. 245; Rockford *v.* Hilderbrand, 61 Ill. 155; Raymond *v.* Lowell, 6 Cush. (Mass.) 524, 534; Davenport *v.* Ruckman, 37 N. Y. 568; Johnson *v.* Haverhill, 35 N. H. 74; Ghenn *v.* Provincetown, 105 Mass. 313; Williams *v.* Clinton, 28 Conn. 264; Bacon *v.* Boston, 3 Cush. (Mass.) 174; Manderschid *v.* Dubuque, 29 Iowa, 73; Warsaw *v.* Dunlap, 112 Ind. 576; Hunt *v.* New York, 109 N. Y. 134; Massey *v.* Columbus, 75 Ga. 658; Selma *v.* Perkins, 68 Ala. 145; Gavin *v.* Chicago, 97 Ill. 66 (bridge in a city); Washington *v.* Small, 86 Ind. 462; Wilson *v.* Wheeling, 19 W. Va. 323, 324 (quoting §§ 1708, 1710, 1711); Emporia *v.* Schmidling, 33 Kan. 485; Wellington *v.* Gregson, 31 Kan. 99 (quoting the text); Lincoln *v.* Gillilan, 18 Neb. 114; Ehrgott *v.* New York, 96 N. Y. 264; Otto Tp. *v.* Wolf, 106 Pa. St. 608; Easton *v.* Neff, 102 Pa. St. 474 (holding also that the question of the necessity for constructing crossing, rests solely in the discretion of the municipal authorities, and is not to be submitted to the jury in an action for injuries caused by a defect in it); Denver *v.* Dunsmore, 7 Colo. 328; Denver *v.* Dean, 10 Colo. 375; Denver *v.* Moewes, 15 Colo. App. 28; Denver *v.* Stein, 25 Colo. 125; Denver *v.* Baldasari, 15 Colo. App. 157; Seward *v.* Wilmington, 2 (Marv.) Del. 189; Colbourn *v.* Wilmington, 4 Pen. (Del.) 443; Columbus *v.* Anglin, 120 Ga. 785; Idlett *v.* Atlanta, 123 Ga. 821; Salem *v.* Webster, 192 Ill. 369; Chicago *v.* Kohlhof, 64 Ill. App. 349; Rock Island *v.* Drost, 71 Ill. App. 613; Elgin *v.* Thompson, 98 Ill. App. 358; Beardstown *v.* Clark, 104 Ill. App. 568; Chicago *v.* Gillette, 108 Ill. App. 455; Nokomis *v.* Farley, 113 Ill. App. 161; Muncie *v.* Hey, 164 Ind. 570; Vincennes *v.* Spees, 35 Ind. App. 389; Padelford *v.* Eagle Grove, 117 Iowa, 616; Kansas City *v.* Orr, 62 Kan. 61; Hollitza *v.* Kansas City, 68 Kan. 157; Louisville *v.* Johnson (Ky.), 69 S. W. Rep. 803; West Kentucky Tel. Co. *v.* Pharis (Ky.), 78 S. W. Rep. 917; Clay City *v.* Abner (Ky.), 82 S. W. Rep. 276; Blume *v.* New Orleans, 104 La. 345; Pierce *v.* Wilmington, 2 Md. 306; Magaha *v.* Hagerstown, 95 Md. 62; Leslie *v.* Grand Rapids, 120 Mich. 28; Lee *v.* Port Huron, 128 Mich. 533; Bieber *v.* St. Paul, 87 Minn. 35; Sumner *v.* Northfield, 96 Minn. 107; Hesselbach *v.* St. Louis, 179 Mo. 505; Haxton *v.* Kansas City, 190 Mo. 53; Young *v.* Webb City, 150 Mo. 333; St. Louis *v.* Kansas City, 110 Mo. App. 653; Wallis *v.* Westport, 82 Mo. App. 522; Burnes *v.* St. Joseph, 91 Mo. App. 489; Miller *v.* Canton, 112 Mo. App. 322; Anderson *v.* Albion, 64 Neb. 280; Plainview *v.* Mendelson, 65 Neb. 85; Weidman *v.* New York, 176 N. Y. 536; Morrison *v.* Syracuse, 45 N. Y. App. Div. 421; Vandeskie *v.* New York, 89 N. Y. App. Div. 625; Coolidge *v.* New York, 99 N. Y. App. Div. 175; Morris *v.* Interurban St. R. Co., 100 N. Y. App. Div. 295; Kopper *v.* Yonkers, 110 N. Y. App. Div. 747; Ibbeken *v.* New York, 94 N. Y. Supp. 568; Neal *v.* Marion, 129 N. Car. 345; Gagnier *v.* Fargo, 11 N. Dak. 73; Norman *v.* Teel, 12 Okla. 69; Durbin *v.* Napoleon, 21 Ohio Cir. Ct. R. 160; Murphy *v.* Dayton, 7 Ohio N. P. 227; Rick *v.* Wilkes-Barre, 9 Pa. Super. Ct. 399; Dallas *v.* Moore (Tex. Civ. App.), 74 S. W. Rep. 95; Waggener *v.* Point Pleasant, 42

§ 1712 (1020). **Ground of the Liability; Notice; Contributory Negligence; Damages.** — The *ground of the action* is either *positive misfeasance* on the part of the corporation, its officers, or servants, or by others under its authority, in doing acts which cause the streets to be out of repair, in which case no other *notice* to the corporation of the condition of the street is essential to its liability; or the ground of the action is the *neglect of the corporation* to put the streets in repair, or to remove obstructions therefrom, or to remedy causes of danger occasioned by the wrongful acts of others, in which cases *notice of the condition of the street*, or what is equivalent to notice, is necessary, as will presently be stated, to give to the person injured a right of action against the corporation, unless, indeed, the matter be otherwise regulated by statute.[1] It is also essential to liability

W. Va. 798; Parrish *v.* Huntington, 57 W. Va. 286; Peake *v.* Superior, 106 Wis. 403. Cities are held to as great a degree of care, in maintaining their streets, towards a fireman driving over the streets in discharge of his duties, as they are to any other traveller. Kansas City *v.* McDonald, 60 Kan. 481. One who owns a ferry outside of a city, from which public travel is diverted by the failure of the city to keep a certain street in repair, suffers no injury other than that shared by the general public, and is not entitled to damages therefor. Prosser *v.* Ottumwa, 47 Iowa, 509.

[1] AS TO DEGREE OF CARE REQUIRED OF THE PLAINTIFF. Dist. of Columbia *v.* McElligott, 117 U. S. 621, where Mr. Justice *Harlan* said, "He [plaintiff] was under an obligation to exercise due care in protecting himself from personal harm while discharging duties out of which such liability might arise. If he failed to exercise such care; if he exposed himself to dangers that were threatening or so obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the district supervisor of the character alleged (to place a watch over a gravel bank as requested by plaintiff), be guilty of such *contributory negligence* as would defeat his claim for injuries so received." District of Columbia *v.* Haller, 4 App. D. C. 405; Mosheuvel *v.* District of Columbia, 17 App. D. C. 401; Seward *v.* Wilmington, 2 (Marv.) Del. 189; Anderson *v.* Wilmington, 2 Pen. (Del.) 28; Colbourn *v.* Wilmington, 4 Pen. (Del.) 443; Cook *v.* Atlanta, 94 Ga. 613; Idlett *v.* Atlanta, 123 Ga. 821; Beardstown *v.* Smith, 150 Ill. 169; Spring Valley *v.* Gavin, 182 Ill. 232; Alton *v.* English, 69 Ill. App. 197; Mattoon *v.* Worland, 97 Ill. App. 13; Herrin *v.* Newton, 103 Ill. App. 423; Boswell *v.* Wakley, 149 Ind. 64; Salem *v.* Walker, 16 Ind. App. 687; Decatur *v.* Stoops, 21 Ind. App. 397; Citizens St. R. Co. *v.* Ballard, 22 Ind. App. 151; Perry *v.* Cedar Falls, 87 Iowa, 315; Baxter *v.* Cedar Rapids, 103 Iowa, 599; Harvey *v.* Clarinda, 111 Iowa, 528; Finnegan *v.* Sioux City, 112 Iowa, 232; Bender *v.* Minden, 124 Iowa, 685; Kansas City *v.* McDonald, 60 Kan. 481; Junction City *v.* Blades, 59 Kan. 774; Covington *v.* Manwaring, 113 Ky. 592; Whitman *v.* Lewiston, 97 Me. 519; Pierce *v.* Wilmington, 2 Marv. (Del.) 306; Calkins *v.* Springfield, 167 Mass. 68; Flynn *v.* Watertown, 173 Mass. 108; Cloney *v.* Kalamazoo, 124 Mich. 655; Burrell *v.* Greenville, 133 Mich. 235; Oestereich *v.* Detroit, 137 Mich. 415; Stainback *v.* Meridian, 79 Miss. 447; Holloway *v.* Kansas City, 184 Mo. 19; Holding *v.* St. Joseph, 92 Mo. App. 143; Williams *v.* Hannibal, 94 Mo. App. 549; Johnson *v.* St. Joseph, 96 Mo. App. 663; South Omaha *v.* Meyers (Neb.), 92 N. W. Rep. 743; Atkinson *v.* Fisher (Neb.), 93 N. W. Rep. 211; Morrison *v.* Syracuse, 175 N. Y. 523; Walsh *v.* Telegraph Co., 176 N. Y. 163; Scanlon *v.* Watertown, 14 N. Y. App. Div. 1; Rommeney *v.* New York, 49 N. Y. App. Div. 64; Williams *v.* Port Leyden, 62 N. Y. App. Div. 490; Sweet *v.* Poughkeepsie, 97 N. Y. App. Div. 82; Russell *v.* Monroe, 116 N. Car. 720;

that *the plaintiff should have been using reasonable or ordinary care to avoid the accident,* or, in other words, he must be free of any such

Neal *v.* Marion, 129 N. Car. 345; Pinnix *v.* Durham, 130 N. Car. 360; Monroeville *v.* Weihl, 13 Ohio Cir. Ct. R. 689; Newark *v.* McDowell, 16 Ohio Cir. Ct. R. 556; Ohliger *v.* Toledo, 20 Ohio Cir. Ct. R. 142; Durbin *v.* Napoleon, 21 Ohio Cir. Ct. R. 160; Peat *v.* Norwalk, 26 Ohio Cir. Ct. R. 161; Wood *v.* Bridgeport, 143 Pa. 167; Evans *v.* Philadelphia, 205 Pa. 193; Sickels *v.* Philadelphia, 209 Pa. 113; Rick *v.* Wilkes-Barre, 9 Pa. Super. Ct. 399; Bohl *v.* Dell Rapids, 15 S. Dak. 619; Ft. Worth *v.* Johnson, 84 Tex. 137; Palestine *v.* Hassell, 15 Tex. Civ. App. 519; Luke *v.* El Paso (Tex. Civ. App.), 60 S. W. Rep. 363; Cowie *v.* Seattle, 22 Wash. 659; Berg *v.* Milwaukee, 83 Wis. 599; Rhyner *v.* Menasha, 107 Wis. 201; Smith *v.* Cairo, 48 Ill. App. 166 (cripple). *Cripple* must exercise higher degree of care. Mt. Vernon *v.* Brooks, 39 Ill. App. 426. *Deaf man.* Champaign *v.* White, 38 Ill. App. 233; *Lady 65 years old.* Toledo *v.* Center, 16 Ohio Cir. Ct. R. 308; Craig *v.* Sedalia, 63 Mo. 417; Evans *v.* Utica, 69 N. Y. 166. A person using a street need not be vigilant to discover dangerous obstructions, but may rely upon the assumption that the corporation has performed its duty, and he is, in that respect, exposed to no danger from its neglect. Ward *v.* District of Columbia, 24 App. D. C. 524; Wilkins *v.* Wilmington, 2 Marv. (Del.) 132; East Dubuque *v.* Burhyte, 74 Ill. App. 99; Citizens St. R. Co. *v.* Ballard, 22 Ind. App. 151; Cox *v.* Des Moines, 111 Iowa, 646; Topeka Water Co. *v.* Whiting, 58 Kan. 639; Campbell *v.* Boston, 189 Mass. 7; Haxton *v.* Kansas City, 190 Mo. 53; Laverdure *v.* New York, 28 N. Y. App. Div. 65; Heckmen *v.* Evenson, 7 N. Dak. 173; Gillard *v.* Chester, 212 Pa. 338; Pettengill *v.* Yonkers, 116 N. Y. 558; Albritton *v.* Huntsville, 60 Ala. 486; Fallen *v.* Boston, 3 Allen (Mass.), 38; Gilman *v.* Deerfield, 15 Gray (Mass.), 577; Fogg *v.* Nahant, 106 Mass. 278; Damon *v.* Scituate (travelling on wrong side of road), 119 Mass. 66 (1875); Griffin *v.* New York, 9 N. Y. 456; Munger *v.* Tonawanda R. Co., 4 N. Y. 349; Tonawanda R. Co. *v.* Munger, 5 Denio, 255, and cases cited; Cobb *v.* Standish (*woman* driving), 14 Me. 198; Coombs *v.* Purrington (walking in carriage-way), 42 Me. 332; Centralia *v.* Krouse, 64 Ill. 19; Harper *v.* Milwaukee, 30 Wis. 365; Ripon *v.* Bittel, 30 Wis. 614; Requa *v.* Rochester, 45 N. Y. 129; Davenport *v.* Ruckman, 37 N. Y. 568; Todd *v.* Troy, 61 N. Y. 506; Diveny *v.* Elmira, 51 N. Y. 506; Beatty *v.* Gilmore, 16 Pa. St. 463; Seward *v.* Milford, 21 Wis. 485; Weisenberg *v.* Appleton, 26 Wis. 56; Murphy *v.* Dean, 101 Mass. 455; Wright *v.* Templeton, 132 Mass. 49 (partly blind horse); Norris *v.* Litchfield, 35 N. H. 271; Winn *v.* Lowell (plaintiff with poor sight), 1 Allen (Mass.), 177; Hill *v.* Glenwood, 124 Iowa, 475. *Blind man.* Franklin *v.* Harter, 127 Ind. 446; Foy *v.* Winston, 126 N. Car. 381; Homewood *v.* Hamilton, 1 Ont. Law Rep. (Can.) 266; Lynch *v.* Smith (injury to child), 104 Mass. 52; Hyde *v.* Jamaica, 27 Vt. 442, 443; Minick *v.* Troy, 83 N. Y. 514; McGuire *v.* Spence, 91 N. Y. 303; Bovee *v.* Danville, 53 Vt. 183; Brennan *v.* Friendship, 67 Wis. 223; Parish *v.* Eden, 62 Wis. 272; Boulder *v.* Niles, 9 Colo. 415; Peoria *v.* Simpson, 110 Ill. 294; Yahn *v.* Ottumwa, 60 Iowa, 429 (husband driving); Wilson *v.* Atlanta, 63 Ga. 291; McLaury *v.* McGregor, 54 Iowa, 717; Osborne *v.* Hamilton, 29 Kan. 1; Donoho *v.* Vulcan Iron Works, 75 Mo. 401 (infant playing in street); Schindler *v.* Schroth, 146 Cal. 433; Ottawa *v.* Hayne, 114 Ill. App. 21, aff'd 214 Ill. 45; Rea *v.* Sioux City, 127 Iowa, 615; Jewell City *v.* Van Meter, 70 Kan. 887, 79 Pac. Rep. 149; Keyes *v.* Second Baptist Church, 99 Me. 308; Harvey *v.* Malden, 188 Mass. 133; Coffey *v.* Carthage, 186 Mo. 573; Morris *v.* Interurban St. R. Co., 100 N. Y. App. Div. 295; Easton *v.* Philadelphia, 26 Pa. Super. Ct. 517; Collins *v.* Janesville, 111 Wis. 348. *Child playing.* District of Columbia *v.* Boswell, 6 App. D. C. 402; Augusta *v.* Tharpe, 113 Ga. 152; Waverly *v.* Reesor, 93 Ill. App. 649; Crawford *v.* Wilson & B. Mfg. Co., 8 N. Y. Misc. 48; Ricketts *v.* Markdale, 31 Ont. Rep. (Can.) 610. *Child playing* on defective sidewalk. Caskey *v.* La Belle, 100 Mo. App. 590. The mere fact that a *child* was playing on the sidewalk when injured did not exonerate the city from liability.

fault or neglect on his part as will in actions for negligence defeat a recovery. *Actual damages only* can in general be recovered. The

Straub *v.* St. Louis, 175 Mo. 413. *Child walking backwards.* Chicago *v.* McCrudden, 92 Ill. App. 257. *Infant 7 years old.* Reed *v.* Madison, 83 Wis. 171. 12-year-old boy. Brennan *v.* New York, 67 Hun (N. Y.), 648, 51 N. Y. 617. Degree of care required of a boy. Stern *v.* Bensieck, 161 Mo. 146. Care required of a child. Casey *v.* Malden, 163 Mass. 507; Strudgeon *v.* Sand Beach, 107 Mich. 496. Boy playing. Graham *v.* Boston, 156 Mass. 75; *infra*, § 1719. It is the duty of plaintiff, when he is walking at night on streets which are unusually icy, to use more than ordinary care. Denver *v.* Hubbard, 29 Colo. 529; Hursen *v.* Chicago, 85 Ill. App. 298; Rogers *v.* Rome, 96 N. Y. App. Div. 427; Rockford *v.* Hildebrand, 61 Ill. 155. See Merrill *v.* Portland, 4 Cliff. C. C. 138; Shearm. & Red. Neg. (4th ed.) §§ 375 *et seq.* *Crossing a street* at a place other than a crossing is not negligence *per se.* Bell *v.* Clarion, 115 Iowa, 357, 88 N. W. Rep. 824.

PLAINTIFF'S KNOWLEDGE OF DEFECT, EFFECT OF. *Supra*, § 1697; Mt. Vernon *v.* Dusouchett, 2 Ind. 587; Farnum *v.* Concord, 2 N. H. 392; Reed *v.* Northfield, 13 Pick. (Mass.) 94; Wheeler *v.* Westport, 30 Wis. 392; Aurora *v.* Pulfer, 56 Ill. 270; Smith *v.* St. Joseph, 45 Mo. 449; Mahoney *v.* Metropolitan R. Co., 104 Mass. 73; Humphreys *v.* Armstrong County, 56 Pa. St. 204; Durkin *v.* Troy, 61 Barb. 437; Weed *v.* Balston, 76 N. Y. 329; Estelle *v.* Lake Crystal, 27 Minn. 243; McKeigue *v.* Janesville, 68 Wis. 50; Strong *v.* Stevens Point, 62 Mis. 255; Lowell *v.* Watertown, 58 Mich. 568; Loewer *v.* Sedalia, 77 Mo. 431; Dubois *v.* Kingston, 102 N. Y. 219; Bullock *v.* New York, 99 N. Y. 654; Altoona *v.* Lotz, 114 Pa. St. 238; Crescent *v.* Anderson, 114 Pa. St. 643; Gosport *v.* Evans, 112 Ind. 133; Bruker *v.* Covington, 69 Ind. 33; Munger *v.* Marshalltown, 56 Iowa, 216; Maultby *v.* Leavenworth, 28 Kan. 745; Corlett *v.* Leavenworth, 27 Kan. 673; McKenzie *v.* Northfield, 30 Minn. 456; District of Columbia *v.* Moulton, 182 U. S. 576; District of Columbia *v.* Crumbaugh, 13 App. D. C. 553; Swart *v.* District of Columbia, 17 App. D. C. 407; Lord *v.* Mobile, 113 Ala. 360; Davis *v.* California, &c. R. Co., 105 Cal. 131; Highlands *v.* Raine, 23 Colo. 295; Colbourn *v.* Wilmington, 4 Pen. (Del.) 443; Sheats *v.* Rome, 92 Ga. 535; Columbus *v.* Griggs, 113 Ga. 597; Giffen *v.* Lewiston, 6 Idaho, 231; Clayton *v.* Brooks, 150 Ill. 97; Streator *v.* Chrisman, 182 Ill. 215; Altamont *v.* Carter, 196 Ill. 286; Matton *v.* Faller, 217 Ill. 273; Springfield *v.* Rosenmeyer, 52 Ill. App. 301; Sumner *v.* Scaggs, 52 Ill. App. 551; Coffeen *v.* Lang, 67 Ill. App. 359; Waverly *v.* Henry, 67 Ill. App. 407; Noble *v.* Hanna, 74 Ill. App. 564; Chicago *v.* Fitzgerald, 75 Ill. App. 174; Chicago *v.* Richardson, 75 Ill. App. 198; East St. Louis *v.* Donahue, 77 Ill. App. 574; Streator *v.* Chrisman, 82 Ill. App. 24; Litchfield *v.* Anglin, 83 Ill. App. 55; Chicago *v.* McCabe, 93 Ill. App. 288; Savanna *v.* Trusty, 98 Ill. App. 277; Dehlinger *v.* Chicago, 100 Ill. App. 314; Lockport *v.* Licht, 113 Ill. App. 613; Ft. Wayne *v.* Breese, 123 Ind. 581; Fowler *v.* Linquist, 138 Ind. 566; Huntington *v.* Folk, 154 Ind. 91; Lyon *v.* Logansport, 9 Ind. App. 21; Indianapolis *v.* Marold, 25 Ind. App. 428; Mishawaka *v.* Kirby, 32 Ind. App. 233; Frankfort *v.* Coleman, 19 Ind. App. 368; Huntingburg *v.* First, 22 Ind. App. 66; Graham *v.* Oxford, 105 Iowa, 705; Marshall *v.* Belle Plaine, 106 Iowa, 508; Keyes *v.* Cedar Falls, 107 Iowa, 509; Hoover *v.* Mapleton, 110 Iowa, 571; Sachra *v.* Manilla, 120 Iowa, 562, 95 N. W. Rep. 198; Templin *v.* Boone, 127 Iowa, 91; Horton *v.* Trompeter, 53 Kan. 150; Ottawa *v.* Black, 10 Kan. App. 439; Garnett *v.* Hamilton, 69 Kan. 866; Henderson *v.* Burke (Ky.), 44 S. W. Rep. 422; West Kentucky Tel. Co. *v.* Pharis (Ky.), 78 S. W. Rep. 917; Lancaster *v.* Walter (Ky.), 80 S. W. Rep. 189; Norwood *v.* Somerville, 159 Mass. 105; Dipper *v.* Milford, 167 Mass. 555; St. Germain *v.* Fall River, 177 Mass. 550; Fox *v.* Chelsea, 171 Mass. 297; Dittrich *v.* Detroit, 98 Mich. 245; Schwingschlegel *v.* Monroe, 113 Mich. 683; Urtel *v.* Flint, 122 Mich. 65; Howey *v.* Fisher, 122 Mich. 43; Vergin *v.* Saginaw, 125 Mich. 499; King *v.* Colon Tp., 125 Mich. 511; Belyea *v.* Port Huron, 136 Mich. 504; Maloy *v.* St. Paul, 54 Minn. 398; Taylor *v.* Mankato, 81 Minn. 276; Friday *v.* Moorhead, 84 Minn. 273; Lyons *v.* Red

case would be exceptional, indeed, when the plaintiff could properly recover vindictive, or more than compensatory damages.[1]

Wing, 76 Minn. 20; Graney *v.* St. Louis, 141 Mo. 180; Wheat *v.* St. Louis, 179 Mo. 572; Chilton *v.* St. Joseph, 143 Mo. 192; Culverson *v.* Maryville, 67 Mo. App. 343; Waltemeyer *v.* Kansas City, 71 Mo. App. 354; Rusher *v.* Aurora, 71 Mo. App. 418; Boulton *v.* Columbia, 71 Mo. App. 519; Jennings *v.* Kansas City, 105 Mo. App. 677; South Omaha *v.* Taylor (Neb.), 96 N. W. Rep. 209; Kleng *v.* Buffalo, 156 N. Y. 700; McPherson *v.* Buffalo, 13 N. Y. App. Div. 502; Richardson *v.* Syracuse, 41 N. Y. App. Div. 118; Beck *v.* Buffalo, 50 N. Y. App. Div. 621; Smith *v.* Ryan, 8 N. Y. Supp. 853; Neddo *v.* Ticonderoga, 28 N. Y. Supp. 887; Neal *v.* Marion, 126 N. Car. 412; Moon *v.* Middletown, 14 Ohio Cir. Ct. R. 498; Bond Hill *v.* Atkinson, 16 Ohio Cir. Ct. R. 470; Ohliger *v.* Toledo, 20 Ohio Cir. Ct. R. 142; Leber *v.* Kelley Transp. Co., 21 Ohio Cir. Ct. R. 773; Pittman *v.* El Reno, 4 Okla. 638; Manross *v.* Oil City, 178 Pa. St. 276; Steck *v.* Allegheny, 213 Pa. 573; Rick *v.* Wilkes-Barre, 9 Pa. Super. Ct. 399; Knoxville *v.* Cox, 103 Tenn. 368; San Antonio *v.* Porter, 24 Tex. Civ. App. 444; Brown *v.* Bachman (Tex. Civ. App.), 72 S. W. Rep. 622; Dallas *v.* Moore (Tex. Civ. App.), 74 S. W. Rep. 95; Dwyer *v.* Salt Lake City, 19 Utah, 521; Charlottesville *v.* Stratton's Adm'r, 102 Va. 95; Cowie *v.* Seattle, 22 Wash. 659; Koch *v.* Ashland, 88 Wis. 603; De Pere *v.* Hibbard, 104 Wis. 666; Collins *v.* Janesville, 107 Wis. 436; Collins *v.* Janesville, 111 Wis. 348; Lyon *v.* Grand Rapids, 121 Wis. 609; Gunlack *v.* Montreal, 17 Rap. Jud. Que., C. S., 294; *post*, § 1719, and note.

Where a city had allowed an excavation to be made in a street which had never been used as a public highway or opened for travel, and the plaintiff *with knowledge of the excavation* turned his horse loose in the vicinity, which, while running at large contrary to law, fell into the excavation and was injured, it was held that he could not recover. Gribble *v.* Sioux City, 38 Iowa, 390. Where plaintiff *knew of a defect* in a sidewalk, and that on account of the darkness it was imprudent to go over it, and that there was another safe walk which she might use, but persisted in going over it, these facts were held to establish contributory negligence. Parkhill *v.* Brighton, 61 Iowa, 103; McGinty *v.* Keokuk, 66 Iowa, 725; Hollingsworth *v.* Ft. Dodge, 125 Iowa, 627. Further as to plaintiff's knowledge of the defect, Shearm. & Red. Neg. (4th ed.) 376.

Ordinary care is such care as is usually exercised under like circumstances by persons of average prudence. Whether it is a want of ordinary care for a *blind man* to travel upon the highway on foot, unattended, is a question of fact to be determined by the jury, in view of the circumstances of the individual case. Where a blind man in the daytime walked off the side of an unobstructed bridge sixteen feet in width, which was defective for want of a rail, and suffered an injury, which would not have happened but for his blindness, the court cannot say, as matter of law, that his fault contributed to the accident; but it is for the jury, after considering his familiarity with the road, his ability, arising from the increased acuteness, fidelity, and power of his other senses, or otherwise, and all the circumstances of the case, to say whether he was guilty of carelessness in attempting to pass the bridge without a guide. Lockport *v.* Licht, 113 Ill. App. 613; Ham *v.* Lewiston, 94 Me. 265; Lewis *v.* Independence, 54 Mo. App. 183; Carter *v.* Nunda, 55 N. Y. App. Div. 501; Reed *v.* Schuylkill Haven, 22 Pa. Super. Ct. 27. *A blind person* is not bound to exercise any higher degree of care to avoid accident from a defective condition of the street than a person having the full sense of sight. Hill *v.* Glenwood, 124 Iowa, 475. *Adult playing with a dog* on the street is not using ordinary care. Jackson *v.* Greenville, 72 Miss. 220; Sleeper *v.* Sandown, 52 N. H. 244; Salem *v.* Goller, 76 Ind. 291. The fact that with *knowledge of the defect* the plaintiff voluntarily attempted to pass it, is not conclusive evidence of the want of due care, but is for the jury. Lyman *v.* Amherst, 107 Mass. 339.

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[1] MEASURE OF DAMAGES; WHAT JURY MAY CONSIDER. South Omaha *v.* Taylor (Neb.), 96 N. W. Rep. 209; Chicago *v.* Langlass, 52 Ill. 256;

§ 1713 (1022). **Defective Streets; Is the American Doctrine as to Implied Liability sound?** — The doctrine of the preceding sections

See also Whittaker *v.* West Boylston, 97 Mass. 273; Frost *v.* Waltham, 12 Allen, 85; Rindge *v.* Colrain, 11 Gray, 157; Pollard *v.* Woburn, 104 Mass. 84. Compare Riehst *v.* Goshen, 42 Ind. 339; Rice *v.* Des Moines, 40 Iowa, 638; Emporia *v.* Schmidling, 33 Kan. 485; Nichols *v.* Minneapolis, 33 Minn. 430; Hopkins *v.* Rush River, 70 Wis. 10; Albion *v.* Hetrick, 90 Ind. 545; Hartman *v.* Muscatine, 70 Ind. 511; Ross *v.* Davenport, 66 Iowa, 548. In Prince Georges County *v.* Burgess, 61 Md. 29, *Irving*, J., after citing cases, said, "The doctrine to be extracted from all these cases is, that if the defect in the road or bridge be such as to make the same practically impassable, a *person takes all the hazard*, who, with such knowledge, attempts to pass over the road or bridge, and will not be redressed if he is injured. But if the defect be one which does not render the road wholly unfit for use, or bridge substantially impassable; and is only a defect which might result injuriously if not shunned, in such case it cannot be that a citizen, with business, must remain at his home, and may not make any attempt to use the road or bridge as his necessity requires." Coolidge *v.* New York, 99 N. Y. App. Div. 175.

Though plaintiff have *knowledge of a defect*, a city cannot defend merely by showing that other streets which he could have used were safe. Evans *v.* Iowa City, 125 Iowa, 202; Considine *v.* Dubuque, 126 Iowa, 283; Dallas *v.* Muncton, 37 Tex. Civ. App. 112; McClammy *v.* Spokane, 36 Wash. 339; Fulliam *v.* Muscatine, 70 Iowa, 436; compare Parkhill *v.* Brighton, 61 Iowa, 103, and Walker *v.* Decatur County, 67 Iowa, 307 (bridge). But see as to passing over *defective or icy sidewalk*, which might easily have been avoided, Wilson *v.* Charlestown, 8 Allen (Mass.), 137; Horton *v.* Ipswich, 12 Cush. (Mass.) 488; Centralia *v.* Krouse, 64 Ill. 19; Craig *v.* Sedalia, 63 Mo. 417; Albritton *v.* Huntsville, 60 Ala. 486; Higert *v.* Greencastle, 43 Ind. 574; Alline *v.* LeMars, 71 Iowa, 654; Erie *v.* Magill, 101 Pa. St. 616. Further as to liability in respect of icy sidewalks. Masters *v.* Troy, 50 Hun (N. Y.), 485; Corbett *v.* Troy, 53 Hun, 228; Ney *v.* Troy, 3 N. Y. Supp. 679; s. c. 50 Hun, 604; Tobey *v.* Hudson, 2 N. Y. Supp. 180.

Negligence of the *driver of a vehicle has sometimes been imputed* to the persons riding. Whitman *v.* Lewiston, 97 Me. 519; Graham *v.* Philadelphia, 19 Pa. Super. Ct. 292. But see Michigan City *v.* Boeckling, 122 Ind. 39; Otis *v.* Janesville, 47 Wis. 422; and see Prideaux *v.* Mineral Point, 43 Wis. 513. For a full discussion of this subject, see s. p. Lake View *v.* Miller, 25 Mich. 274. Such negligence will defeat the action. *Ib.* As to *imputed* negligence, see Thompson on Negligence, pp. 222, 1121, 1180 *et seq.*, for full discussion. In *Minnesota* the court, after reviewing the authorities, held that where the plaintiff did not participate in, and had no authority respecting, the management of the vehicle, and was not herself guilty of negligence, the negligence of the driver and owner of the vehicle *could not be imputed* to her. Follman *v.* Mankato, 35 Minn. 522. The contributory negligence of a voluntary carrier not *imputable* to a passenger. Carlisle *v.* Brisbane, 113 Pa. St. 544.

The *husband's knowledge* of the defect, and of his wife's intention to pass over it, held not to defeat an action by the husband and wife for injuries sustained by the wife in consequence of such defect. Street *v.* Holyoke, 105 Mass. 82. The husband cannot give notice of a claim for damages for injuries to his wife. Hubbard *v.* Fayette, 70 Me. 121. Husband held entitled to recover for personal injury to wife by defective sidewalk, she not knowing of the defect and he failing to warn her, the jury finding that under the circumstances the husband was not guilty of negligence in not giving the wife notice of the danger. Nanticoke *v.* Warne, 106 Pa. St. 373.

ONUS IN RESPECT TO PROVING DUE CARE ON PART OF PLAINTIFF IS UPON HIM. Law *v.* Crombie, 12 Pick. 176; Moore *v.* Abbott, 32 Me. 46; *Ib.* 574; Murdock *v.* Warwick, 4 Gray (Mass.), 178, and cases; *Ib.* 395, 397, *per Shaw*, C. J.; Rowell *v.* Lowell, 7 Gray (Mass.),

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Decatur *v.* Fisher, 53 Ill. 407; McGary *v.* Lafayette, 12 Rob. (La.) 668; *Ib.*, 4 La. An. 440; Chicago *v.* Martin, 49 Ill. 241; Atchison *v.* King,

(§§ 1708–1712) *that there is, on the conditions therein stated, an implied civil liability on the part of municipal corporations in respect of defective*

100; Rusch *v.* Davenport, 6 Iowa, 443; Merrill *v.* North Yarmouth, 78 Me. 200; Lockport *v.* Licht, 113 Ill. App. 613; Peat *v.* Norwalk, 26 Ohio Cir. Ct. R. 161; Peverly *v.* Boston, 136 Mass. 366, where *Devens*, J., said, "It is not necessary for the plaintiff to prove due care on his part by directly affirmative evidence; the inference of such care may be drawn from the absence of all appearance of fault, either positive or negative, on his part, in the circumstances under which the injury was received." *Contra*, Beatty *v.* Gilmore, 16 Pa. St. 463, where the subject is carefully considered; Erie *v.* Schwingle, 22 Pa. St. 384. In *Maryland* the *onus* of proving contributory negligence on the part of the plaintiff rests on the defendant. Prince George's County *v.* Burgess, 61 Md. 29; Washington & G. R. Co. *v.* Gladmon, 15 Wall. (U. S.) 401. The United States Supreme Court in this case decided that where the question is not controlled by statute, "contributory negligence" on the part of the plaintiff, unless it appears on the plaintiff's own evidence, is a defence to be proved by the defendant. *Ante*, § 1698. *Post*, § 1719, where the subject is discussed. Shearm. & Red. Neg. (4th ed.) §§ 107, 108, and cases; 2 Thomps. Neg. 1175, 1232, 1235.

EFFECT OF PLAINTIFF'S VIOLATION OF ORDINANCES AND SUNDAY LAW ON HIS RIGHT OF RECOVERY. Pueblo *v.* Smith, 3 Colo. App. 386; Atchison *v.* Acheson, 9 Kan. App. 33; Carswell *v.* Wilmington, 2 Marv. (Del.) 360; Mullen *v.* Owosso, 100 Mich. 103; Davidson *v.* Portland, 69 Me. 116; Norris *v.* Litchfield, 35 N. H. 271, 918; Baker *v.* Portland, 58 Me. 199; 10 Am. L. Reg. (N. S.) 559, and note of Judge *Redfield*, denying Heland *v.* Lowell, 3 Allen (Mass.), 407; Steele *v.* Burkhardt, 104 Mass. 59; Sutton *v.* Wauwatosa, 29 Wis. 21; Smith *v.* Boston & M. R. Co., 120 Mass. 490, and cases cited in note; Commonwealth *v.* Adams, 114 Mass. 323; Johnson *v.* Irasburgh, 47 Vt. 28; Lyons *v.* Dosolette, 124 Mass. 387; Shearm. & Red. Neg. (4th ed.) § 104, and cases; Platz *v.* Cohoes, 89 N. Y. 219; Wentworth *v.* Jefferson, 60 N. H. 168, where the rule is stated to be that recovery may be had if the violation of the Sunday law does not contribute to the accident. The *mere fact* that plaintiff was *returning from a bawdy-house* when he was injured, he not being guilty of contributory negligence, will not affect his right to recover. McVoy *v.* Knoxville, 85 Tenn. 19.

Effect of INTOXICATION *of plaintiff*. Alger *v.* Lowell, 3 Allen (Mass.), 402; Hubbard *v.* Mason, 60 Iowa, 400; Monk *v.* New Utrecht, 104 N. Y. 552; Seymer *v.* Lake, 66 Wis. 651; Cassedy *v.* Stockbridge, 21 Vt. 391; Fitzgerald *v.* Weston, 52 Wis. 354; Shearm. & Red. Neg. (4th ed.) §§ 93, 94, 110; Thomps. Neg. 388, 430, 1174, 1203; Ott *v.* Buffalo, 131 N. Y. 594.

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9 Kan. 550; Raymond *v.* Lowell, 6 Cush. (Mass.) 524, 537; Beecher *v.* Derby Br. & F. Co., 24 Conn. 491; Masters *v.* Warren, 27 Conn. 293; Shartle *v.* Minneapolis, 17 Minn. 308, where a verdict for $4,000 was sustained; Farrelly *v.* Cincinnati, 2 Disney (Ohio), 516; Peru *v.* French (married woman), 55 Ill. 317, 318; Pennsylvania & O. Canal Co. *v.* Graham, 63 Pa. St. 290; Sheel *v.* Appleton, 49 Wis. 125 (bodily and mental suffering may be considered); Wylie *v.* Wausau, 48 Wis. 506 (decrease of physician's practice); Scott *v.* Montgomery, 95 Pa. St. 444; Wilson *v.* Wheeling, 19 W. Va. 323, 324; Reed *v.* Belfast, 20 Me. 246; Nebraska City *v.* Campbell, 2 Black (U. S.), 590; Collins *v.* Council Bluffs, 32 Iowa, 324 (where a verdict for $15,000 was sustained; *Cole*, J., dissented, but dissent does not appear); Fleming *v.* Shenandoah, 71 Iowa, 456 (pain and suffering considered an element); Galveston *v.* Barbour, 62 Tex. 172 (mental suffering of parents upon death of child not an element of damages); Crete *v.* Childs, 11 Neb. 252 (damages caused by negligence of plaintiff in employing medical aid not allowed); McNamara *v.* Clintonville, 62 Wis. 207; Page *v.* Sumpter, 53 Wis. 652; Luck *v.* Ripon, 52 Wis. 196; Ripon *v.* Bittel, 30 Wis. 614; 2 Thomps. Neg. 1266–1271.

As to liability to EXEMPLARY *damages*. Chicago *v.* Langlass, 52 Ill. 256; Decatur *v.* Fisher (denying right of jury to give exemplary damages), 53 Ill. 407. It is difficult to conceive of a

streets and sidewalks — has been learnedly and vigorously combated in a judgment of the Supreme Judicial Court of Massachusetts, de-

case which would justify exemplary damages against a municipal corporation. Chicago *v.* Martin, 49 Ill. 241; Chicago *v.* Kelly, 69 Ill. 475; Ehrgott *v.* New York, 96 N. Y. 264; Hunt *v.* Booneville, 65 Mo. 620; 2 Thomps. Neg. 1265. Text cited and approved, Richmond *v.* Courtney, 32 Gratt. (Va.) 792; Centreville *v.* Woods, 57 Ind. 192. See also Elizabethtown, L. & B. S. R. Co. *v.* Combs, 10 Bush, 382; Parsons *v.* Lindsay, 26 Kan. 426; Barbour County *v.* Horn, 48 Ala. 566; Ottawa *v.* Sweely, 65 Ill. 434; Prosser *v.* Ottumwa, 47 Iowa, 509. *Annuity tables* held admissible to prove the probable length of life of deceased. McKeigue *v.* Janesville, 68 Wis. 50; Mulcairns *v.* Janesville, 67 Wis. 24. The *question of the measure of damages* is one that has produced more difficulty than perhaps any other topic in the law. *Per Wilde*, B., in Gee *v.* Lancashire & Y. R. Co., 6 H. & N. 211. See also Rowley *v.* London & N. W. R. Co., L. R. 8 Ex. 221. "We have no means of ascertaining by a fixed rule what shall be the limit of damages in such a case (action for negligence). There are no principles which will apply equally to animals, goods, and passengers. Damages in such a case must be left to the common sense of the jury, assisted by the presiding judge." *Per Mellor*, J., in Fair *v.* London & N. W. R. Co., 21 L. T. R. N. S. 326. See also Collins *v.* Council Bluffs, 32 Iowa, 324; Chicago *v.* Martin, 49 Ill. 241. "It would be most unjust if, whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount that they think an equivalent for the mischief done. . . . Scarcely any sum would compensate a laboring man for the loss of a limb; yet you do not in such a case give him enough to maintain him for life." *Per Parke*, B., in Armsworth *v.* Southeastern R. Co., 11 Jur. 758, cited in 18 Q. B. 104. "It is very true that cases sometimes occur in which a jury, being over-anxious to fully compensate a party, give damages so great as to induce the court to interfere. In the great majority of cases, however, I am satisfied with the common-sense views upon which they act." *Per Cockburn*, C. J., in Fair *v.* London & N. W. R. Co., 21 L. T. N. S. 326, 327. The rule is that the damages should be such as to furnish a *reasonable compensation* for the injury sustained. Chicago *v.* Langlass, 52 Ill. 256. See also Decatur *v.* Fisher, 53 Ill. 407; Joliet *v.* Conway, 119 Ill. 489. In assessing the compensation to a person injured through the negligence of a municipal corporation, the jury should take into consideration two things, — first, the pecuniary loss he sustains by the accident; second, the injury he sustains in his person, or his physical capacity for enjoying life. When they come to the consideration of pecuniary loss, they have to take into account not only his present loss, but his incapacity to earn a future improved income. Then, as to the second ground: undoubtedly health is the greatest of all physical blessings; and to say that when it is utterly shattered no compensation is to be made for it, is really perfectly extravagant. *Per Cockburn*, C. J., in Fair *v.* London & N. W. R. Co., 21 L. T. N. S. 326, 327. In *Maine* a person can recover only for "bodily injury" or "damage to property." Weeks *v.* Shirley, 33 Me. 271; Verrill *v.* Minot, 31 Me. 299; Mason *v.* Ellsworth, 32 Me. 271; Brown *v.* Watson, 47 Me. 161; State *v.* Hewett, 31 Me. 396, 400; Reed *v.* Belfast, 20 Me. 246; Sanford *v.* Augusta, 32 Me. 536; Stover *v.* Blue Hill, 51 Me. 439. So, in *Connecticut* and *Massachusetts*, the recovery can be only for damages "to the person or property." Chidsey *v.* Canton, 17 Conn. 475; Beecher *v.* Derby Br. & F. Co., 24 Conn. 491; Canning *v.* Williamstown, 1 Cush. (Mass.) 451; Harwood *v.* Lowell, 4 Cush. 310. In *Vermont*, however, any special damage sustained is recoverable. Bailey *v.* Fairfield, Brayt. (Vt.) 126. So, in *Wisconsin:* Weisenberg *v.* Appleton, 26 Wis. 56. If the action be by the *personal representative*, the jury, in estimating the damages, are restricted to compensation for pecuniary loss only, and cannot take into consideration mental or bodily suffering. Armsworth *v.* Southeastern R. Co., 11 Jur. 758; Blake *v.* Midland R. Co., 18 Q. B. 93; Franklin *v.* Southeastern R. Co., 3 H. & N. 211; Ducksworth *v.* Johnson, 4 H. & N. 653; Dalton *v.* Southeastern R. Co., 4 C. B. N. S. 296; Pym *v.* Great Northern R. Co., 2 B. & S. 759; s. c. 4 B. & S. 396; Secord *v.*

livered by the chief justice, who in his exhaustive discussion refers to nearly all of the leading English and American cases on the subject.[1] He thus sums up the result of his review of the American decisions: "There is no case in which the neglect of a duty imposed by *general law* upon all cities and towns alike has been held to sustain an action by a person injured thereby against a city, when it would not against a town. The only decisions of the State courts, in which the mere grant by the legislature of a city charter, authorizing and requiring the city to perform certain duties, has been held sufficient to render the city liable to a private action for neglect in their performance, when a town would not be so liable, are in New York, since 1850, and in Illinois. The cases in the Supreme Court of the United States, in which private actions have been sustained against a city for neglect of a duty imposed upon it by law, are of two classes: 1. Those which arose under the peculiar terms of special charters, in the District of Columbia, as in Weightman *v.* Washington and Barnes *v.* District of Columbia, or in a Territory of the United States, as in Nebraska City *v.* Campbell. 2. Those which, as in New York *v.* Sheffield, and Chicago City *v.* Robbins, arose in New York or in Illinois, and in which the general liability of the city was not denied or even discussed, and apparently could not have been, consistently with the rule by which the Supreme Court of the United States, upon questions of the construction and effect of the Constitution and statutes of a State, follows the latest decisions of the highest court of that State, even if like words have been differently construed in other States. In the absence of such binding decisions, we find it difficult to reconcile the view, that the mere acceptance of a municipal charter is to be considered as conferring such a benefit upon the corporation as will render it liable to private action for neglect of the duties thereby imposed upon it, with the doctrine that the purpose of the creation of municipal corporations by the State is to exercise a part of its powers of government, — a doctrine universally recognized, and which has nowhere been more strongly asserted

Great Western Ry. Co., 15 Up. Can. Q. B. 631; Morley *v.* Great Western Ry. Co., 16 Up. Can. Q. B. 504; Pennsylvania R. Co. *v.* McCloskey, 23 Pa. St. 526; Quin *v.* Moore, 15 N. Y. 432; Lucas *v.* New York, 21 Barb. (N. Y.) 245; Safford *v.* Drew, 3 Duer (N. Y.), 627; Soule *v.* New York & N. H. R. R., 24 Conn. 575; Rowley *v.* London & N. W. Ry. Co., L. R. 8 Ex. 221; Johnson *v.* Hudson River R. R. Co., 6 Duer (N. Y.), 634, 648; Harris. Munic. Man. (5th ed.) p. 497, from which the foregoing references to the decisions in Canada are extracted. See also Biggar, Munic. Man. (Canada, 1900) 824 *et seq.*

[1] Hill *v.* Boston, 122 Mass. 344, opinion by *Gray*, C. J., noted *supra*, § 1642. Subject discussed. 18 Am. Law Rev. p. 1008; Shearm. & Red. Neg. §§ 258, 288–290; *ante*, § 1646; *post*, §§ 1715, 1716.

than by the Supreme Court of the United States.[1] But, however, it may be where the duty in question is imposed by the charter itself, the examination of the authorities confirms us in the conclusion that a duty, which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, pecuniarily or otherwise, but upon the city as the representative and agent of the public, and for the public benefit, and by a general law applicable to all cities and towns in the commonwealth, and a breach of which in the case of a town would give no right of private action, is a duty owing to the public alone; and a breach thereof by a city, as by a town, is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby."

§ 1714 (1023). **Same Subject; Author's Comment.** — In reference to this subject, it may be remarked that there is undoubtedly some difficulty in defining the logical ground on which to base the doctrine of the implied liability of municipal corporations proper for defective streets, when such liability is denied as respects counties, and towns without special charters. There is also some apparent, if not real, difficulty in holding that such a liability exists on the part of municipal corporations in reference to streets, without extending it to other duties which are everywhere conceded not to give a private action for their neglect. The courts which hold the doctrine in question also differ as to the reasons on which it rests. Notwithstanding this, it will be found, we think, upon a careful examination of the cases referred to in the preceding sections, *that they do establish the rule therein laid down as respects municipal corporations proper;* and that Mr. Justice Hunt is quite right in saying that, whatever may be the true reason for the rule, "the law in this country must be deemed to be settled in accordance with them."[2] It will also be found, we are quite sure, that the doctrine of such a liability on the part of municipal corporations, organized under special charters or under general incorporation acts, exists in the States very generally, and is not confined to the States of New York and Illinois.

The doctrine works well and is just, since no stimulus to the per-

[1] United States *v.* Baltimore & O. R. R. Co., 17 Wall. (U. S.) 322, 329, *per Hunt*, J.; Laramie *v.* Albany, 92 U. S. 307, 308, *per Clifford*, J.

[2] Barnes *v.* District of Columbia, 91 U. S. 540, 551; noted *ante*, § 1655, note; *ante*, § 1646; 18 Am. Law Rev. 1008. The remark of the learned Justice quoted in the text is as true at the present time, 1911, as it was in 1875 when it was made.

formance of duty is more effectual than the wholesome fear of the verdict of a jury for damages. Municipal corporations as well as private corporations and persons are often most effectually stimulated to the performance of duty through the nerve that reaches the pocket. While it must be admitted to be exceptional, the doctrine may, we think, be vindicated as resting upon the special nature of the duty itself, relating to streets in cities (which have peculiar and local uses distinct from State highways) which are under the direct and exclusive control of the municipal authorities, whose duty in respect of repairs is intrinsically ministerial, and upon the ample means which are supplied for its performance, rather than upon the ideal notion of a contract between the State and the municipality, or upon the other notion of a special consideration received for the supposed implied promise faithfully to discharge the duty imposed by the charter or constituent act of the corporation.

§ 1715 (1023 *a*). **Same Subject; Author's Comment.** — It may be that the doctrine is anomalous. Seemingly it is. But a careful consideration of the subject, particularly of the nature of streets in cities (which have local and special uses not common to State highways in general); of the great and exclusive powers over and concerning streets conferred upon chartered cities, which include the power and duty (sometimes specifically enjoined, and sometimes embraced in more general authority), of keeping them in repair fit for use (which duty is not legislative or judicial, but rather in its nature ministerial); of the adequate provision for raising the revenue or means to discharge the duty, — may, perhaps, show that the anomaly imputed to the doctrine under review is more apparent than real. It may be, and probably is true, that this doctrine is the unconscious product of judicial legislation necessarily evolved in the very work of interpreting the various parts and clauses of charters or legislative acts relating to the powers of municipalities, and the purposes for which such powers were granted. Be it so. Such a function is inherent in every jural system. It constitutes the chief work of the judge, and it is among the most important duties of the judicial office. It has been well observed that in the infinite diversity of subjects which arise for judicial determination, "judgment in most cases consists less in the application of a precise text, than in a combination of several texts, which lead to a decision rather than contain it."[1] Such decision and judgment are the result of the

[1] M. Portalis, Preliminary Discourse on the *projet* of the Code Napoleon. Amos, Science of Law, p. 63.

interpretation of various clauses and texts, with the definite purpose of ascertaining the intention and will of the legislature, in respect of a matter where it is not in terms expressed one way or the other, but is necessarily left to be collected from a consideration of all of the enactments bearing upon it. It is, therefore, no solid objection to the doctrine in question that it is the unperceived or unconscious product of judicial interpretation, or if one pleases to say so, of judicial legislation, since much of the best portions of our jurisprudence and of the jurisprudence of every country has thus originated, and will unavoidably continue thus to originate, as long as the judicial office exists and justice is administered among men. The doctrine itself, under the conditions stated in a previous section,[1] has seemed so reasonable, that it is believed never to have been legislatively repudiated, and it is certain that it has been almost universally adopted. It has in fact become, as above shown, part of the settled jurisprudence of the country.

§ 1716 (1023 *b*). **Same Subject; Comments on Doctrine of Implied Liability as respects Different Classes of Corporations.** — Whether the implied liability in respect of defective highways and streets rests upon the nature of the duty imposed, upon the means supplied for its performance, or upon a sense of public utility, or upon all of these grounds, it is not easy, as above stated, to see why, when the same conditions otherwise exist, the nature of the incorporated instrumentality should make a difference in the result. Whether the instrumentality be a *quasi* corporation such as a road district but with a corporate purse for its purposes, or a county charged with the like duty in respect of highways and having for the effectual discharge thereof the power to raise taxes, or a chartered municipality having like duties and powers over streets within its limits, why, under conditions otherwise the same (there being no statute giving or denying the action), should the two former classes of corporations be not liable while the latter class is liable, for neglect of duty, to an action for damages? It may be after all that there is a substantial difference not readily perceived in the greater efficiency with which the latter class of corporations as actually constituted is able to perform the duty in question. And it may be that this is only another of the many examples with which our jurisprudence abounds, — which abhors generalizations, disregards mere symmetry, and unconsciously and silently embodies the underlying notions of the local communities, — this may be, we suggest,

[1] *Ante*, § 1708.

after all only another example of the fact that logic and law are not always precisely coincident or coterminous; that law is freqently logic limited and circumscribed by a sense of expediency; and that accordingly legislators and courts declare and apply distinctions that are oftentimes easier to feel than to unfold and define, and which do not obviously consist with an indefinite extension and inexorable application of those principles of logic that are apparently applicable to and seemingly control the subject. The foregoing considerations are applicable to all kinds of *quasi* corporations. These are primarily and distinctively State instrumentalities, and the prerogative of partaking of the State's exemption from liability in respect of the exercise of all of their public functions and duties without exception, is one which naturally grows out of the manner and objects of their creation.

§ 1717 (1024). **Where City is directly in Fault.** — Where streets have been rendered *unsafe by the direct act, order, or authority of the municipal corporation* (not acting through independent contractors, the effect of which will be considered presently), no question has been made, or can reasonably exist, as to the liability of the corporation for injuries thus produced, where the person suffering them is without contributory fault, or was using due care.[1] Even

[1] Detroit *v.* Corey (*sewer excavation*), 9 Mich. 165. Compare Detroit *v.* Beckman, 34 Mich. 125, referred to in note, *infra;* Lloyd *v.* New York (*dangerous excavation*), 5 N. Y. 369; Weet *v.* Brockport, 16 N. Y. 161, note; Chicago *v.* Major (*uncovered city cistern in street*), 18 Ill. 349. Approved, but distinguished, Chicago *v.* Starr, 42 Ill. 174 (where the city was held *not liable* for *an injury caused by the fall of a counter, leaning against a fence on a sidewalk*); Dayton *v.* Pease, 4 Ohio St. 80 (in which the city was held liable for damages caused by the *fall of a bridge built upon a defective plan,* furnished by the city engineer); Cincinnati *v.* Stone, 5 Ohio St. 38; Conrad *v.* Ithaca, 16 N. Y. 158; Wendell *v.* Troy, 39 Barb. (N. Y.) 329; Monje *v.* Grand Rapids, 122 Mich. 645; McDonald *v.* Duluth, 93 Minn. 206; New York *v.* Sheffield, 4 Wall. (U. S.) 189; Grant *v.* Brooklyn (*act of a city water commissioner in opening a sewer*), 41 Barb. 381; Baltimore *v.* Pendleton, 15 Md. 12; Pfau *v.* Reynolds, 53 Ill. 212; *infra,* § 1720; Brooks *v.* Somerville, 106 Mass. 271; Covington *v.* Bryant, 7 Bush, 248. City held liable for death of plaintiff's *child by drowning in a deep unguarded ditch in the street.* Chicago *v.* Hesing, 83 Ill. 204; Savannah *v.* Donnelly, 71 Ga. 258 (*excavation made by citizen by permission of the city*); Glantz *v.* South Bend, 106 Ind. 305 (*street crossing composed of planks raised two inches above the level of the sidewalk*). Where a borough authorized a railroad company to carry its track over a street by a bridge at a certain height and afterwards permitted the level of the street to be so raised as to render the *height of the bridge insufficient,* the borough was held liable for damages caused by the bridge being too low, and it was also held that no liability attached to the railroad. Gray *v.* Danbury Bor., 54 Conn. 574.

In Detroit *v.* Beckman, 34 Mich. 125, an injury was caused at night to a traveller as he was driving along one of the streets of the city. An *open sewer* had, some time before, been constructed in the street by the city, which was covered only part of the way, leaving the sewer at the end of the covered portion and within the limits of the travelled portion of the

in those States in which a municipality is not held *impliedly* liable to a private action for neglecting to keep its streets in repair, it is yet held to be liable if it, or its officers under its authority, by positive acts place obstructions on the streets or by such acts otherwise render them unsafe, whereby travellers are injured.[1] Where

street, open and unprotected. Conceding that the city had not covered the sewer to the extent that due care required, it was nevertheless held that the city was not liable. The ground of the decision was that the injury resulted from the *plan* of the work adopted by the city, and that in such cases there is no liability, since the plan is the result of legislative action, and that to create a liability there must be neglect in the proper execution of the plan as distinguished from the plan itself, or the work must result in a direct injury to adjoining property. In Lansing *v.* Toolan, 37 Mich. 152, a similar decision on like grounds was made, holding the city not to be liable where a contractor under it dug a ditch across a street, bridging it only with plank sixteen feet wide, into which a traveller at night was precipitated and injured. It seems to the author, however, as he understands the facts, that these are cases where the street was rendered unsafe for travel by the direct act of the city, or its contractor, and that the city would be held liable in those States in which an implied municipal responsibility is recognized for unsafe streets, which, however, is not the case in *Michigan*. Detroit *v.* Blackeby, 21 Mich. 84; 2 Thomps. Neg. 736. See *post*, § 1739. Does the principle that actionable negligence cannot be predicated of the *plan itself* (*post*, § 1739) go so far as to exempt from liability if that plan leaves the streets in an unsafe and dangerous condition for public use? In the author's opinion this question ought to be answered in the negative.

In Chope *v.* Eureka, 78 Cal. 588, it was held that a municipal corporation is not liable, in the absence of statutory provision, for personal injuries to one who fell into a sewer which was in process of construction, and was negligently left insufficiently guarded by the officers of the corporation. *McFarland*, J., said: "Without noticing any of the other points made by appellant, it is sufficient to say that it has long been the settled law of this State that a municipal corporation is not liable for personal injuries to individuals, such as that claimed to have been sustained by plaintiff, where there is no statutory provision declaring such liability. There is, no doubt, some conflict of decisions on the questions in other States, although it is to be observed that in the New England and some other States there are statutory declarations of the liability. But in California the doctrine above stated had been clearly and continuously adopted, and if any change in the law is desirable, that change must be made by the legislature. And so far at least, the legislature has shown no disposition to make the change. Winbigler *v.* Los Angeles, 45 Cal. 36; Tranter *v.* Sacramento, 61 Cal. 271, 275; Barnett *v.* Contra Costa County, 67 Cal. 77; Cromwell *v.* Sonoma County, .25 Cal. 315; Huffman *v.* San Joaquin County, 21 Cal. 426, 430." Three judges concurred and two dissented. The dissenting judges referring to § 1717 of the text as "a correct statement of the law, and one that is supported by an overwhelming weight of authority."

[1] Hill *v.* Boston, 122 Mass. 344, 364; *ante*, §§ 1642, 1713.

In Foreman *v.* Canterbury, L. R. 6 Q. B. 214, it was held that the mayor, aldermen, and burgesses of Canterbury, who were by the same act of Parliament the local board of health and surveyors of highways, were liable to an action by a traveller who suffered an *injury by driving against a heap of stones which had been broken for the purpose of mending the highway, and left in the highway at night, without light or guard*. But, at the trial of that case, it had been taken for granted that there was negligence in some one, and it had been expressly admitted that *the person who did the act was the servant of the defendants;* and the judgment of the court, delivered by *Blackburn*, J., was, says *Gray*, C. J., in Hill *v.* Boston, *supra*, "distinctly put upon the ground that the defendants would not be liable simply because they were surveyors of high-

the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its *neglect or omission* to keep the streets in repair,[1] as well as for those caused by defects occasioned by the *wrongful acts of others*,[2] but, as the *basis of the action*

ways, but that they were not, merely because they were surveyors, exempted from the liability which any person or corporation would incur for placing an obstruction in the highway. And in like cases since, the liability has been held to depend, not upon the defendant's relation to the highway by reason of being charged with the duty of repairing it, but upon the question whether the obstruction was placed in the highway by the defendant, or the defendant's servants." Taylor *v.* Greenhalgh, L. R. 9 Q. B. 487; Pendlebury *v.* Greenhalgh, 1 Q. B. D. 36; Palmer *v.* St. Albans, 56 Vt. 522.

[1] Hutson *v.* New York, 9 N. Y. 163; Hickok *v.* Plattsburg, 16 N. Y. 161; Davenport *v.* Ruckman, 37 N. Y. 568; Diveny *v.* Elmira, 51 N. Y. 506; Bloomington *v.* Bay, 42 Ill. 503; Atchison *v.* King, 9 Kan. 550; Higert *v.* Greencastle, 43 Ind. 574; *supra*, § 1708. *Contra:* Detroit *v.* Blackeby, 21 Mich. 84; s. c. with note of Judge *Redfield*, 9 Am. L. Reg. N. S. 670; Oliver *v.* Kansas City, 69 Mo. 79, approving text; Ironton *v.* Kelley, 38 Ohio St. 50; District of Columbia *v.* Dempsey, 13 App. D. C. 533; Dayton *v.* Taylor's Adm'r, 62 Ohio St. 11; Hutchinson *v.* Clarke, 26 R. I. 307; Kennedy *v.* Portage la Prairie, 12 Manitoba R. 634; *supra*, § 1666, and note. In Turner *v.* Indianapolis, 96 Ind. 51, it was held that the "fellow-servant doctrine" or the defence of "common employment" was not applicable, and therefore not available to prevent a fireman injured in the discharge of the duties of his place from recovering against the city for negligence on the part of its officers, in respect of keeping streets in a safe condition for use.

[2] *Ante*, §§ 1708–1712, notes and cases: Hickok *v.* Plattsburg, 16 N. Y. 161, note (*negligent omission* to fill up ditch which a wrong-doer had excavated in the street); Hewitt *v.* Cleveland, 21 Ohio Cir. Ct. R. 505; Wendell *v.* Troy, 39 Barb. (N. Y.) 329; Requa *v.* Rochester, 45 N. Y. 129; Serrot *v.* Omaha City, 1 Dillon C. C. R. 312; Griffin *v.* New York, 9 N. Y. 456; Tallahassee *v.* Fortune, 3 Fla. 19; Higert *v.* Greencastle, 43 Ind. 574, 587; Garibaldi *v.* O'Connor, 210 Ill. 284; Harper *v.* Kopp (Ky.), 73 S. W. Rep. 1127; Foy *v.* Winston, 126 N. Car. 381; Koch *v.* Williamsport, 195 Pa. St. 488; Kessler *v.* Berger, 205 Pa. 289; Shippers' Compress & Warehouse Co. *v.* Davidson, 35 Tex. Civ. App. 558; O'Hanlin *v.* Carter Oil Co., 54 W. Va. 510; Aurora *v.* Bitner, 100 Ind. 396 (gutter crossing constructed by private persons); Brennan *v.* St. Louis, 92 Mo. 482, city held liable where a child three years old was accidentally thrown, by another child, from the sidewalk into a ditch negligently left in the gutter for several months by the city. Scranton *v.* Catterson, 94 Pa. St. 202 (water plug in street). Where the municipal authorities in the repair of streets obstruct them, it is their duty to give proper warning of the same, and if by the neglect of such duty a traveller is injured, the municipality is liable. Carlisle *v.* Brisbane, 113 Pa. St. 544. In *Ohio* it is made by statute the duty of municipal corporations to keep the streets in order. The statute neither gives nor denies an action for the breach of this duty; but it is held that a person receiving injuries in consequence of its neglect in this respect, has a right of action as at common law for the damages caused thereby. A building permit by municipal authorities authorizing the occupation of part of a public street *as a depository for building materials*, and requiring proper lights at night to indicate their locality, does not relieve the municipality from the duty of exercising a reasonable diligence to prevent the holders of the permit from occupying the streets in such a way as to endanger passers-by in their proper use of it. Cleveland *v.* King, 132 U. S. 295; s. c. 28 Fed. Rep. 835; Stephens *v.* Macon (notice in such case), 83 Mo. 345; *post*, §§ 1720–1728; Abilene *v.* Cowperthwait, 52 Kan. 324; Rommeney *v.* New York, 49 N. Y. App. Div. 64; Sproul *v.* Seattle, 17 Wash. 256.

Dangerous holes or excavations in

is negligence, notice to the corporation of the defect which caused the injury, or of facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability.[1]

§ 1718 (1025). **Notice essential to Liability when Corporation not in Fault.** — In the class of cases last referred to in the preceding section the corporation, in the absence of a controlling enactment, *is responsible only for a reasonable diligence* to repair the defect or prevent accidents after the unsafe condition of the street is known, or ought to have been known to it, or to its officers having authority to act respecting it.[2] A corporate body never can either take care or

OR NEAR THE TRAVELLED WAY. A religious corporation made an excavation, which was inadequately guarded, at the site of a public alley in a city for an entrance to their church. The plaintiff crossing the alley fell in at night and was injured; the city was held liable, although the excavation was not in the travelled part of the city. Niblett *v.* Nashville, 12 Heisk. 684. See Stack *v.* Portsmouth, 52 N. H. 221; McDermett *v.* Kingston, 57 How. (N. Y.) Pr. 196; Wiggin *v.* St. Louis, 135 Mo. 558; Neal *v.* Marion, 129 N. Car. 345; Toledo *v.* Nitz, 23 Ohio Cir. Ct. R. 350; Oklahoma City *v.* Meyers, 4 Okla. 686. Where the excavation is *outside of the travelled* way, whether there is a liability or not depends upon the circumstances of the particular case, and especially upon the nearness to the travelled way, and the danger to the traveller using the street or public way in the usual manner. Other illustrations: Talty *v.* Atlantic, 92 Iowa, 135; Hawley *v.* Atlantic, 92 Iowa, 172; Richardson *v.* Boston, 156 Mass. 145; Logan *v.* New Bedford, 157 Mass. 534; Murphy *v.* Brooklyn, 118 N. Y. 575; Taylor *v.* Mt. Vernon, 129 N. Y. 651; see Cobb *v.* Standish (miry watering place by the roadside), 14 Me. 198; Reed *v.* Northfield (hole in the road), 13 Pick. (Mass.) 94; Norwich *v.* Breed, 30 Conn. 535; Murphy *v.* Gloucester, 105 Mass. 470; Ghenn *v.* Provincetown, *Ib.* 313; Koester *v.* Ottumwa (insufficient barricade), 34 Iowa, 41; O'Gorman *v.* Morris, 26 Minn. 267 (neglect to cover a culvert). There is a liability if a dangerous excavation is made so near a public street as to render it dangerous to travellers. Bassett *v.* St. Joseph, 53 Mo. 290; *post*, § 1727, note; Sterling *v.* Detroit, 134 Mich. 22.

DEFECTIVE BRIDGES AND CAUSEWAYS ARE ACTIONABLE. Degree of strength required; Criterion of sufficiency. Richardson *v.* Royalton & W. Turnp. Co., 6 Vt. 496; *ante*, § 1157; Gregory *v.* Adams, 14 Gray (Mass.), 242, where an elephant was injured by a bridge giving way. *Latent* defect in bridge. Rapho *v.* Moore, 68 Pa. St. 404; Abernethy *v.* Van Buren, 52 Mich. 353. Index — *Bridge*.

[1] Text quoted and approved, Spiceland *v.* Alier, 98 Ind. 467; Turner *v.* Indianapolis, 96 Ind. 51; York *v.* Spellman, 19 Neb. 357; Russell *v.* Columbia, 74 Mo. 480; Rea *v.* Sioux City, 127 Iowa, 615; Franklin *v.* House, 104 Tenn. 1; Newport News *v.* Scott's Adm'r, 103 Va. 794. As to *written notice*, see *ante*, § 1709.

[2] Dewey *v.* Detroit, 15 Mich. 307 (where the duty of street commissioners and the rule as to notice are clearly stated by *Campbell*, J.); New York *v.* Sheffield, 4 Wall. 189; McGinity *v.* New York, 5 Duer (N. Y.), 674; Dantzeiser *v.* Cook, 40 Ind. 65; Griffin *v.* New York, 9 N. Y. 456; Requa *v.* Rochester, 45 N. Y. 129; Serrot *v.* Omaha City, 1 Dillon C. C. R. 312; Dorlon *v.* Brooklyn, 46 Barb. (N. Y.) 504; Doulson *v.* Clinton City, 33 Iowa, 397; Cleveland *v.* St. Paul, 18 Minn. 279; Hume *v.* New York, 47 N. Y. 639; McCarthy *v.* Syracuse, 46 N. Y. 194; Smith *v.* New York, 66 N. Y. 295; Todd *v.* Troy, 61 N. Y. 506; Gorham *v.* Cooperstown, 59 N. Y.

neglect to take care except through its officers or servants. If suc
a body, by its officers or servants, *has the means of knowing* that

660; Rapho *v.* Moore, 68 Pa. St. 404; Centralia *v.* Krouse, 64 Ill. 19; Dooley *v.* Sullivan, 112 Ind. 451; Ironton *v.* Kelley, 38 Ohio St. 50; Birch *v.* Charleston L. H. & Power Co., 113 Ill. App. 229; Holitza *v.* Kansas City, 68 Kan. 157; Baltimore *v.* Walker, 98 Md. 637; Isham *v.* Broderick, 89 Minn. 397; Corey *v.* Ann Arbor, 134 Mich. 376; Ball *v.* Neosho, 109 Mo. App. 683; Small *v.* Kansas City, 110 Mo. App. 721; McManus *v.* Watertown, 88 N. Y. App. Div. 361; Snader *v.* Murphy, 19 Pa. Super. Ct. 35; San Antonio *v.* Talerico (Tex. Civ. App.), 78 S. W. Rep. 28.

As to necessity of notice to city, or *the lapse of sufficient time to acquire knowledge of the unsafe condition of the street*, see, also, Domer *v.* District of Columbia, 21 App. D. C. 284; Heath *v.* Manson, 147 Cal. 694; Cunningham *v.* Denver, 23 Colo. 18; Denver *v.* Hyatt, 28 Colo. 129; Boulder *v.* Weger, 17 Colo. App. 69; Denver *v.* Murray, 18 Colo. App. 142; McAllister *v.* Bridgeport, 72 Conn. 733; Seward *v.* Wilmington, 2 Marv. (Del.) 189; Downs *v.* Smyrna, 2 Pen. (Del.) 132; Joliet *v.* Johnson, 177 Ill. 178; Chicago *v.* Baker, 195 Ill. 54; Ryan *v.* Chicago, 79 Ill. App. 28; Lockport *v.* Richards, 81 Ill. App. 533; Streator *v.* Chrisman, 82 Ill. App. 24; Reid *v.* Chicago, 83 Ill. App. 554; Ransom *v.* Belvidere, 87 Ill. App. 167; Powell *v.* Bowen, 92 Ill. App. 453; Chicago *v.* McCabe, 93 Ill. App. 288; Sherman *v.* Chicago, 101 Ill. App. 312; Streator *v.* O'Brien, 103 Ill. App. 85; Chicago *v.* Davies, 110 Ill. App. 427; Michigan City *v.* Phillips (Ind. App.), 69 N. E. Rep. 700; Michigan City *v.* Phillips, 163 Ind. 449; Frankfort *v.* Coleman, 19 Ind. App. 368; Evansville *v.* Frazer, 24 Ind. App. 628; Lewisville *v.* Batson, 29 Ind. App. 21; Baxter *v.* Cedar Rapids, 103 Iowa, 599; Smith *v.* Sioux City, 119 Iowa, 50; Garnett *v.* Hamilton, 69 Kan. 866; Pleasanton *v.* Rhine, 8 Kan. App. 452; Louisville *v.* Brewer's Adm'r (Ky.), 72 S. W. Rep. 9; Madisonville *v.* Pemberton's Adm'r (Ky.), 75 S. W. Rep. 229; Louisville *v.* Keher, 117 Ky. 841; Haines *v.* Lewiston, 84 Me. 18; Hoey *v.* Natick, 153 Mass. 528; Miller *v.* North Adams, 182 Mass. 569; Burleson *v.* Reading, 110 Mich. 512; Snyder *v.* Albion, 113 Mich. 275 Urtel *v.* Flint, 122 Mich. 65; Hunte *v.* Durand, 137 Mich. 53; Thompso *v.* West Bay City, 137 Mich. 94 L'Herault *v.* Minneapolis, 69 Minn 261; Buckley *v.* Kansas City, 156 Mo 16; Young *v.* Webb City, 150 Mo 333; Drake *v.* Kansas City, 190 Mo 370; Caton *v.* Sedalia, 62 Mo. App 227; Richardson *v.* Marceline, 73 Mo App. 360; Milledge *v.* Kansas City 100 Mo. App. 490; Gerber *v.* Kansa City, 105 Mo. App. 191; Donnelly *v* Rochester, 166 N. Y. 315; Cahill *v* Rochester, 183 N. Y. 581; Lane *v* Syracuse, 12 N. Y. App. Div. 118 Williams *v.* Brooklyn, 33 N. Y. App Div. 539; Tarba *v.* Rochester, 4 N. Y. App. Div. 188; Archer *v.* Mt Vernon, 57 N. Y. App. Div. 32; Blakes lee *v.* Geneva, 61 N. Y. App. Div. 42 Cahill *v.* Rochester, 96 N. Y. App. Div 557; Foy *v.* Winston, 126 N. Car. 381 Newark *v.* McDowell, 16 Ohio Cir. Ct R. 556; Cincinnati *v.* Frazer, 18 Ohi Cir. Ct. R. 50; Rogers *v.* Williamsport 199 Pa. 450; Rowland *v.* Philadelphia 202 Pa. 50; Aiken *v.* Philadelphia, Pa. Super. Ct. 502; Allen *v.* Cook, 2 R. I. 525; 45 Atl. Rep. 148; Dallas Jones, 93 Tex. 38; Houston *v.* Owe (Tex. Civ. App.), 67 S. W. Rep 788; Dallas *v.* Moore (Tex. Civ App.), 74 S. W. Rep. 95; Houston Vatter (Tex. Civ. App.), 74 S. W Rep. 806; Lynchburg *v.* Wallace 95 Va. 640; Cowie *v.* Seattle, 22 Wash 659; Born *v.* Spokane, 27 Wash. 719 Piper *v.* Spokane, 22 Wash. 147 Cooper *v.* Milwaukee, 96 Wis. 458 Hallum *v.* Omro, 122 Wis. 337; Gun lack *v.* Montreal, 17 Rap. Jud. Que. C. S., 294; Ward *v.* Jefferson, 24 Wis 342; Hubbard *v.* Concord, 35 N. H 52; Reed *v.* Northfield, 13 Pick. (Mass. 94; Worster *v.* Canal Br. Prop., 1 Pick. 541; Hart *v.* Brooklyn, 36 Bart 226. Approved, Dantzeiser *v.* Cool 40 Ind. 65; Weightman *v.* Washing ton, 1 Black, 39, 62, *per Clifford*, J. Manchester *v.* Hartford, 30 Conn. 118 Howe *v.* Lowell, 101 Mass. 99; Bloom ington *v.* Bay, 42 Ill. 503, 509; Penn sylvania & O. Canal Co. *v.* Graham 63 Pa. St. 290; Decatur *v.* Fisher, 5 Ill. 407; Springfield *v.* Doyle, 76 Ill 202; Fahey *v.* Harvard, 62 Ill. 28 Rockford *v.* Hildebrand, 61 Ill. 155 Chicago *v.* Fowler, 60 Ill. 322; Ster

street is unfit for travel, and is negligently ignorant of its state, it is guilty of negligence.[1]

ling *v.* Merrill, 124 Ill. 522; Smith *v.* New York, 66 N. Y. 295; Furnell *v.* St. Paul, 20 Minn. 117; Bartlett *v.* Kittery, 68 Me. 358; Serrot *v.* Omaha, 1 Dillon C. C. 312; Vandyke *v.* Cincinnati, 1 Disney (Ohio), 532; Indianapolis *v.* Scott, 72 Ind. 196; Varnham *v.* Council Bluffs, 52 Iowa, 698; Salina *v.* Trosper, 27 Kan. 544; Dotton *v.* Albion, 50 Mich. 129; Bonine *v.* Richmond, 75 Mo. 437; Rehberg *v.* New York, 91 N. Y. 137; Campbell *v.* Fair Haven, 54 Vt. 336; Galveston *v.* Barbour, 62 Tex. 172; Warsaw *v.* Dunlap, 112 Ind. 576; Turner *v.* Newburgh, 109 N. Y. 301; Peru *v.* French, 55 Ill. 317, 318; Chicago *v.* Murphy, 84 Ill. 322; Chicago *v.* Stearns, 105 Ill. 554; Joliet *v.* Seward, 99 Ill. 267; Madison County *v.* Brown, 89 Ind. 48; Evansville *v.* Wilter, 86 Ind. 414; Logansport *v.* Justice, 74 Ind. 378 (under statute of *Indiana* notice to councilman is notice to the city); Lafayette *v.* Larson, 73 Ind. 367; McKeigue *v.* Janesville, 68 Wis. 50; McLimans *v.* Lancaster, 63 Wis. 596; Sheel *v.* Appleton, 49 Wis. 125; Bellamy *v.* Atlanta, 75 Ga. 167; Kibele *v.* Philadelphia, 105 Pa. St. 41 (escaping gas); Vanderslice *v.* Philadelphia, 103 Pa. St. 102 (defect in sewer); Woodbury *v.* District of Columbia, 5 Mackey, 127; Larmon *v.* District of Columbia, 5 Mackey, 330; Sherwood *v.* District of Columbia, 4 Mackey, 276; Brunswick *v.* Braxton, 70 Ga. 193; Madison *v.* Baker, 103 Ind. 41; Aurora *v.* Bitner, 100 Ind. 396; Indianapolis *v.* Murphy, 91 Ind. 382; Carter *v.* Monticello, 68 Iowa, 178 (notice given to a *member of a town council* must relate to the defects which caused the injury); Goodson *v.* Des Moines, 66 Iowa, 255 (that there were other defects in a sidewalk is *not evidence of notice* of the one complained of); Cook *v.* Anamosa, 66 Iowa, 427 (a city is *not charged with notice* of a defect not apparent to ordinary ob-

[1] Harrison Munic. Man. (5th ed.) 486, 492; Biggar Munic. Man. (Canada, 1900) 824 *et seq.*; Mersey Dock H. Co. *v.* Penhallow, 7 H. & N. 329; s. c. L. R. 1 H. L. Cases, 93. See also Thompson *v.* Northeastern R. Co., 3 L. T. N. S. 618; Submarine Tel. Co. *v.* Dickson, 15 C. B. N. S. 759; Rapho *v.* Moore, 68 Pa. 404; Adair *v.* Kingston, 27 Up. Can. C. P. 126; Sherwood *v.* Hamilton, 37 Up. Can. Q. B. 410; Boyle *v.* Dundas, 27 Up. Can. C. P. 129; Castor *v.* Uxbridge, 39 Up. Can. Q. B. 113; Chicago *v.* Gillette, 108 Ill. App. 455; Nokomis *v.* Farley, 113 Ill. App. 161; Evans *v.* Iowa City, 125 Iowa, 202; West Kentucky Tel. Co. *v.* Pharis (Ky.), 78 S. W. Rep. 917; Jones *v.* Boston, 188 Mass. 53; Cutcher *v.* Detroit, 139 Mich. 186; Drake *v.* Kansas City, 190 Mo. 370; Jones *v.* Sioux Falls, 18 S. Dak. 477; Hitt *v.* Kansas City, 110 Mo. App. 713; and see Powers *v.* Council Bluffs, 50 Iowa, 197; Rowell *v.* Williams, 29 Iowa, 210; Vanpelt *v.* Davenport, 42 Iowa, 308. It is no defence that they appointed a proper overseer of highways and gave him means and authority to keep the road in good order. The municipal corporations are, as it were, themselves the overseers of the highway, and on this principle bound to keep it in repair. They have not only the duty thrown expressly upon them of keeping highways in repair, but have all necessary powers given to them for enabling them to perform that duty. The corporation must, at their peril, answer for the consequences of the duty not being performed. The negligence of their officers or servants is no answer. Colbeck *v.* Brantford, 21 Up. Can. Q. B. 276. Nor is it any excuse that the alleged defect arose from the necessary repairs of the highway; for in such a case there should, when necessary to safe travelling, be a light or other signal to warn travellers of existing danger in the use of the way. Buffalo *v.* Holloway, 7 N. Y. 493; Hutson *v.* New York, 9 N. Y. 163; Storrs *v.* Utica, 17 N. Y. 104; Milwaukee *v.* Davis, 6 Wis. 377; Smith *v.* Milwaukee, 18 Wis. 63; Pettigrew *v.* Evansville, 25 Wis. 223. Where *a statutory obligation is imposed on a person, he is liable* for any injury that arises to others in consequence of its having been *negligently performed*, and this whether it was performed by himself or by a contractor employed by him. Gray *v.* Pullen, 5 B. & S. 970; s. c. in error, *Ib.* 980.

§ 1719 (1026). **Doctrine as to Notice and Contributory Negligence summarized; When Questions for the Jury; Burden of Proof.** — In

servers and not known to the inhabitants generally); Olsen *v.* Worcester, 142 Mass. 536; Waldron *v.* St. Paul, 33 Minn. 87; Squires *v.* Chillicothe, 89 Mo. 226; Plattsmouth *v.* Mitchell, 20 Neb. 228; Kunz *v.* Troy, 104 N. Y. 344; Twogood *v.* New York, 102 N. Y. 216 (*policeman's report* to superior officer not sufficient notice); Goodfellow *v.* New York, 100 N. Y. 15; Saulsbury *v.* Ithaca, 94 N. Y. 27; Chase *v.* Cleveland, 44 Ohio St. 505; Fortin *v.* East Hampton, 145 Mass. 196; Hinckley *v.* Somerset, 145 Mass. 326 (the fact that a *wall was rebuilt by the town authorities* held to be notice of its being of insufficient height); Stanton *v.* Salem, 145 Mass. 476 (the *burden of showing that the defect* was one which the proper officers had knowledge of, or might have had by exercising reasonable care and diligence, is upon the plaintiff; s. p. Hanscom *v.* Boston, 141 Mass. 242); Pomfrey *v.* Saratoga, 104 N. Y. 459, where *Earl*, J., said: "Municipal authorities . . . do not fill the measure of their responsibility, however, by acting simply when they have actual notice; but they owe to the public the duty of *active vigilance*." Drake *v.* Kansas City, 190 Mo. 370 ; Kopper *v.* Yonkers, 110 N. Y. App. Div. 747; Alliance *v.* Campbell, 17 Ohio Cir. Ct. R. 595. *Infra*, § 1727. The House of Lords, upon great consideration, have held that having *the means of knowledge*, and *negligently remaining ignorant, is equivalent*, in creating a liability, *to actual knowledge*. Mersey Docks Cases, 11 H. L. Cas. 687, 701; s. c. L. R. 1 H. L. 93; Weisenberg *v.* Appleton, 26 Wis. 56.

Notice not necessary when city is in fault. Denver *v.* Aaron, 6 Colo. App. 232; Indianapolis *v.* Marold, 25 Ind. App. 428; Buck *v.* Biddeford, 82 Me. 433; Haniford *v.* City of Kansas, 103 Mo. 172; Smith *v.* St. Joseph, 42 Mo. App. 392; Golden *v.* Clinton, 54 Mo. App. 100; Omaha *v.* Jensen, 35 Neb. 68; Wilson *v.* Troy, 135 N. Y. 96; Twist *v.* Rochester, 165 N. Y. 619; Bauer *v.* Rochester, 12 N. Y. Supp. 418; s. c. 59 Hun, 616; Riddle *v.* Westfield, 65 Hun (N. Y.), 432; Hoyer *v.* North Tonawanda, 79 Hun (N. Y.), 39; Stedman *v.* Rome, 88 Hun (N. Y.), 279; Akers *v.* New York, 14 N. Y. Misc. 524; Ludlow *v.* Fargo, 3 N. D. 485; Alliance *v.* Campbell, 17 Ohio Cir. Ct. R. 595; Circleville *v.* Sohn, 20 Ohio Cir. Ct. R. 368; Dallas *v.* Jones, 93 Tex. 38; Evans *v.* Huntington, 37 W. Va. 601; Springfield *v.* Le Claire, 49 Ill. 476; Barton *v.* Syracuse, 36 N. Y. 54, 58; *per Bockes*, J.; Chicago *v.* Johnson, 53 Ill. 91; Furnell *v.* St. Paul, 20 Minn. 117; Moore *v.* Minneapolis, 19 Minn. 300; Fort Wayne *v.* Coombs, 107 Ind. 75; Holmes *v.* Paris, 75 Me. 559; Houston *v.* Isaaks, 68 Tex. 116; holding also, that the rule is the same where the charter requires notice to be given before suit. Houston *v.* Vatter, 32 Tex. Civ. App. 298. In *Missouri* notice is not necessary where the city has given permission to an individual to make an excavation in a street for building purposes. Stephens *v.* Macon, 83 Mo. 345. See Cleveland *v.* King, 132 U. S. 295; s. c. below, 28 Fed. Rep. 835. *Notice of defect occasioned by act of third persons essential to liability.* Hume *v.* New York, 47 N. Y. 639. Same point, Fort Wayne *v.* De Witt, 47 Ind. 391, 396, 397, where *Buskirk*, C. J., quoting the text (§§ 1717, 1718) says, "It states the law upon the subject with great accuracy." Huntington *v.* Breen, 77 Ind. 29. Under the statute of *West Virginia*, notice to the city is not necessary. Sheff *v.* Huntington, 16 W. Va. 307; Domer *v.* District of Columbia, 21 App. D. C. 284; Linton *v.* Smith, 31 Ind. App. 546.

Where a person was injured from a *defective sidewalk, caused by the stringers upon which the boards rested being decayed* so as not to hold nails, in consequence of which a loose board tipped when stepped upon by a companion walking with the injured person, and it was shown that the stringers had been in that condition for a long time before the accident, although it was not shown affirmatively that the city knew of the particular board being loose at the time, the city was held chargeable with notice of the unsafe condition of the sidewalk, and to have been guilty of negligence in not having it repaired. Aurora *v.* Hillman, 90 Ill. 61; Bloomington *v.* Chamberlain, 104 Ill. 268; Burrows *v.* Lake Crystal, 61 Minn. 357; Hall *v.* Austin, 73 Minn.

the class of cases in which, as above stated, neglect to repair defects caused by others is the basis of the liability, two important elements are usually involved: 1st. *Notice, express or implied, to the defendant corporation;* and 2d. *Whether the plaintiff was guilty of contributory negligence.* These are questions of fact in all cases except where the facts are undisputed, and where, although undisputed, the inference to be deduced from them is clear and certain. Although the facts are not controverted, yet if different minds may reasonably draw therefrom different conclusions, the question is for the jury as one of fact, and not for the court as one of law. This statement of the law is substantially taken from the judgment of the Supreme Court of the United States, and in the author's opinion it gives the true rule on the subject.[1] It is everywhere admitted in the absence of statute to the contrary that *contributory negligence* on the part of the plaintiff, that is to say, the want of reasonable care on his part, will defeat a recovery. Many cases hold that *the burden of proving* due care rests affirmatively on the plaintiff. Other cases hold the reverse. It seems to the author that the better view, where the question is not controlled by statute, is that taken by the Supreme Court of the United States, viz., that where the plaintiff's contributory fault does not appear clearly upon his own testimony the burden of proof to establish it rests on the defendant. In other words, the plaintiff is not bound to prove affirmatively that he was himself free from negligence. Where the plaintiff's fault is relied on as a defence to defeat a recovery, the burden to establish such defence rests with the defendant, which, however, may be shown either by the plaintiff's evidence or by the defendant's or by both.[2] For the general

134; Williams *v.* Hannibal, 94 Mo. App. 549; Aslen *v.* Charlotte, 35 N.Y. App. Div. 625. Where a sidewalk is *continuously defective* for a considerable distance, — in this case sixty feet, — and an accident occurs at one end of it, evidence of its condition for the whole distance is admissible to show that the city should have known of it. Armstrong *v.* Ackley, 71 Iowa, 76; Viellesse *v.* Green Bay, 110 Wis. 160.

The Supreme Court of the United States has held that proof of *like accidents* which occurred *at the same place* in a defective sidewalk, and while it was in the same condition as when the plaintiff was injured, is admissible in his favor. District of Columbia *v.* Armes, 107 U. S. 519, and cases cited. See also Quinlan *v.* Utica, 11 Hun, 217; affirmed, s. c. 74 N. Y. 603; Osborne *v.* Detroit, 32 Fed. Rep. 36; Abilene *v.* Hendricks, 36 Kan. 196; Delphi *v.* Lowery, 74 Ind. 520; Gilmer *v.* Atlanta, 77 Ga. 688. In *Wisconsin* such proof is not admissible. Phillips *v.* Willow, 70 Wis. 6. See also Bloor *v.* Delafield, 69 Wis. 273. Proof that a walk was out of repair in a "locality near" where an accident occurred is not competent to charge a city with notice of the defect causing the accident. Ruggles *v.* Nevada, 63 Iowa, 185.

[1] Sioux C. & P. R. Co. *v.* Stout, 17 Wall. (U. S.) 657; s. c. below, 2 Dillon C. C. R. 294; see also Montgomery *v.* Wright, 72 Ala. 411.

[2] Washington & G. R. Co. *v.* Gladmon, 15 Wall. (U. S.) 401; Muller *v.* District of Columbia, 5 Mackey, 286.

doctrines of negligence, however, in its more detailed application, the reader must consult the works devoted to that subject. What constitutes notice or facts from which it may be inferred, and kindred points, will be found further illustrated in the notes.[1]

[1] Haskell *v.* New Gloucester, 70 Me. 305; Hume *v.* New York, 47 N. Y. 639; Hayes *v.* New York, 74 N. Y. 264; Merrill *v.* Portland, 4 Cliff. C. C. 138; Augusta *v.* Harper, 59 Ga. 151; Johnson *v.* Milwaukee, 46 Wis. 568; Benedict *v.* Fond du Lac, 44 Wis. 495; Draper *v.* Ironton, 42 Wis. 696; *supra*, § 1712, note; Chicago *v.* Gillette, 108 Ill. App. 455; Ottawa *v.* Hayne, 114 Ill. App. 21, aff'd 214 Ill. 45; Brown *v.* Chillicothe, 122 Iowa, 640; Lorenz *v.* New Orleans, 114 La. 802; Torphy *v.* Fall River, 188 Mass. 310; Carver *v.* Jackson, 82 Miss. 583; Miller *v.* Canton, 112 Mo. App. 322; Ibbeken *v.* New York, 94 N. Y. Supp. 568.

The *fact that the traveller knew the danger*, or *was familiar with the road*, is a circumstance to be considered in determining the question whether the plaintiff contributed by his own want of care to the accident. Harris. Munic. Man. (5th ed.) 493, citing Clayards *v.* Dethick, 12 Q. B. 439; Reed *v.* Northfield, 13 Pick. (Mass.) 94; Humphreys *v.* Armstrong County, 56 Pa. St. 204; Smith *v.* Lowell, 6 Allen (Mass.), 39; Snow *v.* Housatonic R. Co., 8 Allen (Mass.), 441; Frost *v.* Waltham, 12 Allen (Mass.), 85; Clark *v.* Lockport, 49 Barb. (N. Y.) 580; Whittaker *v.* West Boylston, 97 Mass. 273; Fox *v.* Sackett, 10 Allen (Mass.), 535; Hutton *v.* Windsor, 34 Up. Can. Q. B. 487. Such knowledge in some cases has been held sufficient to raise a presumption of negligence on plaintiff's part, so as to require evidence to negative the presumption. See on this subject Fox *v.* Glastenbury, 29 Conn. 204; Folsom *v.* Underhill, 36 Vt. 580; Jacobs *v.* Bangor, 16 Me. 187; Hanlon *v.* Keokuk, 7 Iowa, 477; Brown *v.* Jefferson, 16 Iowa, 339; Smith *v.* Lowell, 6 Allen (Mass.), 39; Wilson *v.* Charlestown, 8 Allen (Mass.), 137; Horton *v.* Ipswich, 12 Cush. (Mass.) 488; James *v.* San Francisco, 6 Cal. 528; Winckler *v.* Gt. Western Ry. Co., 18 Up. Can. C. P. 250, 262; Nicholls *v.* Great Western Ry. Co., 27 Up. Can. Q. B. 382; Rastrick *v.* Great Western Ry. Co., *Ib.* 396; see also Bridges *v.* North London Ry. Co., L. R. 6 Q. B. 377; Bellfontaine R. Co. *v.* Hunter, 33 Ind. 335; Adams *v.* Lancashire & Y. R. Co., L. R. 4 C. P. 739; Gee *v.* Metropolitan R. Co., L. R. 8 Q. B. 177; Cornish *v.* Toronto Street Ry. Co., 23 Up. Can. C. P. 355; Blackwell *v.* Toronto Street R. Co., 38 Up. Can. Q. B. 172. It is not such negligence as to prevent a recovery *that the traveller did not know the road*, and yet proceeded on a dark night. Williams *v.* Clinton, 28 Conn. 264; *ante*, § 1018, note. So driving in a violent storm through the streets of a city with which the driver was unacquainted was held not of itself to be such negligence as to prevent recovery by him for injuries sustained through defect in the street. Milwaukee *v.* Davis, 6 Wis. 377. Nor driving on the wrong side of the road. Damon *v.* Scituate, 119 Mass. 66. *Being blind, halt, or deaf is not, per se, to be taken as evidence* of contributory negligence. All persons, however blind, halt, or deaf, have a right to act on the assumption that the highway is reasonably safe. Davenport *v.* Ruckman, 37 N. Y. 568; Renwick *v.* New York Central R. Co., 36 N. Y. 133. See also Coates *v.* Canaan, 51 Vt. 131; *ante*, §§ 1698, 1711.

There are extreme cases, in which the dangerous character of a highway is so great and so manifest that courts are warranted in holding it unsafe, *as a matter of law*. Prideaux *v.* Mineral Point, 43 Wis. 513. So of its sufficiency, also. McMaugh *v.* Milwaukee, 32 Wis. 200. But almost always the sufficiency of a highway is a question of fact, to be determined by the jury upon evidence of its actual condition. Draper *v.* Ironton, 42 Wis. 696. The *opinion of witnesses* of its sufficiency or insufficiency is inadmissible. Montgomery *v.* Scott, 34 Wis. 338; Oleson *v.* Tolford, 37 Wis. 327; Griffin *v.* Willow, 43 Wis. 509. Possibly there might be cases in which the opinions of experts might be admissible upon matters going to the sufficiency of a highway. Generally, however, it is a pure question of fact, not of science or skill. Benedict *v.* Fond du Lac, 44 Wis. 495; s. P. Chicago *v.* McGiven, 78 Ill. 347. Evidence to show that the

§ 1720 (1027). **Corporate Liability for Acts of Contractors and of others.** — Whether the duty of maintaining the streets in a safe con-

condition of the street had been improved subsequent to the injury is not admissible as an admission of negligence. Cramer *v.* Burlington, 45 Iowa, 627.

Upon the question of *notice*, and what is sufficient to *impart or imply it*, it is difficult to harmonize all of the cases. But in the absence of notice, or the existence of the defect when caused by third persons for such a length of time as to imply notice or establish negligence, the general rule is that there is no liability on the corporation. On the foregoing points, as well as the officers to whom notice must be given, or the length of time the defect must have existed, the reader may also consult Heath *v.* Manson, 147 Cal. 694; Cummings *v.* Hartford, 70 Conn. 115; Joliet *v.* Looney, 159 Ill. 471; Lundon *v.* Chicago, 83 Ill. App. 208; Reid *v.* Chicago, 83 Ill. App. 554; Mareck *v.* Chicago, 89 Ill. App. 358; Decatur *v.* Hamilton, 89 Ill. App. 561; Mattoon *v.* Russell, 91 Ill. App. 252; Owen *v.* Ft. Dodge, 98 Iowa, 281; Keyes *v.* Cedar Falls, 107 Iowa, 509; Pittsburg *v.* Broderson, 10 Kan. App. 430; Bell *v.* Henderson (Ky.), 74 S. W. Rep. 206; Emery *v.* Waterville, 90 Me. 485; Gurney *v.* Rockport, 93 Me. 360; Ham *v.* Lewiston, 94 Me. 265; Bradbury *v.* Lewiston, 95 Me. 216; Corey *v.* Ann Arbor, 124 Mich. 134; Cunningham *v.* Thief River Falls, 84 Minn. 21; Robinson *v.* Mills, 25 Mont. 391; McSherry *v.* Canandaigua, 129 N. Y. 612; Sprague *v.* Rochester, 159 N. Y. 20; Schumacher *v.* New York, 166 N. Y. 103; Elias *v.* Rochester, 49 N. Y. App. Div. 597; Toledo *v.* Center, 16 Ohio Cir. Ct. R. 308; Newark *v.* McDowell, 16 Ohio Cir. Ct. R. 556; Burger *v.* Philadelphia, 196 Pa. St. 41; Canfield *v.* East Stroudsburg, 19 Pa. Super. Ct. 649; San Antonio *v.* Mackey's Estate, 22 Tex. Civ. App. 145; Ft. Worth *v.* Shero, 16 Tex. Civ. App. 487; Dallas *v.* Meyers (Tex. Civ. App.), 55 S. W. Rep. 742; Lynchburg *v.* Wallace, 95 Va. 640; Higert *v.* Greencastle, 43 Ind. 574; Boucher *v.* New Haven, 40 Conn. 456; Moore *v.* Minneapolis, 19 Minn. 300; Market *v.* St. Louis, 56 Mo. 189; Atlanta *v.* Perdue, 53 Ga. 607; Chicago *v.* McCarthy, 75 Ill. 602; Chicago *v.* Langlass, 66 Ill. 361; Chicago *v.* Crooker, 2 Ill. App. 279; Warren *v.* Wright, 3 Ill. App. 602; Studley *v.* Oshkosh, 45 Wis. 380; Hayes *v.* New York, 74 N. Y. 264; Furnell *v.* St. Paul, 20 Minn. 117 (in which it is held that the city is bound to take notice of the decay of wooden sidewalks); Barnes *v.* Newton, 46 Iowa, 567; Merrill *v.* Portland, 4 Cliff. C. C. 138; Farrell *v.* Oldtown, 69 Me. 72; Perkins *v.* Fayette, 68 Me. 152; Noble *v.* Richmond, 31 Gratt. (Va.) 271; Weightman *v.* Washington, 1 Black (U. S.), 39; Rogers *v.* Shirley, 74 Me. 144; Liffin *v.* Beverly, 145 Mass. 549. Notice to the city of *open and notorious defects* is presumed. Balls *v.* Woodward, 51 Fed. Rep. 646; Canfield *v.* Newport (Ky.), 73 S. W. Rep. 788; McGrail *v.* Kalamazoo, 94 Mich. 52; Miller *v.* Canton, 112 Mo. App. 322; Deland *v.* Cameron, 112 Mo. App. 704; Knight *v.* Kansas City, 113 Mo. App. 561; Lindholm *v.* St. Paul, 19 Minn. 245; Moore *v.* Minneapolis, 19 Minn. 300; Harris. Munic. Man. (5th ed.) 494. *Supra*, § 1718, note. There is a presumption that the proper officer, when informed approximately of the location of a defect in a street, will look it up and remedy it. The fact of his being informed and the presumption arising therefrom may justify a jury in finding that he had actual notice. Welch *v.* Portland, 77 Me. 384. *Report of a street commissioner* showing that a bridge was unsafe, printed and circulated by the city, held admissible to prove notice thereof to the municipal officers. Bond *v.* Biddeford, 75 Me. 538.

If the defect arise otherwise than from faulty structure, and from some act other than the direct conduct of the defendants or their servants, and be a recent defect, it is generally necessary to show that defendants or their servants had knowledge thereof or were negligently ignorant of it. District of Columbia *v.* Payne, 13 App. D. C. 500; Idlett *v.* Atlanta, 123 Ga. 821; Streator *v.* Chrisman, 182 Ill. 215; Powell *v.* Bowen, 92 Ill. App. 453; Parmenter *v.* Marion, 113 Iowa, 297; Henderson *v.* Reed (Ky.), 62 S. W. Rep. 1039; Bowling Green *v.* Duncan, 122 Ky. 244; Whitney *v.* Lowell, 151 Mass. 212; Parker *v.* Boston, 175 Mass. 501; Clark *v.* Brookfield, 97 Mo. App. 16;

dition for public travel and use is specially imposed on the corporation, or is deduced in the manner before stated, *it rests primarily,*

Lincoln *v.* Pirner, 59 Neb. 634; Northdruft *v.* Lincoln, 66 Neb. 430; Jones *v.* Greensboro, 124 N. Car. 310; Brown *v.* Bachman (Tex. Civ. App.), 72 S. W. Rep. 622; Dallas *v.* Moore (Tex. Civ. App.), 74 S. W. Rep. 95; Harr. Munic. Man. (5th ed.) 494; Castor *v.* Uxbridge, 39 Up. Can. Q. B. 113; New York *v.* Sheffield, 4 Wall. 189; Griffin *v.* New York, 9 N. Y. 456; McGinity *v.* New York, 5 Duer, 674; Hart *v.* Brooklyn, 36 Barb. (N. Y.) 226; Dewey *v.* Detroit, 15 Mich. 307; Prindle *v.* Fletcher, 39 Vt. 255, 257; Yale *v.* Hampden & B. Turnp. Co., 18 Pick. (Mass.) 357; Davis *v.* Lamoille Pl. R. Co., 27 Vt. 602; Goodnough *v.* Oshkosh, 24 Wis. 549; Cooley *v.* Westbrook, 75 Me. 181; Weisenberg *v.* Appleton, 26 Wis. 56; Curry *v.* Mannington, 23 W. Va. 14.

Notice may be *inferred from the notoriety of the defect,* and from its continuance for such a length of time as to lead to the presumption that the proper officers of the municipality did in fact know, or with proper vigilance and care might have known, the fact. This latter is sufficient, because this degree of care and vigilance they are bound to exercise; and therefore if, in point of fact, they do not know of such defect, when by ordinary and due vigilance and care they would have known it, they must be responsible, as if they had actual notice. *Per Shaw,* C. J., in Reed *v.* Northfield, 13 Pick. (Mass.) 94. Chicago *v.* Gillett, 91 Ill. App. 287; Padelford *v.* Eagle Grove, 117 Iowa, 616; Huff *v.* Marshall, 97 Mo. App. 542; Anderson *v.* Albion, 64 Neb. 280; Matthews *v.* Toledo, 21 Ohio Cir. Ct. R. 69; Dallas *v.* Moore (Tex. Civ. App.), 74 S. W. Rep. 95. *See further, as to length of time the defect must have existed.* McAllister *v.* Bridgeport, 72 Conn. 733; Denver *v.* Hyatt, 28 Colo. 129; Downs *v.* Smyrna, 2 Pen. (Del.) 132; Decatur *v.* Besten, 169 Ill. 340; Brownlee *v.* Alexis, 39 Ill. App. 135; Anna *v.* Boren, 77 Ill. App. 408; Belvidere *v.* Crichton, 81 Ill. App. 595; Powell *v.* Bowen, 92 Ill. App. 453; Chicago *v.* McCabe, 93 Ill. App. 288; Williams *v.* Carterville, 97 Ill. App. 160; Michigan City *v.* Boeckling, 122 Ind. 39; Ft. Wayne *v.* Duryee, 9 Ind. App. 620; Theissen *v.* Belle Plaine, 81 Iowa, 118; Salina *v.* Kerr, 7 Kan. App. 223; Atchison *v.* Acheson, 9 Kan. App. 33; Newport *v.* Miller, 93 Ky. 22; Frankfort *v.* Chinn (Ky.), 89 S. W. Rep. 188; Rodda *v.* Detroit, 117 Mich. 412; Urtel *v.* Flint, 122 Mich. 65; Scheel *v.* Detroit, 130 Mich. 51; Corey *v.* Ann Arbor, 124 Mich. 134; Butler *v.* Oxford, 69 Miss. 618; Badgley *v.* St. Louis, 149 Mo. 122; Straub *v.* St. Louis, 175 Mo. 413; Young *v.* Webb City, 150 Mo. 333; Carvin *v.* St. Louis, 151 Mo. 334; Lincoln *v.* Smith, 28 Neb. 762; Lincoln *v.* Pirner, 59 Neb. 634; Parsons *v.* Manchester, 67 N. H. 163; Bieling *v.* Brooklyn, 120 N. Y. 98; Breil *v.* Buffalo, 144 N. Y. 163; Smith *v.* New York, 17 N. Y. App. Div. 438; Warner *v.* Randolph, 18 N. Y. App. Div. 458; Laverdure *v.* New York, 28 N. Y. App. Div. 65; O'Hara *v.* Buffalo, 39 N. Y. App. Div. 443; Fisher *v.* Mt. Vernon, 41 N. Y. App. Div. 293; Hawkins *v.* New York, 54 N. Y. App. Div. 258; Brush *v.* New York, 59 N. Y. App. Div. 12; Blakeslee *v.* Geneva, 61 N. Y. App. Div. 42; Schall *v.* New York, 88 N. Y. App. Div. 64; Tiers *v.* New York, 74 Hun (N. Y.), 452; Foels *v.* Tonawanda, 75 Hun (N. Y.), 363; Barr *v.* Bainbridge, 42 N. Y. App. Div. 628; Leipsic *v.* Gerdeman, 68 Ohio St. 1; Norman *v.* Teel, 12 Okla. 69; Dixon *v.* San Antonio (Tex. Civ. App.), 30 S. W. Rep. 359; Dallas *v.* McAllister (Tex. Civ. App.), 39 S. W. Rep. 173; Palestine *v.* Hassell, 15 Tex. Civ. App. 521; Naylor *v.* Salt Lake City, 9 Utah, 491; Lorence *v.* Ellensburgh, 13 Wash. 341; Coure *v.* Seattle, 22 Wash. 659; Sproul *v.* Seattle, 17 Wash. 256; Devenish *v.* Spokane, 21 Wash. 77; West *v.* Eau Claire, 89 Wis. 31; Rhyner *v.* Menasha, 107 Wis. 201; Byington *v.* Merrill, 112 Wis. 211; Crites *v.* New Richmond, 98 Wis. 55; Gunlack *v.* Montreal, 17 Rap. Jud. Que., C. S., 294; Ince *v.* Toronto, 27 Ont. App. (Can.) 410; Albritton *v.* Huntsville, 60 Ala. 486; Johnson *v.* Milwaukee, 46 Wis. 568; Studley *v.* Oshkosh, 45 Wis. 380; Cusick *v.* Norwich, 40 Conn. 376; Rosenberg *v.* Des Moines, 41 Iowa, 415; Boucher *v.* New Haven, 40 Conn. 456; Littlefield *v.* Norwich, 40 Conn. 406; Chicago *v.* Langlass, 66 Ill. 361; Chicago *v.* McCarthy, 75 Ill. 602; Atlanta *v.* Perdue, 53 Ga. 607; Moore

as respects the public, upon the corporation, and the obligation to discharge this duty cannot be evaded, suspended, or cast upon

v. Minneapolis, 19 Minn. 300; Market *v.* St. Louis, 56 Mo. 189; Townsend *v.* Des Moines, 42 Iowa, 657; Case *v.* Waverly, 36 Iowa, 545; Rice *v.* Des Moines, 40 Iowa, 638; Castor *v.* Uxbridge, 39 Up. Can. Q. B. 113; Dewey *v.* Detroit, 15 Mich. 307; New York *v.* Sheffield, 4 Wall. 189; Serrot *v.* Omaha, 1 Dillon C. C. R. 312; Howe *v.* Plainfield, 41 N. H. 135.

If the defect be palpable, dangerous, and has existed for a long time, the jury may very properly infer either negligent supervision and ignorance consequent upon and chargeable to such neglect, or notice of the defect and a disregard of the duty to repair it. Manchester *v.* Hartford, 30 Conn. 118. See further Bloomington *v.* Bay, 42 Ill. 503; Howe *v.* Lowell, 101 Mass. 99; Donaldson *v.* Boston, 16 Gray, 508; Colley *v.* Westbrook, 57 Me. 181; East Dubuque *v.* Burhyte, 74 Ill. App. 99; McEvoy *v.* Sault Ste. Marie, 136 Mich. 172; Norman *v.* Teel, 12 Okla. 69; Still *v.* Houston, 27 Tex. Civ. App. 447; Mauch *v.* Hartford, 112 Wis. 40. Where an injury was produced by some sudden and unexpected cause, it was held that the corporation were not liable till they had a reasonable opportunity to repair before the accident. Hubbard *v.* Concord, 35 N. H. 52; Barton *v.* Syracuse, 36 N. Y. 54; Springfield *v.* Le Claire, 49 Ill. 476. Notice to a citizen is not to the corporation (Donaldson *v.* Boston, 16 Gray, 508), although held otherwise in Maine. Springer *v.* Bowdoinham, 7 Me. 442; Mason *v.* Ellsworth, 32 Me. 271. Speaking of a sewer, *Morrison,* J., said: "It did not appear, however, when the mud accumulated in the culvert, or when the stone fell at its mouth, and the mere existence of these obstructions was not, in my opinion, enough to establish negligence. There was no evidence that the defendants or their officers had any notice of these obstructions, nor did it appear that they were of so notorious a character, or had continued so long, as to charge the defendants with constructive notice of them." Bateman *v.* Hamilton, 33 Up. Can. Q. B. 251. But as to sewers, see Barton *v.* Syracuse, 36 N. Y. 54; Springfield *v.* Le Claire, 49 Ill. 476. There is no presumption of law as to notice. Boucher *v.* New Haven, 40 Conn. 456. It is ordinarily for a jury to decide whether, from the circumstances, there was notice. Colley *v.* Westbrook, 57 Me. 181; Hall *v.* Lowell, 10 Cush. (Mass.) 260; Stanton *v.* Springfield, 12 Allen, 566; Mosey *v.* Troy, 61 Barb. 580; Allenton *v.* Chichester, L. R. 10 C. P. 319. In some States existence of the defect for twenty-four hours (Brady *v.* Lowell, 3 Cush. (Mass.) 121; Monies *v.* Lynn, 124 Mass. 165; compare Hutchins *v.* Littleton, 124 Mass. 289), reasonable notice (Whitehead *v.* Lowell, 124 Mass. 281), or express notice (Tripp *v.* Lyman, 37 Me. 250; Bartlett *v.* Kittery, 68 Me. 358), is necessary by statute before there can be any right of action against the corporation.

What is evidence of notice. Erd *v.* St. Paul, 22 Minn. 443; Grimes *v.* Keene, 52 N. H. 330. Where the encroachment of the sea destroyed the road, so that the subject of repair was not in existence, it was held that there was no obligation at an enormous cost to rebuild the road. Regina *v.* Bamber, 5 Q. B. 279; Queen *v.* Hornsea, Dearsly C. C. 291; but see Queen *v.* Greenhow, L. R. 1 Q. B. Div. 703. If the cost of rebuilding the road or making the necessary repair would exceed the statutable limit of taxation, it may be that there would be no obligation to repair. See Grant *v.* Sligo Harbor Com'rs, L. R. 11 Ir. C. L. R. 190; Butler *v.* Bray Commissioners, *Ib.* 181. But in such a case it would, it is believed, be the duty of the corporation so to close up the road that there could be no danger in using or attempting to use it. See Harrold *v.* Simcoe & O. R. Co., 16 Up. Can. C. P. 43; s. c. 18 Up. Can. C. P. 9; Harris. Munic. Manual for Canada (5th ed.), 494.

In the preparation of this chapter, and occasionally elsewhere, the author has derived valuable material from Harrison's Municipal Manual for Canada. This work consists of the statutes of that country applicable to its municipal corporations, with annotations by the late Chief Justice *Harrison,* based upon the English and American as well as the local decisions. With the author's permission he freely used the present work, for which

others, by any act of its own. Therefore, according to the better view, where a *dangerous excavation is made* and negligently left open (without proper lights, guards, or covering), in a travelled street or sidewalk, *by a contractor under the corporation* for building a sewer or other improvement, the corporation is liable to a person injured thereby, although it may have had no immediate control over the workmen, and had even stipulated in the contract that proper precautions should be taken by the contractor for the protection of the public, and making him liable for accidents occasioned by his neglect.[1] It is immaterial, as respects the primary liability

he gratefully expressed his obligations, and extended a reciprocal permission. He was a learned lawyer, a careful writer, and an able judge. His death, which occurred after the second edition of this work, was deeply lamented in his own country, and as he was a co-laborer in the same field it was felt by the author as a personal loss. It is a melancholy pleasure to record this humble tribute to his memory and his labors. A fifth edition, carefully edited by Mr. F. J. Joseph, appeared in 1889. In 1900 Mr. R. W. Biggar, Q. C., published his Municipal Manual founded upon "The Municipal Act" of Ontario, and the amendments thereto. This valuable work is the continuation of and successor to Harrison's Municipal Manual.

[1] Storrs *v.* Utica (sewer excavation), 17 N. Y. 104, *per Comstock*, J.; Vogel *v.* New York, 92 N. Y. 10; Brusso *v.* Buffalo, 90 N. Y. 679; Wilson *v.* Wheeling, 19 W. Va. 323; Birmingham *v.* McCary, 84 Ala. 469, quoting text; Chicago *v.* Murdoch, 212 Ill. 9, aff'g 113 Ill. App. 656; Sterling *v.* Schiffmacher, 47 Ill. App. 141; East St. Louis *v.* Murphy, 89 Ill. App. 22; Indianapolis *v.* Marold, 25 Ind. App. 428; Bennett *v.* Mt. Vernon, 124 Iowa, 537; Glasgow *v.* Gillenwaters, 113 Ky. 140; Frankfort *v.* Allen (Ky.), 82 S. W. Rep. 279; Cabot *v.* Kingman, 166 Mass. 403; Donahoe *v.* Kansas City, 136 Mo. 657; Omaha *v.* Jensen, 35 Neb. 68; Beatrice *v.* Reid, 41 Neb. 214; Schumacher *v.* New York, 40 N. Y. App. Div. 320; Dunstan *v.* New York, 91 App. Div. 355; Gorney *v.* New York, 102 N. Y. App. Div. 259; Godfrey *v.* New York, 104 N. Y. App. Div. 357; McAllister *v.* Albany, 18 Oreg. 426; Trego *v.* Honeybrook, 160 Pa. 76; Stork *v.* Philadelphia, 199 Pa. 462; Marsh *v.* Philadelphia, 8 Pa. Dist. R. 340; Patterson *v.* Austin (Tex. Civ. App.), 29 S. W. Rep. 1139; Detroit *v.* Corey (sewer excavation), 9 Mich. 165, where the same principle was applied, and the result of Storrs *v.* Utica concurred in, although the city was *bound to let the contract to the lowest bidder; Campbell*, J., dissenting, on the ground, mainly, that the city, being required to let to the lowest bidder, could not itself have built the sewer, and the relation of principal and agent did not exist between the city and the contractor, — the majority holding that such relation did exist, and that the contractor had, and could have, no right to make the excavation, except as the agent of the city. In an early case in *California* (James *v.* San Francisco, 6 Cal. 528), it was held that there was no corporate liability where the city was *obliged to let the contract to the lowest bidder*; and the rule in *California* is now settled that a contractor engaged in constructing sewers for a city under contract let by the city, in performing the work is not the agent or servant of the city, and any negligence in performing the work is his negligence, and the city is not liable for injuries sustained thereby. O'Hale *v.* Sacramento, 48 Cal. 212. In this case the contractor left an excavation in the street without lights or a barrier, into which the plaintiff was precipitated. The court adhered to the rule in Boswell *v.* Laird, 8 Cal. 469; Du Pratt *v.* Lick, 38 Cal. 691; s. p. Krause *v.* Sacramento, 48 Cal. 221. The courts in California do not, however, seem to regard the duty of keeping streets in repair as a *corporate* duty, carrying with it an implied liability for nonrepair. Winbigler *v.* Los Angeles, 45 Cal. 36; *ante*, § 1717, note. See Spring-

of the corporation in such a case, whether it has or has not inserted such a clause in its agreement with the contractor. If, however, it

field *v.* Le Claire, 49 Ill. 476, following Storrs *v.* Utica, and disapproving Painter *v.* Pittsburgh, 46 Pa. St. 221, cited *infra;* s. c. 3 Am. L. Reg. N. S. 350, with useful note by Mr. (now Chief Justice) *Mitchell;* Chicago *v.* Robbins, 2 Black, 418; s. c. 2 Am. L. Reg. N. S. 529, assumes the same principle; Blake *v.* St. Louis, 40 Mo. 569, which overrules, probably, Barry *v.* St. Louis, 17 Mo. 121, cited *infra;* Welsh *v.* St. Louis, 73 Mo. 71 (approving Blake *v.* St. Louis, and "overruling, probably," Barry *v.* St. Louis); Broadwell *v.* Kansas City, 75 Mo. 213; St. Paul *v.* Seitz, 3 Minn. 297, 308, *per Flandrau,* J.; Baltimore *v.* Pendleton, 15 Md. 12; Butler *v.* Bangor, 67 Me. 388; Seattle *v.* Buzby, 2 Wash. Ter. 25; King *v.* Cleveland, 28 Fed. Rep. 835 (a pile of building materials left in a street without warning lights in the night time); s. c. 132 U. S. 295; Turner *v.* Newburgh, 109 N. Y. 301; Baltimore *v.* O'Donnell, 53 Md. 110 (rope across street without light); Ironton *v.* Kelley, 38 Ohio St. 50; Circleville *v.* Neuding, 41 Ohio St. 465, where city was held liable for contractor's negligence in leaving cistern in street unfenced; s. P. Wilson *v.* Wheeling, 19 W. Va. 323. Compare Westchester *v.* Apple, 35 Pa. St. 284, which, in its result and reasoning, is opposed to the general doctrine of the courts elsewhere, and rests upon the questionable basis that a city corporation has the right to disregard its duty to the public to keep its streets in a safe condition.

Painter *v.* Pittsburgh, *supra,* is against the principle stated in the text; but, as pointed out by Mr. (now Chief Justice) *Mitchell* in his note, the ground upon which the doctrine of the text rests "was apparently not urged in the argument, and is not noticed by the court." In the case of Erie *v.* Calkins, 85 Pa. St. 247, the city employed a contractor to make a sewer; by the contract the power was reserved for the city engineer to change the work, &c.; the contractor was bound to indemnify the city for any damages by reason of his neglect, &c. Plaintiff was injured by falling into the excavation, left carelessly unguarded, and the city was held not liable. A municipal corporation, under general charter authority, granted a license to dig a ditch and lay a water-pipe in the street to conduct water from the residence of the licensee to certain other houses which he owned. The licensee dug a ditch near the sidewalk and neglected to put up proper guards, in consequence of which plaintiff was injured. It was held that the municipality was not liable although the street commissioner or other authorities had knowledge that the license was being misused or abused. Susquehanna Depot *v.* Simmons, 112 Pa. St. 384. Says the court: "If the excavation had been *per se* a nuisance, the case would have been different, for in that case the public authorities would have been bound to abate it as soon as they had knowledge of the obstruction. But not being a nuisance, but lawful, the borough cannot be held for an accident happening thereby, and Florence [the contractor of the licensee] alone must be regarded as responsible for the injury resulting to the plaintiff from his neglect." But since the street commissioner had knowledge of the ditch, and that it rendered the street unsafe, *quære,* whether the case was rightly decided. Chicago *v.* Robbins, 2 Black (U. S.), 418; Shearm. & Red. Neg. (4th ed.) § 358. Barry *v.* St. Louis, 17 Mo. 121, referred to above. The latest *New York* case there cited is the case of Bailey, 2 Denio (N. Y.), 433, and the proposition that the city is primarily liable for the defective or dangerous condition of its streets, and should not be allowed, in executing a work attended with danger, to shift this responsibility by contract, does not appear to have been presented to the court. See Harrisburgh *v.* Saylor, 87 Pa. St. 216. The text cited and approved. Savannah *v.* Waldner, 49 Ga. 316, 321.

In accordance with the rule of the text, see Nashville *v.* Brown, 9 Heisk. 1, where *Nicholson,* C. J., approves Judge *Mitchell's* criticism on Painter *v.* Pittsburgh; Knoxville *v.* Bell, 12 Lea (Tenn.), 157. A city cannot, either by contract or ordinance, divest itself of the duty to keep its streets safe for public travel. Watson *v.* Tripp, 11 R. I. 98; Troy *v.* Troy &

has taken the precaution to obtain from the contractor an express stipulation of this character, this will give it, on being held liable (however it might otherwise be), a remedy over against him.[1] And so, on the same principle, namely, that the duty to keep the streets and sidewalks in a safe condition rests upon the corporation and cannot be surrendered or abdicated, it is liable, for *injuries caused by open excavations made therein,* with its knowledge or consent, express or implied, *by the adjoining lot-owner* for the purpose of an area or to obtain light and air for the basement or cellar; but in such cases the corporation has, without any express contract, if as respects the defendant it is not itself in fault, a remedy over against the owner of the lot or building for whose benefit the excavation was made.[2]

Lans. R. Co., 49 N. Y. 657; Pearson *v.* Zable, 78 Ky. 170; *post,* § 1730. Nor by a permit to lot-owner to deposit building material in the street. Cleveland *v.* King, 132 U. S. 295, noted *supra,* § 1717. Additional interesting illustration of the *primary liability of the city.* See Fink *v.* St. Louis, which will be found briefly stated *infra,* § 1730, note; Shearm. & Red. Neg. (4th ed.) §§ 176, 297, 298; Jacksonville *v.* Drew, 19 Fla. 106 (liability of city for defect in bridge in care of contractor); 2 Thomps. Neg. 737–742.

The charter of Milwaukee provided that when an injury happens in the city by reason of any defect or encumbrance of any street, sidewalk, &c., or other cause for which the city would otherwise be liable, if such defect, &c., is caused by *the default of any person, such person shall be primarily liable.* This provision was held valid, but not applicable where the defect is caused by the negligence of persons making public improvements under contract with the city; and that the exemption of the city from liability for such injuries is invalid under the Constitution of the State, as granting to the city a special immunity against a general rule of law to which other municipal corporations are subject. Hincks *v.* Milwaukee, 46 Wis. 559; Durkee *v.* Janesville, 28 Wis. 464; Amos *v.* Fond du Lac, 46 Wis. 695; State *v.* Bartlett, 35 Wis. 387; Rooney *v.* Milwaukee County, 40 Wis. 23; Kimball *v.* Rosendale, 42 Wis. 407.

[1] Buffalo *v.* Holloway, 7 N. Y. 493, aff'g s. c. 14 Barb. (N. Y.) 101; Staldter *v.* Huntington, 153 Ind. 354; Marsh *v.* Philadelphia, 8 Pa. Dist. R. 340. It is here held that, *as between the corporation and contractor,* there is no *implied* agreement to protect the public; but is this right? See Storrs *v.* Utica, 17 N. Y. 104; Blake *v.* Ferris, 5 N. Y. 48; Myers *v.* Snyder, Bright. (Pa.) 489; Beatty *v.* Gilmore, 16 Pa. St. 463; Brooklyn *v.* Brooklyn R. Co., 47 N. Y. 475; Brusso *v.* Buffalo, 90 N. Y. 679; Herrington *v.* Lansingburg, 110 N. Y. 145. Liability of city for negligence of contractor in the repair of street. Logansport *v.* Dick, 70 Ind. 65.

[2] Chicago *v.* Robbins, 2 Black (U. S.), 418; s. c. 4 Wall. (U. S.) 657; 2 Am. L. Reg. N. S. 529, distinguishing Hilliard *v.* Richardson, 3 Gray (Mass.), 349, and overruling Scammon *v.* Chicago, 25 Ill. 424, on this point; Rowell *v.* Williams (excavation for cellar), 29 Iowa, 210, following and approving Chicago *v.* Robbins; Powers *v.* Council Bluffs, 50 Iowa, 197; Oliver *v.* Kansas City, 69 Mo. 79, approving text; Wendell *v.* Troy, 39 Barb. (N. Y.) 329; 4 Abb. Ct. App. 563; Fahey *v.* Harvard (requisites of declaration), 62 Ill. 28; Galesburg *v.* Higley, 61 Ill. 287; Wilson *v.* Wheeling, 19 W. Va. 323; Curry *v.* Mannington, 23 W. Va. 14; *post,* § 1728. Under peculiar circumstances the adjoining owner held not liable for accident caused by defective sidewalks over area. Jansen *v.* Atchison, 16 Kan. 358, but *quære; post,* § 1729. Degree of care required of municipality where cellar door forms part of

§ 1721 (1028). **Liability for Acts of Contractors.** — There has been much controversy as to the liability of a municipal corporation for the *negligence or wrongful acts of contractors under it* in the execution of the work agreed to be performed. Ordinarily, no person other than the one immediately or actually guilty of the wrongful act is liable therefor, except upon the ground that the relation of principal and agent, or master and servant, existed between the person or corporation sought to be made liable, and the person who did the act, or was guilty of the negligence that caused the injury. In other words, the principle of *respondeat superior* does not as a rule extend to cases of independent contracts, where the party for whom the work is to be done is not the immediate superior of those guilty of the wrongful act, and has no choice in the selection of workmen, and no control over the manner of doing the work under the contract.[1]

§ 1722 (1029). **Same Subject; Exception where Work is necessarily dangerous.** — The general rule is stated in the preceding section,[2] but it is important to bear in mind that it *does not apply where the contract directly requires the performance of a work intrinsically dan-*

the surface of a sidewalk. Johnston *v.* Charleston, 3 S. Car. 232; Smalley *v.* Appleton (unsafe sidewalk), 70 Wis. 340.

[1] *Infra*, § 1722, and cases. Koontz *v.* District of Columbia, 24 App. D. C. 59; Bennett *v.* Mt. Vernon, 124 Iowa, 537; Jewell *v.* Mt. Vernon, 91 N. Y. App. Div. 578; Haefelin *v.* McDonald, 96 N. Y. App. Div. 213; Kelly *v.* New York, 106 N. Y. App. Div. 576; White *v.* Philadelphia, 201 Pa. 512.

[2] Blake *v.* Ferris, 5 N. Y. 48. See Erie *v.* Calkins, 85 Pa. St. 247; Painter *v.* Pittsburgh, 46 Pa. St. 213; Harrison *v.* Collins, 86 Pa. St. 153; Susquehanna Depot Bor. *v.* Simmons, 112 Pa. St. 384; Cummins *v.* Seymour, 79 Ind. 491; Scammon *v.* Chicago, 25 Ill. 424; Barry *v.* St. Louis, 17 Mo. 121; Cuff *v.* Newark, 35 N. J. L. 17; King *v.* New York Cent. & H. R. R. Co., 66 N. Y. 181; Storrs *v.* Utica, 17 N. Y. 104; and note well-grounded doubts of *Comstock*, J., respecting the correctness of the *application* of the doctrine, so well stated in Judge *Mullett's* opinion in Blake's Case, to the *dangerous* work of excavating a deep hole in a public street. Pack *v.* New York (injury by blasting), 8 N. Y. 222; and see similar case of Kelly *v.* New York, 11 N. Y. 432, both approved in Storrs *v.* Utica, but distinguished; followed in Herrington *v.* Lansingburg, 110 N. Y. 145, where a city having power to build sewers entered into a contract with certain persons to construct a sewer through one of its streets, with provision therein that the contractors should pay damages caused by blasting: the noise of the blasting frightened the plaintiff's horses in another street, causing him to be severely injured in attempting to control them, and it was held that the city was not liable. Following and applying Pack *v.* New York, *supra*, Kelly *v.* Mayor, &c., *supra*, and McCafferty *v.* Spuyten Duyvil & P. M. R. Co., 61 N. Y. 178. See also Cincinnati *v.* Stone, 5 Ohio St. 38; Hilliard *v.* Richardson, 3 Gray (Mass.), 349, "which contains," says Mr. Justice *Davis* (in Chicago *v.* Robbins, 2 Black (U. S.), 418), "a most elaborate and able discussion of the doctrine of *respondeat superior*," with a full review of the authorities. Harper *v.* Milwaukee, 30 Wis. 365. Liability where contractor acts under direction of the city. Chicago *v.* Dermody, 61 Ill. 431; Chicago *v.* Joney, 60 Ill. 383; *ante*, § 460, and note.

gerous, however skilfully performed. In such a case, the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract.[1] But employers not personally giving directions, and not entitled to give directions, respecting the manner of the work, but contracting with a third person to do it, are not liable for a wrongful or negligent act in the performance of the contract, if what was agreed to be done was lawful, and does not constitute a nuisance or is not intrinsically dangerous.[2] And it has been held that the mere fact that the contractor is paid by the day does not necessarily destroy the independent character of his employment.[3] If one renders service in the course of an occupation representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished, it is independent employment.[4]

§ 1723 (1030). **Same Subject.**—Accordingly, the later and better considered cases in this country respecting streets have firmly and, in our judgment, reasonably, established the doctrine that, where

[1] Storrs *v.* Utica, 17 N. Y. 104; Lockwood *v.* New York, 2 Hilton (N. Y.), 66; Springfield *v.* Le Claire, 49 Ill. 476; Chicago *v.* Murdoch, 212 Ill. 9, aff'g 113 Ill. App. 656; Bennett *v.* Mt. Vernon, 124 Iowa, 537; Winfield *v.* Peeden, 8 Kan. App. 671; Louisville *v.* Shanahan (Ky.), 56 S. W. Rep. 808; Hill *v.* Tottenham, 79 Law T. N. S. 495; *supra*, § 1717; *infra*, § 1724, and cases cited. The doctrine of the text approved. Savannah *v.* Waldner, 49 Ga. 316, 323. The subject is discussed in Wright *v.* Holbrook, 52 N. H. 120; Blake *v.* St. Louis, 40 Mo. 569; Murphy *v.* Lowell, 124 Mass. 564. See also Harrisburg *v.* Saylor, 87 Pa. St. 216; Whitney *v.* Clifford, 46 Wis. 138; Carman *v.* Steubenville & Ind. R., 4 Ohio St. 399; Joliet *v.* Harwood, 86 Ill. 110, approving text; Circleville *v.* Neuding, 41 Ohio St. 465; Houston *v.* Isaaks, 68 Tex. 116; Dooley *v.* Sullivan, 112 Ind. 451; Logansport *v.* Dick, 70 Ind. 65; Wilson *v.* Wheeling, 19 W. Va. 323. As to liability in case of blasting done in a street by a citizen in violation of the directions of the city authorities, see Joliet *v.* Seward, 86 Ill. 402.

[2] Gray *v.* Pullen, 32 L. J. Rep. N. S. Q. B. 169; Hilliard *v.* Richardson, 3 Gray (Mass.), 349; Blake *v.* Ferris, 5 N. Y. 48; Painter *v.* Pittsburgh, 46 Pa. St. 213; Birmingham *v.* McCary, 84 Ala. 469, quoting text; Koontz *v.* District of Columbia, 24 App. D. C. 59; Cary *v.* Chicago, 60 Ill. App. 341; Bloomington *v.* Wilson, 14 Ind. App. 476; Schnurr *v.* Huntington County, 22 Ind. App. 188; Harding *v.* Boston, 163 Mass. 14; Harvey *v.* Hillsdale, 86 Mich. 330; Fuller *v.* Grand Rapids, 105 Mich. 529; Charlock *v.* Freel, 125 N. Y. 357; Uppington *v.* New York, 165 N. Y. 222; Carroll *v.* New York, 29 N. Y. App. Div. 420; Uppington *v.* New York, 41 N. Y. App. Div. 370; Wood *v.* Watertown, 58 Hun (N. Y.), 298; Kelly *v.* New York, 106 N. Y. App. Div. 576; Heidenwag *v.* Philadelphia, 168 Pa. 72; Hookey *v.* Oakdale, 5 Pa. Super. Ct. 404; Kuehn *v.* Milwaukee, 92 Wis. 263.

[3] Forsythe *v.* Hooper, 11 Allen (Mass.), 419; Corbin *v.* America Mills, 27 Conn. 274.

[4] Pack *v.* New York, 8 N. Y. 222; East St. Louis *v.* Klug, 3 Ill. App. 90; Barry *v.* St. Louis, 17 Mo. 121; Mercer County *v.* Jackson, 54 Ill. 397; East St. Louis *v.* Giblin, 3 Ill. App. 219; Wood *v.* Mitchell Indep. Sch. Dist., 44 Iowa, 27; Harrison *v.* Collins, 86 Pa. St. 153.

the work contracted for necessarily constitutes an obstruction or defect in the street, of such a nature as to render it unsafe or dangerous for the purposes of public travel, unless properly guarded or protected, the employer (equally with the contractor), where the injury results directly from the acts which the contractor engaged to perform, is liable therefor to the injured party. But the employer is not liable where the obstruction or defect in the street causing the injury is wholly collateral to the contract-work, and entirely the result of the negligence or wrongful acts of the contractor, sub-contractor, or his servants. In such a case the immediate author of the injury is alone liable.[1]

[1] Robbins *v.* Chicago, 4 Wall. (U. S.) 657, 679, and cases cited *per Clifford*, J., whose statement of the principle is substantially adopted in the text. See also on prior appeal, 2 Black (U. S.), 418, where Scammon *v.* Chicago, 25 Ill. 424, is on one point disapproved; Storrs *v.* Utica, 17 N. Y. 104, approving but distinguishing Pack *v.* New York (injury by blasting), 8 N. Y. 222; Kelly *v.* New York (like case), 11 N. Y. 432. See also Herrington *v.* Lansingburgh, 110 N. Y. 145, and Cincinnati *v.* Stone, 5 Ohio St. 38; St. Paul *v.* Seitz, 3 Minn. 297; Nashville *v.* Brown, 9 Heisk. (Tenn.) 1; Erie *v.* Calkins, 85 Pa. St. 247; Edmundson *v.* Pittsburgh, M. & Y. R. R. Co., 111 Pa. St. 316; Goudier *v.* Cormack, 2 E. D. Smith (N. Y.), 254; Detroit *v.* Corey, 9 Mich. 165, concurring in result of Storrs *v.* Utica; Springfield *v.* Le Claire, 49 Ill. 476. Compare Clark *v.* Fry, 8 Ohio St. 358. Palmer *v.* Lincoln, 5 Neb. 136, approves and applies the doctrine of the text. In a discussion of the subject in the Albany Law Journal it is said that "the general rule is that where a person lets work to be done by another by contract, which is innocent and lawful in itself, but which may, if carelessly or negligently done, result in injury to another, he is not charged with liability if such work is in fact carelessly and negligently performed; but he is liable when the work to be done necessarily creates a nuisance. The blasting of rocks by the use of gunpowder or other explosives in the vicinity of another's dwelling-house, or in the vicinity of a highway, is a nuisance, and the person doing the act, or causing it to be done, is liable for all injuries that result therefrom. Hay *v.* Cohoes County, 2 N. Y. 159; Reg. *v.* Mutters, Leigh & C.'s C. Cases, 491." Some close distinctions have been drawn in the application of the doctrine. Thus in McCafferty *v.* Spuyten Duyvil & P. M. R. Co., 61 N. Y. 178, a railroad company let by *contract the entire work of constructing its road.* The contractor sublet a portion of the work. Through the negligence of men employed by the sub-contractor in performing the work, stones and rocks were thrown by a blast upon plaintiff's adjoining property, injuring it; and it was held that the railroad company was not responsible. The court says that this is not a case where the defendant contracted for work to be done which would *necessarily* produce the injuries complained of, but such injuries were caused by the *negligent and unskilful manner* of doing it. The cases of Pack *v.* New York, 8 N. Y. 222; Kelly *v.* New York, 11 N. Y. 432; and Storrs *v.* Utica, 17 N. Y. 104, are cited as authority; and it is said that Hay *v.* Cohoes County, *supra*, is not applicable to the questions involved in McCafferty *v.* Spuyten Duyvil & P. M. R. Co. Note dissenting opinion of *Dwight*, Com'r. See also King *v.* New York Cent. & H. R. R. Co., 66 N. Y. 181; Herrington *v.* Lansingburgh, 110 N. Y. 145, noted *supra*, § 1721, note; Butler *v.* Hunter, 7 H. & N. 826; Reedie *v.* London & N. W. Ry. Co., L. R. 4 Exch. 244; Allen *v.* Willard, 57 Pa. St. 374; St. Paul Water Co. *v.* Ware, 16 Wall. (U. S.) 566; Blumb *v.* Kansas City, 84 Mo. 112.

§ 1724 (1031). **Same Subject.** — Conformably *to the distinctio above drawn*, a corporation is liable for the wrongful act of the cor tractor, under circumstances which show that it, as clearly as th contractor, was the author and promoter of the injury; for instanc where the prosecution of the work as authorized by the corporatio *necessarily* produces the injury, the corporation, as well as th contractor, is responsible for the damage.[1]

§ 1725 (1032). **Negligent or Wrongful Acts by abutting Owne and others.** — *No person, not even the adjoining owner*, whether th *fee* of the street be in himself or in the public, *has the right to d any act which renders the use of the street hazardous* or less secur than it was left by the municipal authorities. Whoever does sc whether by *excavations made in the sidewalk* by the abutter,[2] or b *unsafe hatchways* left therein,[3] or by opening, or *leaving open, a area-way* in the pavement,[4] or by *undermining the street* or side walk, or by *placing unauthorized obstructions thereon*, which mak the use of the street unsafe or less secure,[5] is guilty of a nuisanc

[1] See cases cited in the preceding note, and also Tiffin *v.* McCormick, 34 Ohio St. 638; Carman *v.* Steubenville & Ind. R. R. Co., 4 Ohio St. 399; Fay *v.* Davidson, 13 Minn. 523; Stone *v.* Cheshire R. Corp., 19 N. H. 427; Lowell *v.* Boston & L. R. Co., 23 Pick. (Mass.) 24; Shearm. & Red. Neg. (4th ed.) § 298.

[2] Bush *v.* Johnston, 23 Pa. St. 209; Chicago *v.* Robbins, 2 Black (U. S.), 418; s. c. 4 Wall. (U. S.) 657; Rowell *v.* Williams, 29 Iowa, 210, following Chicago *v.* Robbins, *supra;* Pfau *v.* Reynolds, 53 Ill. 212; Ottumwa *v.* Parks, 43 Iowa, 119; District of Columbia *v.* Baltimore & P. R. Co., 1 Mackey, 314; *ante*, § 1131, and note; Covington S. M. & Mfg. Co. *v.* Drexilius, 120 Ky. 493; Boston *v.* Coon, 175 Mass. 283; Robinson *v.* Mills, 25 Mont. 391; Wilder *v.* Concord, 72 N. H. 259; Rupp *v.* Burgess, 70 N. J. L. 7; Smith *v.* Ryan, 130 N. Y. 653; Blakeslee *v.* Geneva, 61 N. Y. App. Div. 42; Brown *v.* Louisburg, 126 N. Car. 701; Sullivan *v.* Dallas City Nat'l Bank, 27 Tex. Civ. App. 359; Brown *v.* Bachman (Tex. Civ. App.), 72 S. W. Rep. 622; Bowen *v.* Huntington, 35 W. Va. 682.

[3] Severin *v.* Eddy, 52 Ill. 189; Benjamin *v.* Metropolitan S. Ry. Co., 133 Mo. 274; O'Malley *v.* Gerth, 67 N. J. L. 610; Queck-Berner *v.* Atlantic Tr. Co., 80 N. Y. App. Div. 46(Hart *v.* McKenna, 106 App. Di 219; Berger *v.* Content, 47 N. Y Misc. 390; Whitty *v.* Oshkosh, 10 Wis. 87; Minns *v.* Omemee, 2 On Law Rep. (Can.) 579. Where it i equally *the duty of the city and of th owner* to keep the sidewalk in front c the premises in repair, both will b liable jointly or severally to one wh is injured in consequence of thei neglect to do so. Peoria *v.* Simpsor 110 Ill. 294. *Infra*, §§ 1727–1729 Dallas *v.* Meyers (Tex. Civ. App.) 55 S. W. Rep. 742. But see Lin coln *v.* Pirner, 59 Neb. 634; Lincol *v.* Janesch, 63 Neb. 707; Devine *v* Fond du Lac, 113 Wis. 61.

[4] Beatty *v.* Gilmore, 16 Pa. St 463; Durant *v.* Palmer, 29 N. J. L 544; Temperance Hall Assoc. *v.* Giles 33 N. J. L. 260; Irvine *v.* Wood (coal hole in sidewalk), 51 N. Y. 224; *ante* §§ 1178, 1179, 1717, note. Condon *v* Sprigg, 78 Md. 330; Snader *v.* Murphy 19 Pa. Super. Ct. 35; Reynolds *v* Garst, 25 R. I. 83. But see Kuechen meister *v.* Brown, 1 N. Y. App. Div 56.

[5] Congreve *v.* Smith, 18 N. Y. 79 Same *v.* Morgan, *Ib.* 84; Harlow *v* Humiston, 6 Cow. (N. Y.) 189 Wood *v.* Mears, 12 Ind. 515; Bal *v.* Armstrong (building material in gutter), 10 Ind. 181; Howe *v.* New

and is liable to any person who, using due care, sustains any special injury therefrom; and in such cases, the person who created or continues the nuisance is thus liable, irrespective of the question of negligence on his part.[1]

§ 1726 (1033). **Same Subject; Respondeat Superior not Applicable.** — In accordance with the principles stated in the preceding sections, the owner of a building and lot is liable for personal injuries sustained by the *breaking of a flagstone*, or *defective grating forming part of the sidewalk* adjoining the building and covering an excavation made in the sidewalk, and used by the owner for private purposes.[2] It follows that it is no answer to such an action, that

Orleans (unsafe burnt wall), 12 La. An. 481; Parker *v.* Macon (unsafe wall), 39 Ga. 725; Brunswick & W. R. Co. *v.* Hardey, 112 Ga. 604; Schiffmacher *v.* Kircher, 59 Ill. App. 113; Perrigo *v.* St. Louis, 185 Mo. 274; Christman *v.* Meierhoffer, 116 Mo. App. 46; Weller *v.* McCormick, 52 N. J. L. 470; Skelton *v.* Larkin, 146 N. Y. 365; Tremblay *v.* Harmony Mills, 171 N. Y. 598; Ramsey *v.* National Contracting Co., 49 N. Y. App. Div. 11; McConnell *v.* Bostelmann, 72 Hun (N. Y.), 238; Kramer *v.* Southern Ry. Co., 127 N. Car. 328; Price *v.* Betz, 199 Pa. 457; Benard *v.* Woonsocket Bobbin Co., 23 R. I. 581; Copeland *v.* Seattle, 33 Wash. 415. But see Beck *v.* Ferd Heim Brewing Co., 167 Mo. 195; Friedman *v.* Snare & Triest Co., 71 N. J. L. 605. See Ottumwa *v.* Parks, 43 Iowa, 119. *Ante*, § 1717, note.

[1] Congreve *v.* Smith, 18 N. Y. 79; Same *v.* Morgan, *Ib.* 84, following this point Dygert *v.* Schenck, 23 Wend. (N. Y.) 446, and distinguished from Daniel *v.* Potter, 4 C. & P. 262, which involved "no question of liability for a consequential injury from a direct invasion of the street, or wrongful act." *Per Strong*, J., 18 N. Y. 86; Davis *v.* Rich, 180 Mass. 235; Brown *v.* White, 202 Pa. 297; Copeland *v.* Seattle, 33 Wash. 415. But see Kuechenmeister *v.* Brown, 1 N. Y. App. Div. 56. See also Davenport *v.* Ruckman, 10 Bosw. (N. Y.) 20; 37 N. Y. 568; Gridley *v.* Bloomington (broken flagstone over walk), 68 Ill. 47; Irvine *v.* Wood (defectively covered coal-hole in sidewalk), 51 N. Y. 224; O'Malley *v.* Gerth, 67 N. J. L. 610; Stege *v.* Milwaukee, 110 Wis. 484; s. c. below, 4 Rob. (N. Y.) 138; 5 Rob. 482; Calder *v.* Smalley, 66 Iowa, 219 (defectively covered coal-hole). No one is at liberty to leave an excavation of any kind *adjoining a highway*, if it render the highway unsafe for the use of travellers. Barnes *v.* Ward, 9 C. B. 392; Hadley *v.* Taylor, L. R. 1 C. P. 53. See also on the general subject, Cornwall *v.* Metropolitan Com'rs of Sewers, 10 Ex. 771; Hardcastle *v.* South Yorkshire R. Co., 4 H. & N. 67. *Supra*, § 1666, note. Note, on this point, the guarded language of Mr. Justice *Davis*, *obiter*, in Chicago *v.* Robbins, 2 Black (U. S.), 418. In *New York* it is held that a municipal corporation may recover from a person who has negligently or unlawfully created an obstruction in a street, the money which it has been compelled to pay as damages for injuries sustained by individuals; that the city had granted to such person the right to use the street temporarily, and that it gave him no notice of suits against it by persons injured, cannot be urged by way of defence to such an action. Port Jervis *v.* Port Jervis First National Bank, 96 N. Y. 550. *Ante*, § 1704.

[2] Congreve *v.* Smith, 18 N. Y. 79; Same *v.* Morgan, *Ib.* 84; Dygert *v.* Schenck, 23 Wend. (N. Y.) 446. Even if there be authority from the city corporation to make the excavation, this implies "that it is to be done with proper precautions to prevent accidents to travellers," and such a work is lawful only so long as it is safe. Robbins *v.* Chicago, 4 Wall. (U. S.) 657, 679, *per Clifford*, J.; s. p. in s. c. 2 Black (U. S.), 418. It is not a negligent or wrongful act for a city to

the work, including the defective covering, was done for the owner at a fixed price by contractors, who agreed to do it properly. The doctrine of *respondeat superior has no application* to such a case. And because the owner is bound, at his peril, to keep the excavation covered so as to be as safe as if it had not been made, he is not discharged from liability by the fact that, having provided a sufficient covering, it was, without his knowledge, fractured or rendered unsafe by the wrongful acts of others.[1]

silently allow the owner of property abutting on a street *properly to construct* a coal-vault under the sidewalk. Lafayette *v.* Blood, 40 Ind. 62. See *ante*, §§ 1178–1180.

[1] Congreve *v.* Morgan, 18 N. Y. 84. The owner and tenant may be both liable and suable jointly. Irvine *v.* Wood, 51 N. Y. 224; 5 Rob. (N. Y.) 482; s. c. 4 Rob. 138; Eakin *v.* Brown, 1 E. D. Smith (N. Y.), 44; Moore *v.* Townsend, 76 Minn. 64; Ray *v.* Jones & Adams Co., 92 Minn. 101; Rommeney *v.* New York, 49 N. Y. App. Div. 64; Mullins *v.* Siegel-Cooper Co., 95 N. Y. App. Div. 234. The cases in *New York* upon which the doctrine of the text rests, are denied to be sound by the Supreme Court of *Michigan*, in the case of Fisher *v.* Thirkell, 21 Mich. 1. In that case the owner of a building, who for his own advantage and convenience had made, without any express municipal assent (*ante*, § 1178), a scuttle or hole in the sidewalk, opening into a vault connecting with the cellar, was held not to be liable for an accident to a traveller, caused by its being out of repair, it appearing that it was safely constructed originally, and that it was allowed to become out of repair by the tenant under a lease which did not contain any covenant on the part of the lessor to keep the premises in repair. The court regarded such excavations properly made and guarded as lawful, unless made in contravention of some law or authorized municipal regulation, and to draw after them no such consequence as that the party making them shall be responsible for all injuries resulting from the want of entire safety. Since these are made for the exclusive benefit of the owner of the building, the author sees nothing unreasonable in the doctrine that he is bound to see that they are kept in repair, and do not become nuisances by becoming dangerous. *Ante*, § 1179. There may be the additional liability of the tenant and of the municipality in proper cases.

Where a *city permits a cellar-way to be constructed in the sidewalk of one of its principal streets*, which cellar-way is not guarded in any manner except by a trap-door, and is dangerous for persons travelling on said sidewalk when said trap-door is not closed, and when the city permits the person occupying the adjoining lot and those acting under him to open or close said trap-door at their option, the city is liable for any injury that may occur by reason of any person falling, without fault on his part, into said cellar-way, when said trap-door is left open. Smith *v.* Leavenworth, 15 Kan. 81. Whether it is negligence for which a city is liable, for the city council to allow cellars under its sidewalks, in front of shops, is a question for the jury, in an action against the city by one injured by falling into such a cellar. Augusta *v.* Harper, 59 Ga. 151.

The *owner* of a building is not liable for defects in sidewalk occasioned by *natural causes*, as by accumulations of *ice and snow* thereon. Kirby *v.* Boylston Market Assoc., 14 Gray (Mass.), 249. Respective liability of *owner* and *tenant*. Shearm. & Red. Neg. (4th ed.) § 699 *et seq.* *Ante*, §§ 1697, 1704, and notes. *Infra*, § 1727, note. Hartford *v.* Talcott, 48 Conn. 525, holding also that the fact that a city ordinance required property owners to clear sidewalks of ice and snow, under penalty, did not create a liability upon them for injuries caused thereby. Rupp *v.* Burgess, 70 N. J. L. 7. Compare *ante*, § 573. *Supra*, §§ 1697, 1704, and notes. In Irvine *v.* Wood, 51 N. Y. 224, it was held that lessor and lessee might be joined as defendants under the circumstances there appearing.

Defects in ways caused by *railroad companies*. *Infra*, § 1730.

§ 1727 (1034). **Ultimate Liability.** — The *ultimate liability* in such cases is upon the *author or continuer of the nuisance;* but if the party injured elects to proceed against the municipal corporation for failing in its duty to keep the streets and sidewalks in a safe condition for public travel, and there is no statute dispensing with notice as a condition of liability, he must show notice to the corporation of the obstruction or defect, or at least, neglect of duty in not ascertaining it.[1] If the person injured fail in his action

[1] *Supra*, § 1717; *ante*, § 1240; McGinity *v.* New York, 5 Duer (N. Y.), 674; Griffin *v.* New York, 9 N. Y. 456; Portland *v.* Richardson, 54 Me. 46; Veazie *v.* Penobscot R. Co., 49 Me. 119; Chicago *v.* Robbins, 2 Black (U. S.), 418; s. c. 4 Wall. (U. S.) 657; Durant *v.* Palmer, 29 N. J. L. 544; Sterling *v.* Thomas, 60 Ill. 264; Johnston *v.* Charleston (degree of municipal diligence and care), 3 S. Car. 232; Haskell *v.* Penn Yan, 5 Lans. (N. Y.) 43; Alliance *v.* Campbell, 17 Ohio Cir. Ct. R. 595. No liability by owner of land if in the use of his land he places logs outside of the *legal* highway, but within the road as fenced. Harlow *v.* Humiston, 6 Cow. (N. Y.) 189. Manchester *v.* Quimby, 60 N. H. 10, holding that the fact that a city has granted permission to an individual to obstruct a street is not a waiver of his liability to the city for damages it has been compelled to pay for injuries caused by such obstruction. In an action against a town for injuries, the question whether the town can recover from the owner of the adjoining premises is not material. Purple *v.* Greenfield, 138 Mass. 1.

LIABILITY FOR ACT OF AGENT OR SERVANT. Harlow *v.* Humiston, 6 Cow. (N. Y.) 189; Samyn *v.* McCloskey, 2 Ohio St. 536.

LIABILITY AS BETWEEN OWNER AND TENANT. Durant *v.* Palmer, 29 N. J. L. 544; Shipley *v.* Fifty Associates, 106 Mass. 194; Milford *v.* Holbrook, 9 Allen (Mass.), 17; Lowell *v.* Spaulding, 4 Cush. (Mass.) 275, 277; Lowell *v.* Short, *Ib.* 275; Kirby *v.* Boylston Market Assoc., 14 Gray (Mass.), 249; Stephani *v.* Brown, 40 Ill. 428; Chicago *v.* O'Brennan, 65 Ill. 160; Cheetham *v.* Hampson, 4 T. R. 318; Fisher *v.* Thirkell, 21 Mich. 1; Irvine *v.* Wood (coal-hole in sidewalk), 51 N. Y. 224; Jennings *v.* Van Schaick, 108 N. Y. 530 (coal-hole in sidewalk). While it is clear that one who would be liable over to the city if it is compelled to pay damages for an injury caused by a defect in a sidewalk which he is bound to repair, could not maintain an action against the city for an injury to himself by such defect; yet this rule cannot be extended to a plaintiff who was lessee of two rooms in the house and had no right in or control over the coal-cellar, a defect in the covering of which caused the injury, and who was not under any duty or obligation to repair the sidewalk, nor liable to any one for an injury caused by a defect in it. Burt *v.* Boston, 122 Mass. 223, citing Kirby *v.* Boylston Market Assoc., 14 Gray (Mass.), 249; Shipley *v.* Fifty Associates, 106 Mass. 194; Leonard *v.* Storer, 115 Mass. 86; Larue *v.* Farren Hotel Co., 116 Mass. 67; Bartlett *v.* Boston Gasl. Co., 117 Mass. 533, distinguished. *Supra*, § 1697, note.

To the general rule as to the nonliability of landlord, the authorities, says the Supreme Court of *Illinois*, recognize these exceptions: 1. Where the landlord has, by an express agreement between the tenant and himself, agreed to keep the premises in repair, so that in case of a recovery against the tenant, he would have his remedy over, then, to avoid circuity of action, the party injured by the defect and want of repair may have his action in the first instance against the landlord; but such express agreement must be distinctly proved. See Lowell *v.* Spaulding, 4 Cush. (Mass.) 275; Fisher *v.* Thirkell, 21 Mich. 1; Cheetham *v.* Hampson, 4 T. R. 318, *supra*. 2. Where the premises are let with a nuisance upon them, by means of which the injury complained of is received. See Stephani *v.* Brown, *supra*, and Gridley *v.* Bloomington, 68 Ill. 47. Owner held liable for unsafe "awning" which he allowed or suffered the tenant to put up. Jessen *v.* Sweigert, 66 Cal. 182; *supra*, § 1705.

against the municipality, this is no bar to an action by him against the author of the nuisance.[1]

§ 1728 (1035). **Action over.** — If a *municipal corporation be held liable* for damages sustained in consequence of the unsafe condition of the sidewalks or streets, *it has a remedy over against the person by whose wrongful act or conduct the sidewalk or street was rendered unsafe*, unless the corporation was itself a wrong-doer, as between itself and the author of the nuisance;[2] and if the latter had *notice of the pendency of the action against the municipality*, and could have defended it, he has been held to be concluded as to the existence of the defect or nuisance in the street, and as to the liability of the

Liability for a dangerous and unguarded excavation NEAR *a frequented sidewalk or street. Ante*, §§ 1717, note, 1726, note. Norwich *v.* Breed, 30 Conn. 535. Compare Howland *v.* Vincent, 10 Met. (Mass.) 371; Hardcastle *v.* South Yorkshire R. R. Co., 4 H. & N. 67; Hounsel *v.* Smyth, 7 Com. B. (N. S.) 729; Victory *v.* Baker, 67 N. Y. 366; Beck *v.* Carter, 68 N. Y. 283; Bunch *v.* Edenton, 90 N. Car. 431; Halpin *v.* Kansas City, 76 Mo. 335; Hawes *v.* Fox Lake, 33 Wis. 438; Drew *v.* Sutton, 55 Vt. 586; Kelly *v.* Columbus, 41 Ohio, 263; Scranton *v.* Hill, 102 Pa. 378. Shearm. & Red. Neg. (4th ed.) § 715, and cases. Manderschid *v.* Dubuque, 29 Iowa, 73; Ottumwa *v.* Parks, 43 Iowa, 119; *ante*, § 1673; Haughey *v.* Hart, 62 Iowa, 96; Parker *v.* Macon (unsafe wall), 39 Ga. 725; Howe *v.* New Orleans (unsafe wall), 12 La. An. 481; Rowell *v.* Williams, 29 Iowa, 210; Shearm. & Red. Neg. (4th ed.) §§ 285, 347. No liability against the owner for maintaining an area-cover in a highway where this existed at the *time of the dedication* of the highway *to the public*. Fisher *v.* Prowse, 2 B. & S. 770, and cases reviewed by *Blackburn*, J. See Beach *v.* Frankenberger, 4 W. Va. 712; ante, §§ 1694 *et seq.*, and notes.

Municipal liability for personal injuries caused by falling into *trench near* public building. Larrabee *v.* Peabody, 128 Mass. 561; Daily *v.* Worcester, 131 Mass. 452; Barnes *v.* Chicopee, 138 Mass. 67. Municipal liability for *defects in public places*. Clark *v.* Waltham, 128 Mass. 567; Lincoln *v.* Boston, 148 Mass. 578. No municipal liability for the unsafe condition of a *private way used by the public*. Goodin *v.* Des Moines, 55 Iowa, 67, distinguished from Burnham *v.* Boston, 10 Allen (Mass.), 290; Covington *v.* Bryant, 7 Bush, 248; Oliver *v.* Worcester, 102 Mass. 489, and Young *v.* Harvey, 16 Ind. 314. A provision in a charter exempting a city from liability for injuries caused by defective streets, until all legal remedies have been exhausted against the person causing the defect, is strictly construed. Raymond *v.* Sheboygan, 70 Wis. 318; Hiner *v.* Fond du Lac, 71 Wis. 74; Henker *v.* Fond du Lac, 71 Wis. 616; McFarlane *v.* Milwaukee, 51 Wis. 691. It does not, however, apply to cases where the city itself is at fault. Papworth *v.* Milwaukee, 64 Wis. 389.

[1] Severin *v.* Eddy, 52 Ill. 189. See Luke *v.* El Paso (Tex. Civ. App.), 60 S. W. Rep. 363.

[2] Chicago *v.* Robbins, 4 Wall. (U. S.) 657; s. c. 2 Black (U. S.), 418; Portland *v.* Richardson, 54 Me. 46, and cases cited; Milford *v.* Holbrook, 9 Allen (Mass.), 17; Brooklyn *v.* Brooklyn R. Co., 47 N. Y. 475; Brookville *v.* Arthurs, 130 Pa. 501; Chester *v.* First Nat. Bank, 9 Pa. Super. Ct. 517; Rochester *v.* Montgomery, 72 N. Y. 65; Gridley *v.* Bloomington, 68 Ill. 47; District of Columbia *v.* Baltimore & P. R. Co., 1 Mackey, 314; Catterlin *v.* Frankfort, 79 Ind. 547; Elkhart *v.* Wickwire, 87 Ind. 77; McNaughton *v.* Elkhart, 85 Ind. 384; Taylor *v.* Lake Shore & M. S. R. Co., 45 Mich. 74 (special provision in city charter). *Action over*. Shearm. & Red. Neg. (4th ed.) § 301; 2 Thomps. Neg. 789; *infra*, § 1730.

corporation to the plaintiff in consequence thereof, and as to the amount of damage or injury it occasioned.[1] But although duly notified, he is not, says the Supreme Court of the United States, "estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault that the accident happened."[2]

§ 1729 (1036). **Same Subject.** — It has been held that, where an injury has resulted from a defect in the sidewalk, negligently permitted by the city to continue, and for which the city is compelled to pay, there is no *recourse over in favor of the city against the owner of the lot* in front of which the defect existed, and no liability on

[1] Boston *v.* Worthington, 10 Gray (Mass.), 496; Milford *v.* Holbrook, 9 Allen (Mass.), 17; Portland *v.* Richardson, 54 Me. 46; Veazie *v.* Penobscot R. Co., 49 Me. 119; Troy *v.* Troy & L. R. R. Co., 49 N. Y. 657; Brooklyn *v.* Brooklyn R. Co., 47 N. Y. 475, and cases cited. *Ib.* 481.

The city may recover against the author of the defect, who, being notified, neglected to defend, not only the amount of the judgment recovered against it, but also reasonable expenses in defending that action, including counsel fees. Westfield *v.* Mayo, 122 Mass. 100, where the subject is instructively considered by *Lord*, J. A notice from the town to the defendant, stating that an action had been begun against it by the party injured, the site of the injury, the court in which the action was brought, and calling upon the defendant to defend the action, is sufficiently full and precise. Westfield *v.* Mayo, 122 Mass. 100; Milford *v.* Holbrook, 9 Allen (Mass.), 17; Boston *v.* Worthington, 10 Gray (Mass.), 496. As a general rule, when a party is called upon to defend a suit founded upon a wrong for which he is held responsible in law without malfeasance on his part, but because of the wrongful act of another, against whom he has a remedy over, if he has notified the other to appear and defend the suit, counsel fees are the natural and necessary consequence of the wrongful act of the other, and may be recovered as part of the damages. Westfield *v.* Mayo, *supra;* Reggio *v.* Braggiotti, 7 Cush. (Mass.) 166; Baxendale *v.* London, C. & D. R. Co., 10 Ex. 35; Fisher *v.* Val de Travers Asphalte Co., L. R. 1 C. P. Div. 511, distinguished. See Lowell *v.* Boston & L. R. Corp., 23 Pick. (Mass.) 24, holding that the municipal corporation is not *in pari delicto* with the party by whose direct act the defect exists. S. P. Brookville *v.* Arthurs, 130 Pa. 501. If the injured party shall first recover from the city, the person causing the injury appearing in the action and defending, the measure of damages in an action against him by the city is the amount of the judgment, interest, and taxable costs. Unless an appeal from the judgment shall have been taken by the city at his instance, he is not liable for the costs thereof. Ottumwa *v.* Parks, 43 Iowa, 119.

[2] Chicago *v.* Robbins, 2 Black (U. S.), 418, *per Davis*, J.; s. c. 4 Wall. (U. S.) 657, in both of which it is held that *it is not necessary that the notice should have been express or formal.* Catterlin *v.* Frankfort, 79 Ind. 547; Keokuk *v.* Keokuk Indep. School Dist., 53 Iowa, 352. Effect of *record in former action.* King *v.* Chase, 15 N. H. 1; Littleton *v.* Richardson, 34 N. H. 179, 187, and cases cited, where the subject is fully examined. Boston *v.* Worthington, 10 Gray (Mass.), 496; Brooklyn *v.* Brooklyn R. Co., 47 N. Y. 475; Westchester *v.* Apple, 35 Pa. St. 284; Portland *v.* Richardson, 54 Me. 46; Troy *v.* Troy & L. R. Co., *supra.* If defendant is not estopped by the record of the former suit, it must be shown that the municipality was legally liable for the injury for which a recovery was had against it. Cases *supra;* Shearm. & Red. Neg. (4th ed.) § 301.

the part of such owner to the party injured, arising from the mere fact of ownership. Before the lot-holder can be held responsible, there must appear some neglect of a legal duty on his part, or he must have trespassed upon the sidewalk by obstruction upon the surface, made excavation beneath, or done some act rendering the same unsafe, and such negligence, obstruction, excavation, or act must have caused the injury.[1]

§ 1730 (1037). **Where Street is rendered defective by the Act of a Railroad Company; Action over.** — Towns and cities in the New England States are obliged, as we have seen, by statute, to keep their highways and streets in repair;[2] and *railroad companies* in the same States have frequently been authorized by law *to construct their roads over public highways and streets*, the effect of which may be to cause the latter to be out of repair. Under these circumstances the question arises, If a person suffers damage by reason of a defective highway or street, thus occasioned, who is responsible, — the railroad company which caused the defect, or the town or city which is charged with the general duty of maintaining and keeping in repair the public ways? The course of decision is to hold the town or city *primarily* responsible to the person sustaining the injury, thus compelling it, when held liable, to seek indemnity from the railroad company.[3] In such a case the

[1] Jansen *v.* Atchison, 16 Kan. 358. The text states with slight alterations the point decided in the language of the head-note prepared by the judges. *Ante*, §§ 1720, note, 1726, note. See also Martinovitch *v.* Wooley 128 Cal. 141.

[2] *Ante*, §§ 1691, 1708.

[3] Phillips *v.* Veazie, 40 Me. 96; Wellcome *v.* Leeds, 51 Me. 313; Currier *v.* Lowell, 16 Pick. (Mass.) 170, cited *infra;* Elliot *v.* Concord, 27 N. H. 204; Winship *v.* Enfield, 42 N. H. 197; Batty *v.* Duxbury, 24 Vt. 155; Willard *v.* Newbury, 22 Vt. 458; Barber *v.* Essex, 27 Vt. 62; Roxbury *v.* Boston & P. R. Co., 6 Cush. (Mass.) 424, 430; Redfield on Railways, 391; People *v.* Brooklyn, 65 N. Y. 349; Sides *v.* Portsmouth, 59 N. H. 24; District of Columbia *v.* Sullivan, 11 App. D. C. 533; Bentley *v.* Atlanta, 92 Ga. 623; Union St. Ry. Co. *v.* Stone, 54 Kan. 83; Kansas City *v.* Orr, 62 Kan. 61; Endicott *v.* Triple-State N. G. & Oil Co. (Ky.), 76 S. W. Rep. 516; Cutcher *v.* Detroit, 139 Mich. 186; McCarroll *v.* Kansas City, 64 Mo. App. 283; Bates *v.* Holbrook, 67 N. Y. App. Div. 25; Binninger *v.* New York, 80 N. Y. App. Div. 438; 177 N. Y. 199; Sherman *v.* Oneonta, 21 N. Y. Supp. 137; s. c. 66 Hun (N. Y.), 629; Byrne *v.* Syracuse, 79 Hun (N. Y.), 555; Zanesville *v.* Fannan, 53 Ohio St. 605; Toledo Con. St. Ry. Co. *v.* Sweeney, 8 Ohio Cir. Ct. R. 298; Nelson *v.* Narragansett E. L. Co., 26 R. I. 258; White *v.* San Antonio (Tex. Civ. App.), 25 S. W. Rep. 1132; Galveston, &c. R. Co. *v.* White (Tex. Civ. App.), 32 S. W. Rep. 187; Laager *v.* San Antonio (Tex. Civ. App.), 57 S. W. Rep. 61; Brown *v.* Bachman (Tex. Civ. App.), 72 S. W. Rep. 622. But see Michigan City *v.* Boeckling, 122 Ind. 39; Long *v.* Philadelphia, 212 Pa. 125. The rule holds good in some other States. Campbell *v.* Stillwater, 32 Minn. 308; Steubenville *v.* McGill, 41 Ohio St. 235; Aston *v.* McClure, 102 Pa. St. 322. State *v.* Gorham, 37 Me. 451, holds the same doctrine as to *bridges*. See, further, on this subject, *ante*, §§ 1233, 1244, and note;

railroad company is liable to the town or city for its neglect, or that of its workmen, and for the neglect of the workmen of a contractor who had agreed to construct the railroad for a stipulated sum. But the town or city can only recover of the railroad company *single damages*, although it had to pay double damages; nor can it recover from the railroad company the *costs and expenses* of the action brought by the traveller against it, unless the action was defended at the request of the railroad company, or for its benefit.[1]

also, § 1681, note; Kitredge *v.* Milwaukee, 20 Wis. 46. As to liability for defects *at the crossing*. Davis *v.* Leominster, 1 Allen (Mass.), 182; *supra*, § 1687, note.

The traveller may, of course, elect to proceed at once against the railroad company if he chooses. Lowell *v.* Boston & L. R. Co., 23 Pick. (Mass.) 24, 31; Elliot *v.* Concord, 27 N. H. 204, construing statute. See also Willard *v.* Newbury, 22 Vt. 458; Batty *v.* Duxbury, 24 Vt. 155. The primary duty is in the city, although as between it and a street railway company the latter is bound to repair. Watson *v.* Tripp, 11 R. I. 98; following cases above cited, and distinguishing upon the statutes applicable. Sawyer *v.* Northfield, 7 Cush. (Mass.) 490; White *v.* Quincy, 97 Mass. 430. See *supra*, § 1720. *Mandamus* held to lie to compel railroad company to level and grade the street so as to render the use thereof at the railroad crossing safe and convenient for the public. Indianapolis & C. R. Co. *v.* State, 37 Ind. 489. *Ante*, § 1493. In the same State a railroad company was held liable in damages for injury occasioned by reason of the *construction of a raised railroad track along a street of a city, thereby causing the water from rains and freshets to flow upon adjacent real estate*, and also for injury occasioned by reason of the construction of an embankment on a street approaching a street-crossing of said track, in front of a lot in a city occupied by a dwelling-house, thereby rendering the approach to the lot in front on such street impossible for carriages, wagons, and vehicles, and inconvenient for foot-passengers. Indianapolis, B. & W. R. Co. *v.* Smith, 52 Ind. 428. See chapter on Streets, *ante*, as to the rights and liabilities of railway companies in such cases. These depend upon the extent of legislative authority conferred upon the companies, the extent to which it may be constitutionally conferred, and whether the valid statutory authority has been properly pursued. See *post*, § 1743.

In *Massachusetts* a town is not responsible for injuries sustained by a traveller on a highway by the *running of the cars* of a railroad company *across the highway*. Vinal *v.* Dorchester, 7 Gray, 421. The case of Currier *v.* Lowell, 16 Pick. (Mass.) 170, carries the liability of towns to its extreme limits. *Ib.*, *per Shaw*, C. J. Nor by reason of a *telegraph post* erected by authority of the law within the limits of the highway. Young *v.* Yarmouth, 9 Gray (Mass.), 386; *ante*, § 1220.

[1] Lowell *v.* Boston & L. R. Co., 23 Pick. 24, growing out of Currier *v.* Lowell, 16 Pick. 170; s. p. Lowell *v.* Short, 4 Cush. (Mass.) 275; Same *v.* Spaulding, *Ib.* 275, 277; Willard *v.* Newbury, 22 Vt. 458; Tatman *v.* Benton Harbor, 115 Mich. 695. See on this subject, Rex *v.* St. George Par., 3 Campb. 222; Rex. *v.* Liverpool, 3 East, 86; Littleton *v.* Richardson, 34 N. H. 179. *Remedy over* against author of nuisance. *Ante*, §§ 1725–1729.

In a case against the city of St. Louis it appeared that by the charter the city had exclusive control over its own sewers, and it was also authorized to allow or refuse to allow railway companies to construct their roads along the streets. The city gave its assent to the construction of an underground railroad in one of its streets, reserving the right to supervise the removal and reconstruction of any sewer that might become necessary. It became necessary in the progress of the work to remove and reconstruct a sewer. By reason of the negligence of the railway company's contractor in rebuilding the sewer, the foundation of the plaintiff's house fronting on the street gave way. The city was held

Civil Liability in respect of Surface-Water, Drains, and Sewers.

§ 1731 (1038). **Overflow of Water on Private Property; Distinction between Natural Streams and Surface-Water.** — In this connection may be considered the liability of municipal corporations *for injuries to private property in consequence of being overflowed with water* caused by improvements made or work done upon the streets, under their authority. And here *it is important to distinguish* between *natural streams* flowing in channels between defined and actual banks, and *surface-water*, caused by rain or melting snow; for the law relating to them is essentially different, and the powers of the municipality much greater with respect to the latter than the former.[1] Assuming the stream to be of the former character,

liable for the injury, and it was no defence that its officers had failed to exercise supervision and control over the work. It was neglect of duty not to have done so. Fink *v.* St. Louis, 71 Mo. 452. General doctrine as to the *primary* liability of the city as respects the public. *Supra*, § 1720.

Where a city council gave a railroad company the right to construct its track along a public street, and the company, under the right so conferred, made excavations along such street, so that the plaintiffs were deprived of convenient access to and from the street and their lots, and the lots and tenements thereon were subject to injury by the caving and falling of the street and lots, it was held by the Supreme Court of *Illinois* (as to the line of decision therein in such cases, see *infra*, § 1734, note) that the city was liable to the plaintiffs, in an action on the case, for the injury caused by such excavations. *Breese*, J., says: "The case of Moses *v.* Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516, and that of Murphy *v.* Chicago, 29 Ill. 279, were decided long anterior to the adoption of the present Constitution, and are essentially modified by Nevins *v.* Peoria, 41 Ill. 502, and also by Indianapolis, B. & W. R. Co. *v.* Hartley, 67 Ill. 439. We are, as time advances, the more convinced of the justice of the views announced by this court, — that, in the exercise of power conferred upon a municipal authority, private rights must be regarded; that individual property is not at the mercy of municipal power." Pekin *v.* Brereton, 67 Ill. 477. See also Stack *v.* East St. Louis, 85 Ill. 377, and Cumberland *v.* Willison, 50 Md. 138. *Ante*, § 1677 *et seq.*

[1] 3 Kent Com. 439, 440; 2 Washb. Real Prop. 64, pl. 40; 1 West. Jur. 12, Article on "Surface Waters." See Rose *v.* St. Charles, 49 Mo. 509, as to "living" and "permanent" stream. Imler *v.* Springfield, 55 Mo. 119, 127; Barns *v.* Hannibal, 71 Mo. 449; Flagg *v.* Worcester, 13 Gray, 601, 607, and cases there cited by *Merrick*, J.; Goodale *v.* Tuttle, 29 N. Y. 459; Gould *v.* Booth, 66 N. Y. 62, noted *infra*, § 1734, note; Kellogg *v.* Thompson, 66 N. Y. 88; Vanderwiele *v.* Taylor, 65 N. Y. 341. Text approved, Helena *v.* Thompson, 29 Ark. 569, 574, by *English*, C. J. "The rule is different as to surface-water." Little Rock *v.* Willis, 27 Ark. 572; Macomber *v.* Godfrey (watercourse what?), 108 Mass. 219; Briscoe *v.* Drought, 11 Ir. C. L. R. 250; Wood *v.* Ward, 3 Exch. (W. H. & G.) 748; Hoyt *v.* Hudson, 27 Wis. 656; Van Pelt *v.* Davenport, 42 Iowa, 308, appears, although the facts are not very fully reported, to have been a case where surface-water was *set back* on the plaintiff's premises (below the level of the street) in consequence of the insufficient size of the culvert constructed across a ravine by the city in the course of extending its streets, and constructed for the purpose of conducting away the surface-water. Before the culvert was made the surface-water flowed along the ravine without injury to the plaintiff. In heavy showers the culvert was too small to carry off all the water rapidly enough to prevent its flowing back on

and that the municipality is without any valid legislative powers changing what would otherwise be the legal rights of the parties, its authorities under the general power to grade and improve streets, or construct public improvements beneficial to it, cannot deprive others of their legal rights in respect of the water-course, or injure the property of others by badly constructed and insufficient culverts or passageways obstructing the free flow of the water, without being liable therefor.[1]

the property of the plaintiff. The court held, as we understand the opinion, that the city was bound to use reasonable care, judgment, and skill in determining the *size* of the culvert (the point in controversy in the case), otherwise it would be liable; and it further held that it had discharged its whole duty, so as to relieve it from liability, if it had committed the matter of the size to a competent civil engineer, who drafted plans providing for a culvert which, in his judgment, would be large enough, but in which it afterwards appeared he was mistaken. See also Hoehl *v.* Muscatine, 57 Iowa, 444; *post*, §§ 1739–1746.

[1] Barron *v.* Baltimore, 2 Am. Jur. 203, approved in Stetson *v.* Faxon, 19 Pick. (Mass.) 147, 158; and see also Thayer *v.* Boston, *Ib.* 511; Larrabee *v.* Cloverdale, 131 Cal. 96; Gardner *v.* Newburgh (diverting water-course), 2 Johns. (N. Y.) Ch. 162; Kellogg *v.* Thompson (diverting water-course from highway), 66 N. Y. 88; Phinizey *v.* Augusta, 47 Ga. 260. Text approved, Aicher *v.* Denver, 10 Colo. App. 413. See Indianapolis *v.* Lawyer, 38 Ind. 348; Rice *v.* Evansville, 108 Ind. 7; Crawfordsville *v.* Bond, 96 Ind. 236; Carmichael *v.* Texarkana, 94 Fed. Rep. 561; Birmingham *v.* Land, 137 Ala. 538; Los Angeles Cemetery Assoc. *v.* Los Angeles, 103 Cal. 461; Geurkink *v.* Petaluma, 112 Cal. 306; Larrabee *v.* Cloverdale, 131 Cal. 96; Holmes *v.* Atlanta, 113 Ga. 961; Bloomington *v.* Costello, 65 Ill. App. 407; Hoffman *v.* Muscatine, 113 Iowa, 332; Kansas City *v.* Slangstrom, 53 Kan. 431; Flanders *v.* Franklin, 70 N. H. 168; Doremus *v.* Paterson, 65 N. J. Eq. 711; Sammons *v.* Gloversville, 175 N. Y. 346; Magee *v.* Brooklyn, 18 N. H. App. Div. 22; Butler *v.* White Plains, 59 N. Y. App. Div. 30; O'Donnell *v.* Syracuse, 102 App. Div. 80; Ordway *v.* Canisteo, 66 Hun (N. Y.), 569; McBride *v.* Akron, 12 Ohio. Cir. Ct. R. 610; Blizzard *v.* Danville, 175 Pa. 479; Owens *v.* Lancaster, 182 Pa. St. 257; San Antonio *v.* Pizzini (Tex. Civ. App.), 58 S. W. Rep. 635; San Antonio *v.* Diaz (Tex. Civ. App.), 62 S. W. Rep. 549; Donovan *v.* Royal, 26 Tex. Civ. App. 248; Houston *v.* Hutcheson (Tex. Civ. App.), 81 S. W. Rep. 86; Winchell *v.* Waukesha, 110 Wis. 101; Kemper *v.* Louisville, 14 Bush, 87; Barns *v.* Hannibal, 71 Mo. 449; Pye *v.* Mankato, 36 Minn. 373; Morse *v.* Worcester (bill in equity by property owner against municipality), 139 Mass. 389; Stanchfield *v.* Newton, 142 Mass. 110. A city owning the bed of a river and having the right to divert and sell water to its citizens held not liable for damages to private property caused by a sudden and unexpected overflow. Moore *v.* Los Angeles, 72 Cal. 287; *ante*, § 306, note; *supra*, § 1673; Shearm. & Red. Neg. (4th ed.) § 274.

INSUFFICIENT OR DEFECTIVE WATERWAYS OR CULVERTS. Haynes *v.* Burlington, 38 Vt. 350; Helena *v.* Thompson, 29 Ark. 569; Groton *v.* Haines, 36 N. H. 388; Gilman *v.* Laconia, 55 N. H. 130; Aurora *v.* Love, 93 Ill. 521; Wheeler *v.* Worcester, 10 Allen (Mass.), 591, where *Colt*, J., states carefully some of the duties of a municipal corporation in bridging a water-course. Stack *v.* East St. Louis, 85 Ill. 377; Peoria *v.* Eisler, 62 Ill. App. 26; Mootry *v.* Danbury, 45 Conn. 550; Parker *v.* Lowell, 11 Gray (Mass.), 353; Perry *v.* Worcester (action of tort for backwater), 6 Gray (Mass.), 544; Sprague *v.* Worcester, 13 Gray (Mass.), 193 (same bridge as in case last cited); Lawrence *v.* Fairhaven, 5 Gray (Mass.), 110; Talbot *v.* Whipple, 7 Gray (Mass.), 122; Rochester W. Lead Co. *v.* Rochester (poorly constructed culvert), 3 N. Y. 463, explained by *Denio*, C. J., in Mills *v.* Brooklyn (inadequate sewer), 32 N. Y. 489; s. c. 5 Am. L. Reg. (N. S.) 33, and note; distinguished

§ 1732 (1039). **Liability in respect of Surface-water.** — As to *surface-water*, quite different principles apply. This the law very largely regards (as Lord Tenterden in an analogous case phrased it) as a common enemy, which every proprietor may fight or get rid of as best he may. The reports contain many instances in which it has been sought to make municipal corporations liable for damages caused, in various ways, by surface-water to private property. Reference will first be made to cases in which the *work of grading or improving the streets has been the cause of the injury.* Where the damage has resulted solely as a consequence of the proper execution of a legal power by the corporation, it falls within the principles already discussed,[1] and there is no implied liability therefor.

in Seifert *v.* Brooklyn, 101 N. Y. 136; *post*, § 1745, note; Gould *v.* Booth, 66 N. Y. 62; Smith *v.* New York (obstruction in sewer), 66 N. Y. 295; Kobs *v.* Minneapolis, 22 Minn. 159, 164; Byrne *v.* Farmington, 64 Conn. 367; Macon *v.* Dannenberg, 113 Ga. 1111 (obstructed culvert); Tatman *v.* Benton Harbor, 115 Mich. 695; Powers *v.* Council Bluffs, 50 Iowa, 197; Ross *v.* Madison (insufficient culvert), 1 Ind. 281; s. c. 3 Ind. 236; Kelly *v.* Pittsburg, C., C. & St. L. R. Co., 28 Ind. App. 457; Dallas *v.* Schultz (Tex. Civ. App.), 27 S. W. Rep. 292 (obstructed culvert); Dayton *v.* Pease, 4 Ohio St. 80; Philadelphia *v.* Randolph, 4 Watts & S. (Pa.) 514; Collins *v.* Philadelphia, 93 Pa. St. 272; Rose *v.* St. Charles, 49 Mo. 509 (back-water), *supra*. Good faith and honest exercise of judgment are no defence in an action caused by inadequate artificial water-way. Perry *v.* Worcester, *supra*. Liability does not extend to *extraordinary* freshets (Sprague *v.* Worcester, *supra*), except such as, looking at the history of the stream in this respect, may be "reasonably expected occasionally to occur." *Per* Chancellor *Walworth*, New York *v.* Bailey, 2 Denio (N .Y), 433, followed by Madison *v.* Ross, 3 Ind. 236. See also Keithsburg *v.* Simpson, 70 Ill. App. 467; Richards *v.* Ann Arbor, 152 Mich. 15; Schumacher *v.* New York, 166 N. Y. 103; Punsky *v.* New York, 129 N. Y. App. Div. 558; Costich *v.* Rochester, 68 N. Y. App. Div. 623; Smith *v.* New York, 66 N. Y. 295; Lynch *v.* New York, 76 N. Y. 60; Cumberland *v.* Willison, 50 Ind. 138; Johnston *v.* Dist. of Columbia, 118 U. S. 19.

Where land is *wrongfully overflowed* the true *measure of damages* is the fair rental value of the ground which was overflowed, and not the possible, or even probable, profits that might have been made had the land not been overflowed. Chicago *v.* Huenerbein, 85 Ill. 594; Loughran *v.* Des Moines (overflow from sewers), 72 Iowa, 382. See also Macon *v.* Dannenberg, 113 Ga. 1111; Keithsburg *v.* Simpson, 70 Ill. App. 467; Podhaisky *v.* Cedar Rapids, 106 Iowa, 543; Eshleman *v.* Martic Township, 152 Pa. 68; McHenry *v.* Parkersburg, 66 W. Va. 533 (temporary damages). Where a city is liable for damages resulting from its having adopted a defective plan for a drain, the damages accrue to him who owned the property at the time of the injury, and his right thereto is not affected by his having sold the property, after having instituted a suit for damages. Seymour *v.* Cummins, 119 Ind. 148.

[1] *Ante*, §§ 988-990; *post*, §§ 1733, 1741 *et seq.* Text quoted as "the rule" in Lampe *v.* San Francisco, 124 Cal. 546. Text cited in Los Angeles Cemetery Assoc. *v.* Los Angeles, 103 Cal. 461; Corcoran *v.* Benicia, 96 Cal. 1; Finley *v.* Kendallville (Ind. App.), 90 N. E. Rep. 1036; Hume *v.* Des Moines (Iowa), 125 N. W. Rep. 846; Jordan *v.* Benwood, 42 W. Va. 312; Wakefield *v.* Pawtucket, 12 R. I. 75; Inman *v.* Tripp, 11 R. I. 520, noticed *infra*, § 1734, note; Smith *v.* Tripp, 13 R. I. 152; Gilfeather *v.* Council Bluffs, 69 Iowa, 310; Bloomington *v.* Brokaw, 77 Ill. 194; Bennett *v.* Mt. Vernon, 124 Iowa, 537; 100 N. W. Rep. 349; Taylor *v.* Houston & T. C. R. Co. (Tex Civ. App.), 80 S. W. Rep.

§ 1733 (1040). **Same Subject.** — Authority to *establish grades for streets, and to grade them,* involves the right to make changes in the surface of the ground, which may affect injuriously the adjacent property owners; but where the *power* is not exceeded, there is no liability, unless created by special constitutional provision [1] or by statute (and then only in the mode and to the extent provided), for the consequences resulting from the power being exercised and properly carried into execution. On the one hand, the owner of the property may take such measures as he deems expedient to keep surface-water off from him, or turn it away from his premises on to the street; and, on the other hand, the municipal authorities may exercise their lawful powers in respect to the graduation, improvement, and repair of streets, without being impliedly liable for the consequential damages caused by surface-water to adjacent property.[2]

260; Kearney *v.* Themanson, 48 Neb. 74. The fact that a city authorized the construction of a railway upon a street will not render it liable for damages caused by surface-water flowing upon private premises when the embankment which turned it upon them was not located upon the street. Callahan *v.* Des Moines, 63 Iowa, 705. Where an ordinance required abutting owners to construct sidewalks, curbs, and gutters at their own expense, and according to prescribed plans, one who constructed a gutter of cobblestones instead of flat stones, as specified, was not allowed to recover damages from the city, caused by the percolation of water through the gutter as laid upon his property. Watson *v.* Kingston, 114 N. Y. 88.

See *as to surface-waters generally* a useful article by Mr. J. C. Thomson, 23 Am. Law Rev. 372, where the authorities are collected. In this article the writer points out that the remark of Lord *Tenterden* referred to in the text was originally made in Rex *v.* Pagham Sewer Com'rs, 8 B. & C. 355, 360, where those commissioners had erected certain works to prevent encroachment by the sea, the effect of which was to force the water against another portion of the coast. The action was *mandamus* to compel the commissioners to have damages assessed, or to erect further works. Lord *Tenterden* said (*Ib.* p. 360): "The sea is the *common enemy* to all proprietors on that part of the coast. . . . I am of opinion that the only safe rule to lay down is that each land-owner for himself may erect such defences for the land under his care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy." Mr. Thomson thinks that the expression does not apply so appropriately to surface-waters as in the case before Lord *Tenterden*, since surface-waters might be more fitly denominated a common nuisance. A common nuisance is very much like a common enemy, and the phrase "common enemy" has been often applied by the courts to surface-waters.

Negligence is the ground of the liability for DEFECTIVE SEWERS *where a liability is held to exist.* Smith *v.* New York, 66 N. Y. 295; Barton *v.* Syracuse, 36 N. Y. 54; McCarthy *v.* Syracuse, 46 N. Y. 194; Nims *v.* Troy, 59 N. Y. 500; Seifert *v.* Brooklyn, 101 N. Y. 136, explaining previous New York cases. *Post,* § 1745, note; Thurston *v.* St. Joseph, 51 Mo. 510; *infra,* §§ 1741–1746, and cases cited. See also Katzenstein *v.* Hartford, 80 Conn. 663; Jeffersonville *v.* Myers, 2 Ind. App. 532; Stein *v.* Lafayette, 6 Ind. App. 414; Peru *v.* Brown, 10 Ind. App. 597; Cummings *v.* Toledo, 12 Ohio Cir. Ct. 650; Herron *v.* Duquesne, 34 Pa. Super. Ct. 231; Dallas *v.* Cooper (Tex. Civ. App.), 34 S. W. Rep. 322.

[1] *Ante,* §§ 1676 *et seq.*

[2] Text approved, Cairo & V. R.

§ 1734 (1041). **Same Subject; Omission to provide Drains.** — is clear *that there is no liability* on the part of a municipal corpor tion for *not exercising the discretionary or legislative powers it m possess* to improve streets, and, as part of such improvement, *construct gutters or provide other means of draining for surface-wate* so as to prevent them from flowing upon the adjoining lots.[1] A

Co. *v.* Stevens, 73 Ind. 278; Wilson *v.* New York, 1 Denio (N. Y.), 595, 598; Lynch *v.* New York, 76 N. Y. 60; Field *v.* West Orange, 36 N. J. Eq. 118; Foster *v.* St. Louis, 71 Mo. 157; Stanchfield *v.* Newton, 142 Mass. 110; Thibodaux *v.* Thibodaux, 46 La. An. 1528; Harp *v.* Baraboo, 101 Wis. 368; Avondale *v.* McFarland, 101 Ala. 381; Myers *v.* Nelson (Cal.), 44 Pac. 801; Daley *v.* Watertown, 192 Mass. 116; Oftelie *v.* Hammond, 78 Minn. 275; Beatrice *v.* Leary, 45 Neb. 149; Churchill *v.* Beethe, 48 Neb. 87; Jung *v.* New York, 132 N. Y. App. Div. 18; Sweetwater *v.* Pate (Tenn. Ch. App.), 59 S. W. Rep. 480; Cooper *v.* Dallas, 83 Tex. 239. The owner of a lot may bring it to grade and he will not be liable if surface-water is thereby diverted to lots owned by other persons. Cedar Falls *v.* Hansen, 104 Iowa, 189. An abutting owner may drain the surface-water from his land into the highway provided he does not interfere with the use or safety of the highway. Davis *v.* Com'rs of Highways, 143 Ill. 9; Nelson *v.* Fehd, 104 Ill. App. 114. Text cited in Aicher *v.* Denver, 10 Colo. App. 413; Powell *v.* Wytheville, 95 Va. 73. In Davis *v.* Crawfordsville, 119 Ind. 1, *Elliott*, C. J., citing the prior cases, states the rule in *Indiana* to be that while a city is liable in damages if it collects water in an artificial channel and pours it upon the land of another, it is not liable for consequential damages by surface-water caused by grading and improving streets, although increased quantities of surface-water may be collected thereon. There is no liability in such case unless the work is negligently performed. Weis *v.* Madison, 75 Ind. 241. If a city adopts a proper plan for constructing a drain, and allows the contractor to use his own methods and means for its construction, it is not liable for damages resulting from his negligence; but where the plan is a defective one, and the contractor constructs the drain according to the plan, the city liable for an injury resulting from negligence in devising the plan. Se mour *v.* Cummins, 119 Ind. 148. S generally, O'Brien *v.* St. Paul, 25 Mi 331, distinguishing Lee *v.* Minneapol 22 Minn. 13; Alden *v.* Minneapol 24 Minn. 254, and Radcliff's Ex. Brooklyn, 4 N. Y. 195; Arndt *v.* Cu man, 132 Ala. 540.

[1] Lynch *v.* New York, 76 N. Y. approving text. Text quoted as "t rule," Campbell *v.* Vanceburg (Ky 101 S. W. Rep. 343; Wilson *v.* N York, 1 Denio (N. Y.), 595, cited *inf* §§ 1735, 1737, 1738; Mills *v.* Brookl 32 N. Y. 489; the above cases plained and distinguished, Seifert Brooklyn, 101 N. Y. 136. Text cit Finley *v.* Kendallville (Ind. App 90 N. E. Rep. 1036; Jordan *v.* B wood, 42 W. Va. 312; *post*, § 17 note; Chicago *v.* Rustin, 99 Ill. A 47; Peoria *v.* Adams, 72 Ill. App. 6 Schumacher *v.* New York, 40 N. App. Div. 320; Prime *v.* Yonkers, 1 N. Y. 105; Schweriner *v.* Philad phia, 35 Pa. Super. Ct. 128; Flagg Worcester, 13 Gray, 601; Roll Augusta, 34 Ga. 326; Carr *v.* Northe Liberties, 35 Pa. St. 324; Grant Erie, 69 Pa. St. 420; Allentown Kramer, 73 Pa. St. 406; Smith *v.* N York, 66 N. Y. 295; Fair *v.* Philad phia, 88 Pa. St. 309; Montgomery Gilmer, 33 Ala. 116; s. c. 26 Ala. 6 Atchison *v.* Challiss, 9 Kan. 603, ov ruling Leavenworth *v.* Casey, McCah (Kan. Ter.), 124; Bennett *v.* New O leans (omission to repair drain machine), 14 La. An. 120; Brunsw *v.* Tucker, 103 Ga. 233; *supra*, § 14 Aurora *v.* Pulfer, 56 Ill. 270; Schattn *v.* Kansas City, 53 Mo. 162; Sprin field *v.* Spence, 40 Ohio St. 665. He derson *v.* Minneapolis, 32 Minn. 3 where a change of grade had render the old drains and sewers useless carry off the water from plaintif land. It was held that the city w not liable for not providing a means carrying off the water. Glossop Heston & I. Local Board, L. R.

even when the work of grading the streets has been entered upon, there is not ordinarily, if ever, any liability to the adjoining owner arising merely from the *non-action* of the corporation in not providing means for keeping surface-waters from property situate below the established grade of the street.[1] There are, indeed, cases which go further, and assert that there is no such liability where, in making improvements upon streets or elsewhere, *authorized by law*, surface-waters are purposely turned from one's own land to that of another, — from the street directly upon the adjacent property owner.[2]

Ch. Div. 102; Attorney-General *v.* Dorking Union, L. R. 20 Ch. Div. 595, construing acts of Parliament, and holding that the remedy for failure of the board to discharge an imperative duty in respect of drains and sewers was *mandamus* and not injunction.

[1] Same authorities; *supra*, §§ 1626, 1677; Wilson *v.* New York, 1 Denio, 595; Lynch *v.* New York, 76 N. Y. 60; Imler *v.* Springfield, 55 Mo. 119; Baxter *v.* Providence, 12 R. I. 310, approving text. Compare Aurora *v.* Reed, 57 Ill. 29, and *Illinois* cases there referred to. Stewart *v.* Clinton, 79 Mo. 603; Kehrer *v.* Richmond, 81 Va. 745, quoting text.

In Gould *v.* Booth, 66 N. Y. 62, 65, *Church*, C. J., says: "The authorities are uniform in *maintaining a distinction between an interference with a running stream, and the exercise of lawful dominion over one's own property which consequentially interferes with surface drainage.*" And in the case last cited, the Court of Appeals held that commissioners of highways were not liable (where no action was given by statute) to the owner of land adjoining a highway for damages caused by a culvert, in an embankment constructed by them, which was insufficient to carry off the surface-water. Moran *v.* McClears, 63 Barb. (N. Y.) 185, distinguished. Acker *v.* Newcastle, 48 Hun (N. Y.), 312, following Gould *v.* Booth, *supra*. *Supra*, §§ 1731–1732.

[2] Turner *v.* Dartmouth, 13 Allen (Mass.), 291; Franklin *v.* Fisk, *Ib.* 211; Greeley *v.* Maine Cent. R. R. Co., 53 Me. 200; Dickinson *v.* Worcester, 7 Allen (Mass.), 19; Gannon *v.* Hargadon, 10 Allen (Mass.), 106; Flagg *v.* Worcester, 13 Gray (Mass.), 601; Barry *v.* Lowell, 8 Allen (Mass.), 127; Parks *v.* Newburyport, 10 Gray (Mass.), 28; Bangor *v.* Lansil, 51 Me. 521. Compare Brine *v.* Great West. Ry. Co., 2 B. & S. 402; Pennoyer *v.* Saginaw, 8 Mich. 534; Pettigrew *v.* Evansville, 25 Wis. 223; Hoyt *v.* Hudson, 27 Wis. 656; Lambar *v.* St. Louis, 15 Mo. 610; Adams *v.* Walker, 34 Conn. 466; Kensington *v.* Wood, 10 Pa. St. 93; Ellis *v.* Iowa City, 29 Iowa, 229; Nevins *v.* Peoria, 41 Ill. 502; Aurora *v.* Reed, 57 Ill. 29; Aurora *v.* Gillett, 56 Ill. 132; Bloomington *v.* Brokaw, 77 Ill. 194; Alton *v.* Hope, 68 Ill. 167; O'Brien *v.* St. Paul, 25 Minn. 331; Stack *v.* East St. Louis, 85 Ill. 377; *supra*, § 1731, note; Mootry *v.* Danbury, 45 Conn. 550; Young *v.* Leedom, 67 Pa. St. 351.

In Inman *v.* Tripp, 11 R. I. 520, the city of Providence (the real defendant), in exercising its power to grade its streets, caused surface-water which formerly flowed in other streets, and other surface-water which had previously collected in a pond at some distance from the plaintiff's property, to be turned and carried into the street in front of the plaintiff's property, along which it flowed, running thence into the plaintiff's cellar and well, the plaintiff's property being situate at the lowest point on the street; and it was held that the city was liable for damages, thus occasioned by what the court regarded as the invasion of the plaintiff's rights of property. *Durfee*, C. J., denies that the city "had the right to grade its streets so as to collect the water from a wide area, some of it from distant puddles or ponds, and bring it, charged with the filth of the streets, to the margin of the plaintiff's land, and then empty it upon his land, and into his cellar and well," and cites and approves Nevins *v.* Peoria, 41 Ill. 502; Pettigrew *v.* Evansville, 25 Wis. 223; Ashley *v.* Port Huron, 35 Mich.

§ 1735 (1041). **Same Subject; Sewers.** — In a well-considered case in Michigan, while it is admitted that a municipal corporation is not impliedly liable for incidental injuries to private property, resulting from the exercise of its legislative powers, such as grading streets, where the *corpus* of the property is in no way invaded, yet such a corporation is *responsible for direct injuries to private property caused by a corporate act in the nature of a trespass or nuisance.* And therefore a city is liable for an injury to the premises of the plaintiff by flooding it with water, not only where such injury is caused by neglect to keep a sewer in repair, but as well where it is the negligent or necessary result of the *constructing* of the sewer.[1]

296; Seifert *v.* Brooklyn, 101 N. Y. 136; Smith *v.* Tripp, 13 R. I. 152. See also Murray *v.* Allen, 20 R. I. 263. If the necessity for the drainage is caused by the city, the doctrine of the text (§ 1734) that it is not bound to supply drainage does not apply. Ashley *v.* Port Huron, *supra, per Cooley,* C. J. Note quoted and approved in Stanford *v.* San Francisco, 111 Cal. 198; Shearm. & Red. Neg. (4th ed.) § 274; *infra,* §§ 1735, 1745, note. See also Shawneetown *v.* Mason, 82 Ill. 337; Effingham *v.* Surrells, 77 Ill. App. 460; New Albany *v.* Lines, 21 Ind. App. 380; Cromer *v.* Logansport, 30 Ind. App. 661; Flanders *v.* Franklin, 70 N. H. 168; Houston *v.* Richardson, 42 Tex. Civ. App. 147; *supra,* § 1731, note.

[1] Ashley *v.* Port Huron, 35 Mich. 296, where the cases are classified and distinguished by *Cooley,* C. J., citing *inter alia,* Pumpelly *v.* Green Bay & Miss. Canal Co., 13 Wall. (U. S.) 166; Arimond *v.* Same, 31 Wis. 316; Eaton *v.* Boston, C. & M. R. Co., 51 N. H. 504; Dillon Munic. Corp. §§ 1732–1734, notes; Rowe *v.* Portsmouth, 56 N. H. 291; Vale Mills *v.* Nassau, 63 N. H. 136 (a city held liable for discharging a public sewer upon private land and into a millpond). Same principle. Seifert *v.* Brooklyn, 101 N. Y. 136; *infra,* §§ 1739, note, 1745, note. Kramer *v.* Los Angeles, 147 Cal. 668; Hession *v.* Wilmington, 1 Marv. (Del.) 122; Langley *v.* Augusta, 118 Ga. 590; Jacksonville *v.* Doan, 145 Ill. 23; Bloomington *v.* Murnin, 36 Ill. App. 647; Peck *v.* Michigan City, 149 Ind. 670; Fitzgerald *v.* Sharon, 143 Iowa, 730; Westcott *v.* Boston, 186 Mass. 540; Smith *v.* Sedalia, 152 Mo. 283; Woods *v.* Kansas City, 58 Mo. App. 272; Stoddard *v.* Saratoga Springs, 127 N. Y. 261; New York Cent. & H. R. R. Co. *v.* Rochester, 127 N. Y. 591; Moody *v.* Saratoga Springs, 163 N. Y. 581; Schumacher *v.* New York, 40 N. Y. App. Div. 320; Smith *v.* Auburn, 88 N. Y. App. Div. 396; Ahrens *v.* Rochester, 97 N. Y. App. Div. 480; Beach *v.* Elmira, 11 N. Y. Supp. 913; s. c. 58 Hun (N. Y.), 606; Evers *v.* Long Island City, 78 Hun (N. Y.), 242; Gillett *v.* Kinderhook, 77 Hun (N. Y.), 604; McBride *v.* Akron, 12 Ohio Cir. Ct. R. 610; Cummings *v.* Toledo, 12 Ohio Cir. Ct. 650; Dallas *v.* Cooper (Tex. Civ. App.), 34 S. W. Rep. 322; Chalkley *v.* Richmond, 88 Va. 402; Miller *v.* Newport News, 101 Va. 432.

In delivering judgment in Ashley *v.* Port Huron, Mr. Chief Justice *Cooley* says: "It is very manifest from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a *direct injury accomplished by a corporate act, which is in the nature of a trespass upon him.* The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it, without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flood must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is

§ 1736 (1042). **Liability for Positive Acts.** — We agree to the doctrine that *the municipality is not bound to protect from surface-water* those who may be so unfortunate as to own property below the level of the street; nor is the duty a perfect one, to adopt a system or mode of drainage which will have this effect; and if one be adopted, there is *in general*, as hereafter shown, no liability except as to ministerial duties in connection therewith. It is possible there may be no middle ground; but we are unable to assent to the doctrine that by reason of their control over streets, and the power to grade and improve them, the corporate authorities have the absolute and unconditional legal right intentionally to divert the water therefrom, as a mode of protecting the streets, and to discharge it, by artificial means, in increased quantities and with collected force and destructiveness, upon the property, perhaps improved and occupied, of the adjoining owner.[1]

a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other. Pumpelly *v.* Green Bay & Miss. Canal Co., 13 Wall. (U. S.) 166; Arimond *v.* Same, 31 Wis. 316; Eaton *v.* Boston, C. & M. R. Co., 51 N. H. 504. A like excess of jurisdiction appears when in the exercise of its powers a municipal corporation creates a nuisance to the injury of an individual. The doctrine of liability in such cases is familiar, and was acted upon in Pennoyer *v.* Saginaw, 8 Mich. 534. The recent case of Rowe *v.* Portsmouth, decided by the Supreme Court of New Hampshire (56 N. H. 291), is in accord with the views we have expressed. See Am. L. T. and Rep., vol. iii. p. 482." Cooley on Torts, chap. xix. on Nuisances, contains a classification of the cases and an instructive discussion of them. The decisions denying liability where the injury is caused by a defective *plan* of sewerage are referred to, *infra*, §§ 1739–1746.

[1] See and compare on this point, in addition to the cases last referred to, Flagg *v.* Worcester, 13 Gray (Mass.), 601, and Livingston *v.* McDonald, 21 Iowa, 160; Albany *v.* Sykes, 94 Ga. 30, quoting and approving the opinion of *Dillon*, J., in Livingston *v.* McDonald; Bentz *v.* Armstrong, 8 Watts & S. (Pa.) 40, remarks of *Kennedy*, J.; Brine *v.* Great Western R. Co., 2 B. & S. 402; *infra*, §§ 1737–1739; Foot *v.* Bronson, 4 Lansing (N. Y.), 47; Arndt *v.* Cullman, 132 Ala. 540; Downs *v.* Ansonia, 73 Conn. 33; Holmes *v.* Atlanta, 113 Ga. 961; Effingham *v.* Surrells, 77 Ill. App. 460; Patoka *v.* Hopkins, 131 Ind. 142; Hirth *v.* Indianapolis, 18 Ind. App. 673; Thorntown *v.* Fugate, 21 Ind. App. 537; Hoffman *v.* Muscatine, 113 Iowa, 332; Hume *v.* Des Moines (Iowa), 125 N. W. Rep. 846; Kansas City *v.* Frohwerk, 10 Kan. App. 120; Mt. Sterling *v.* Jephson (Ky.), 53 S. W. Rep. 1046; Guest *v.* Church Hill, 90 Md. 689; Cahill *v.* Baltimore, 93 Md. 233; Beals *v.* Brookline, 174 Mass. 1; Morley *v.* Buchanan, 124 Mich. 128; McAskill *v.* Hancock Tp., 129 Mich. 74; Follmann *v.* Mankato, 45 Minn. 457; Robbins *v.* Willmar, 71 Minn. 403; Vicksburg *v.* Richardson, 90 Miss. 1; Rychlicki *v.* St. Louis, 115 Mo. 662; Cannon *v.* St. Joseph, 67 Mo. App. 367; Flanders *v.* Franklin, 70 N. H. 168; Soule *v.* Passaic, 47 N. J. Eq. 28; Miller *v.* Morristown, 47 N. J. Eq. 62; Hamilton *v.* Wainwright, 52 N. J. Eq. 419; Kehoe *v.* Rutherford, 74 N. J. L. 659; McCarthy *v.* Far Rockaway, 3 N. Y. App. Div. 379; Carll *v.* Northport, 11 N. Y. App. Div. 120; Bedell *v.* Sea Cliff, 18 N. Y. App. Div.

§ 1737 (1043). **Same Subject.** — If, in consequence of filling streets and cross-streets to the established grade line, water is *collected in*

261; Martin *v.* Brooklyn, 32 N. Y. App. Div. 411; Smith *v.* Auburn, 88 N. Y. App. Div. 396; Miles *v.* Brooklyn, 98 N. Y. App. Div. 195; Anchor Brewing Co. *v.* Dobbs Ferry, 84 Hun (N. Y.), 274; Weir *v.* Plymouth, 148 Pa. 566; Bohan *v.* Avoca, 154 Pa. 404; Frederick *v.* Lansdale, 156 Pa. 613; Rohrer *v.* Harrisburg, 20 Pa. Super. Ct. 543; Whipple *v.* Fairhaven, 63 Vt. 221; McCray *v.* Fairmount, 46 W. Va. 442; Scanlon *v.* Montreal, 17 Rap. Jud. Que., C. S., 363.

The author allows the last sentence in the text to stand as originally written. The many cases since decided, cited in the notes, have found and defined the "middle ground" therein referred to, and adjudged the law to be as stated in the text. Text quoted as "the rule," Lampe *v.* San Francisco, 124 Cal. 546. Text and note quoted and approved, Stanford *v.* San Francisco, 111 Cal. 198; Jordan *v.* Benwood, 42 W. Va. 312, citing text and note; Aicher *v.* Denver, 10 Colo. App. 443, approving text; Lynch *v.* New York, 76 N. Y. 60, approving text. If a municipal corporation "in constructing streets, sewers, drains and gutters causes the surface-water of a large territory, which did not naturally flow in that direction, to be gathered into a body and precipitated on to the premises of an individual, occasioning damage thereto," it has been held liable. Citing Byrnes *v.* Cohoes, 67 N. Y. 204; Bastable *v.* Syracuse, 8 Hun (N. Y.), 587; s. c. 72 N. Y. 64; Noonan *v.* Albany, 79 N. Y. 470, 475; Field *v.* West Orange, 36 N. J. Eq. 120; Seifert *v.* Brooklyn, 101 N. Y. 136, 143, *per Ruger*, C. J; Herring *v.* District of Columbia, 3 Mackey, 572; Blakely *v.* Devine, 36 Minn. 53; Pye *v.* Mankato, 36 Minn. 373; Peters *v.* Fergus Falls, 35 Minn. 549; Rutherford *v.* Holly, 105 N. Y. 632; Noble *v.* St. Albans, 56 Vt. 522; McClure *v.* Red Wing, 28 Minn. 186; Hitchins *v.* Frostburg, 68 Md. 100, approving text. Breen *v.* Hyde, 130 Mich. 1; Schuett *v.* Stillwater, 80 Minn. 287; Sandy *v.* St. Joseph, 142 Mo. App. 330; Lewis *v.* Springfield, 142 Mo. App. 84; Dallas *v.* Young (Tex. Civ. App.), 28 S. W. Rep. 1036; Sweet *v.* Conley, 20 R. I. 381.

It was held on general principles, and not as we understand it in virtue of any constitutional provision, to be the doctrine in *Missouri*, which was regarded as consistent with previous decisions, that a municipal corporation cannot, in the construction of its streets, collect surface-water, and then by means of drains and conduits discharge it in a body upon the lands of an adjoining proprietor, without being liable in damages. *Ray*, C. J., dissented, in an elaborate opinion reviewing the prior cases and the general subject. Rychlicki *v.* St. Louis, 98 Mo. 497; Davis *v.* Crawfordsville, 119 Ind. 1, and cases cited; Cooley on Torts, 580; *ante*, §§ 1684–1686. In *Wisconsin* it is well settled that a lot-owner will not be permitted *to restrain a municipality* from constructing drains along streets or culverts across them, or from grading or otherwise improving the streets, merely because such acts when completed would increase the flow of surface-water upon his land. Heth *v.* Fond du Lac, 63 Wis. 228; Waters *v.* Bay View, 61 Wis. 642; Allen *v.* Chippewa Falls, 52 Wis. 430. See also Jewett *v.* Sweet, 178 Ill. 96; Graham *v.* Keene, 143 Ill. 425; Baughman *v.* Heinselman, 180 Ill. 251; Collins *v.* Keokuk, 91 Iowa, 293.

Under the Municipal Act of *Upper Canada*, which provides for "compensation to the owners of real property taken or used by the corporation in the exercise of its powers in respect to streets, drains, &c., for damages necessarily resulting from the exercise of such powers," it is not in the power of the municipal corporation to drain a highway upon the adjoining proprietor, without making compensation. Brown *v.* Sarnia, 11 Up. Can. Q. B. 87; *Ib.* 125; Perdue *v.* Chinguacousy Corp., 25 Up. Can. Q. B. 61; Harr. Munic. Man. (5th ed.) 359, 522; Biggar, Munic. Man. (Canada, 1900) 650. But there is no liability for *injuries from natural causes*, such as violent and unusual storms. Snook *v.* Brantford, 14 Up. Can. Q. B. 255. The power to repair highways must be reasonably exercised. Reed *v.* City of Hamilton, 5 Up. Can. C. P. 269; Croft *v.* Peterborough, *Ib.* 35. A municipal council has no right to bring down water in any quantity upon the land of an individual, and leave the water

ponds or pools upon the adjoining lots, which are thus brought below the level of the streets, the corporation is not liable for damages thereby occasioned,[1] — not even, it has been held, where it would

to stagnate there, without showing that it could not otherwise have been got rid of, and without showing that it was not in the power of the council to lead the water away from the plaintiff's land after the council had conducted it there. See Brown *v.* Sarnia, 11 Up. Can. Q. B. 87; Perdue *v.* Chinguacousy Corp., 25 Up. Can. Q. B. 61; Rowe *v.* Rochester, 29 Up. Can. Q. B. 590; Attorney-General *v.* Hackney Local Board, L. R. 20 Eq. 626.

A *corporation* has no greater right than an individual to collect the surface-water from its lands and streets, and discharge it upon the land of another. Byrnes *v.* Cohoes, 67 N. Y. 204; Seifert *v.* Brooklyn, 101 N. Y. 136, 143, *per Ruger*, C. J.; Attorney-General *v.* Leeds, L. R. 5 Ch. App. 583; Noonan *v.* Albany, 79 N. Y. 470; approved, Hitchins *v.* Frostburg, 68 Md. 100. The principle of Noonan *v.* Albany has been adopted elsewhere. West Orange *v.* Field, 37 N. J. Eq. 600; Huddleston *v.* West Bellevue, 111 Pa. St. 110; Burton *v.* Chattanooga, 7 Lea, 739; Manning *v.* Lowell, 130 Mass. 21; Gillison *v.* Charleston, 16 W. Va. 282; Arn *v.* Kansas City, 15 Fed. Rep. 236; Addy *v.* Janesville, 70 Wis. 401; *post*, § 1741, and cases in note. A city may be enjoined from discharging water from gutters, &c., on private lands. Field *v.* West Orange, 36 N. J. Eq. 118; Valparaiso *v.* Spaeth (Ind.), 74 N. E. Rep. 518; Galbraith *v.* Yates, 79 Minn. 436. A city is liable for *negligent discharge of sewage on* private property. Seifert *v.* Brooklyn, 101 N. Y. 136; *post*, § 1745, note. A town in *Massachusetts* is not liable for damages caused by *surface-water which percolates* from catch-basins or gutters, constructed by its agents, through the soil into an adjoining cellar. Kennison *v.* Beverly, 146 Mass. 467; Salzman *v.* New Haven, 81 Conn. 389; Comanche *v.* Zettlemoyer (Tex. Civ. App), 40 S. W. Rep. 641. See also O'Donnell *v.* White, 23 R. I. 318.

Rights and liabilities as respects surface-water of the owners of higher and lower city lots, as between themselves. Vanderwiele *v.* Taylor, 65 N. Y. 341; Bentz *v.* Armstrong, 8 Watts & S. 40. See Goodale *v.* Tuttle, 29 N. Y. 459; Washb. on Easements, 358; Kelly *v.* Pittsburgh, C., C. & St. L. R. Co., 28 Ind. App. 457; Sheehan *v.* Flynn, 59 Minn. 436; Peck *v.* Baraboo, 141 Wis. 48. The owner of a higher lot is not bound to drain his lot or connect it with a sewer in order to protect the owner of a lower adjoining lot from the natural flow of surface-water. Vanderwiele *v.* Taylor, 65 N. Y. 341. The case was distinguished from those where there has been an artificial increase of the flow of water to another's injury, as in Rylands *v.* Fletcher, 3 H. L. Cas. (Eng. and I. App.) 330. Smith *v.* Fletcher, 3 Eng. 305; Livingston *v.* McDonald, 21 Iowa, 160, where the subject is fully discussed by *Dillon*, J.

[1] Corcoran *v.* Benicia, 96 Cal. 1; Downs *v.* Ansonia, 73 Conn. 33; Sisson *v.* Stonington, 73 Conn. 348; Clark *v.* Wilmington, 5 Harring. (Del.) 243; Magarity *v.* Wilmington, 5 Hous. (Del.) 530; Kelly *v.* Pittsburgh, C., C. & St. L. R. Co., 28 Ind. App. 457; Hirth *v.* Indianapolis, 18 Ind. App. 673; Hoard *v.* Des Moines, 62 Iowa, 326; Freburg *v.* Davenport, 63 Iowa, 119, *supra*, § 990; Morris *v.* Council Bluffs, 67 Iowa, 334; Gilfeather *v.* Council Bluffs, 69 Iowa, 310; Walters *v.* Marshalltown (Iowa), 120 N. W. Rep. 1046; Schuett *v.* Stillwater, 80 Minn. 287; Gleason *v.* Kirksville, 136 Mo. App. 521; Field *v.* West Orange, 46 N. J. Eq. 183; Prime *v.* Yonkers, 192 N. Y. 105; Anchor Brewing Co. *v.* Dobbs Ferry, 84 Hun (N. Y.), 274; Toledo *v.* Lewis, 17 Ohio Cir. Ct. 588; Almy *v.* Coggeshall, 19 R. I. 549; Yeager *v.* Fairmount, 43 W. Va. 259, quoting and approving text; McCray *v.* Fairmount, 46 W. Va. 442; Peck *v.* Baraboo, 141 Wis. 48. But see Woodbury *v.* Beverly, 153 Mass. 245, which holds that, by statute, the owner "sustains damage." Carson *v.* Springfield, 53 Mo. App. 289. See also Barfield *v.* Macon County, 109 Ga. 386. *Contra*, Weeks *v.* Milwaukee, 10 Wis. 242, modified in Smith *v.* Milwaukee, 18 Wis. 63, and resting on doubtful grounds. See also Nevins *v.* Peoria, 41 Ill. 502, 503, and Aurora *v.* Reed, 57 Ill. 29; Edwards *v.* Peoria, 66 Ill. App. 68; Stocker *v.* Nemaha

have been practicable, in the judicial judgment, to have prevented it by the construction of tunnels, openings, or drains; but upon the last point the cases are conflicting.[1]

§ 1738 (1044). **Same Subject.** — In Missouri the question distinctly arose, whether a municipal corporation in grading a street

County (Neb.), 93 N. W. Rep. 721; O'Donnell *v.* White, 23 R. I. 318; Cooper *v.* Dallas, 83 Tex. 239; McHenry *v.* Parkersburg, 66 W. Va. 533. The case of Hoyt *v.* Hudson, 27 Wis. 656, holds, in a carefully prepared opinion by *Dixon*, C. J., reviewing and classifying the cases, that where the passage of surface-water through a ravine or otherwise is obstructed by the corporation in the exercise of its power to grade and improve streets, the adjacent landowner, injured in consequence, has no action against the municipality. And such is undoubtedly the correct *general* rule, though it is suggested that there *may* be an exception in the case of a hilly region drained through a narrow gorge. Bowlsby *v.* Spear, 31 N. J. L. 351; Hoyt *v.* Hudson, *supra*. But this could at most, it is believed, make it the duty of the corporation to provide, if practicable, a culvert.

[1] Wilson *v.* New York, 1 Denio (N. Y.), 595, is the leading case holding this doctrine. It is expressly approved by *Denio*, C. J., in Mills *v.* Brooklyn, 32 N. Y. 489, who says that it has always been referred to (in that State) as an accurate exposition of the law; distinguished, Seifert *v.* Brooklyn, 101 N. Y. 136; Gould *v.* Booth, 66 N. Y. 62, 65; s. p. Clark *v.* Wilmington, 5 Harring. (Del.) 243; Baxter *v.* Providence, 12 R. I. 310, approving text; Avondale *v.* McFarland, 101 Ala. 381; *supra*, § 1677. *Contra*, Cotes *v.* Davenport, 9 Iowa, 227. Approved, Templin *v.* Iowa City, 14 Iowa, 59; Weeks *v.* Milwaukee, 10 Wis. 242, cited in preceding note; Nevins *v.* Peoria, 41 Ill. 502 (noted *ante*, §§ 1677, note, 1730, note), where *Lawrence*, J., disapproves of Wilson *v.* New York, *supra*, but admits that the rule there declared has been quite generally adopted. Meares *v.* Wilmington, 9 Ired. L. 73, 82, also disapproves of Wilson *v.* New York, on the ground that it overlooks the implied condition that the work should be done properly. But who is to *judge* whether it would have been practicable to have provided for the drainage of the lots in making the improvement, — the city authorities, as maintained in the *New York* cases, or the judicial tribunals? Nevins *v.* Peoria, approved in Bloomington *v.* Brokaw, 77 Ill. 194; Jacksonville *v.* Lambert, 62 Ill. 519; Dixon *v.* Baker, 65 Ill. 518. See Brine *v.* Great Western Ry. Co., 2 B. & S. 402; *supra*, §§ 1675, note, 1734; Brown *v.* Sarnia, 11 Up. Can. Q. B. 87; *supra*, § 1675, note; Perdue *v.* Chinguacousy Corp., 25 Up. Can. Q. B. 61; Harper *v.* Milwaukee, 30 Wis. 365; Hoyt *v.* Hudson, 27 Wis. 656; *infra*, § 1739.

The doctrine of the courts contrary to that stated in the text is that where by *raising the grade of a street* (see *ante*, §§ 1676 *et seq.*, 1733) the existing drainage is destroyed, and property adjoining is damaged by the collection of surface-water caused thereby, the city, being bound to provide a temporary escape for the water, is not relieved by the construction of a culvert which at once became stopped up. Wilber *v.* Ft. Dodge, 120 Iowa, 555; Ross *v.* Clinton, 46 Iowa, 606, approving Cotes *v.* Davenport, 9 Iowa, 227; Damour *v.* Lyons, 44 Iowa, 276; Wallace *v.* Muscatine, 49 G. Greene, 373; Aurora *v.* Gillett, 56 Ill. 132; Aurora *v.* Reed, 57 Ill. 29, 30; Elgin *v.* Kimball, 90 Ill. 356; Pekin *v.* Brereton, 67 Ill. 477; Pumpelly *v.* Green Bay & Miss. Canal Co., 13 Wall. (U. S.) 166; Radcliff's Ex. *v.* Brooklyn, 4 N. Y. 195; Hay *v.* Cohoes County, 2 N. Y. 159; Pettigrew *v.* Evansville, 25 Wis. 223; Pekin *v.* Winkle, 77 Ill. 56; Shawneetown *v.* Mason, 82 Ill. 337; Macon *v.* Dannenberg, 113 Ga. 1111; *ante*, §§ 1676 *et seq.* The confusion arising from the inaccurate use of the term "judicial," as applied to the legislative or discretionary duties of corporate bodies, is pointed out by *Campbell*, J., in People *v.* Bennett, 29 Mich. 451.

which was higher than the adjoining property was bound to keep *a drain or ditch open* while the work was in progress, so as *to prevent the surface-water on the street from flowing upon the adjoining improved property*, if this could be done by ordinary care on the part of the city and at a reasonable expense; and it was decided that the corporation owed no such duty to the abutting proprietor; that it was the duty of such proprietor to protect himself.[1]

§ 1739 (1046). **Non-action. Defective Drains and Sewers.** — Since the duty on the part of a municipality of *providing drainage for surface-water or constructing sewers* is in its nature *judicial or quasi-judicial, or, more accurately speaking, legislative*, requiring the exercise of judgment as to the time when and the mode in which it shall be undertaken, the claims of respective localities as to order of commencement when it cannot all be effected at once, and the best plan which the means at the disposal of the corporation renders it practicable to adopt, it follows, upon legal principles, that the corporation is not liable to a civil action for *wholly failing to provide drainage or sewerage*,[2] nor, probably, for any *defect or want*

[1] Imler *v.* Springfield, 55 Mo. 119. The court in this case reaffirm St. Louis *v.* Gurno, 12 Mo. 414, approve of Wilson *v.* New York, 1 Denio, 595, and of the statement of the law in the text (§§ 1734, 1736), and disapprove New York *v.* Furze, 3 Hill (N. Y.), 612; Stewart *v.* Clinton, 79 Mo. 603. The prior cases in *Missouri* are reviewed in Rychlicki *v.* St. Louis, 98 Mo. 497, noted *supra*, § 1736, note. Shearm. & Red. Neg. (4th ed.) § 283, and note.

[2] Text quoted as "the best statement of the rule," Knostman & P. Furniture Co. *v.* Davenport, 99 Iowa, 589. Text cited in Finley *v.* Kendallville (Ind. App.), 90 N. E. Rep. 1036; Buckley *v.* New Bedford, 155 Mass. 64; Robinson *v.* Danville, 101 Va. 213; Jordan *v.* Benwood, 42 W. Va. 312; Mills *v.* Brooklyn, 32 N. Y. 489; s. c. 5 Am. Law Reg. (N. S.) 33, with note of Mr. (now Chief Justice) *Mitchell*; Wilson *v.* New York, 1 Denio (N. Y.), 595; *supra*, §§ 1626, 1630, note; these cases distinguished, Seifert *v.* Brooklyn, 101 N. Y. 136, noted *ante*, § 1625, note. Child *v.* Boston, 4 Allen (Mass.), 41, 52; Carr *v.* Northern Liberties, 35 Pa. St. 324; Montgomery Council *v.* Gilmer, 33 Ala. 116; s. c. 26 Ala. 665; Atchison *v.* Challiss, 9 Kan. 603, overruling Leavenworth *v.* Casey, McCahon (Kan. Ter.), 124; Hession *v.* Wilmington, 1 Marv. (Del.) 122; Chicago *v.* Rustin, 99 Ill. App. 47; Monticello *v.* Fox, 3 Ind. App. 481; Bulger *v.* Eden, 82 Me. 352; Attwood *v.* Bangor, 83 Me. 582; Atwood *v.* Biddeford, 99 Me. 78; St. Paul & D. R. Co. *v.* Duluth, 56 Minn. 494; Woods *v.* Kansas, 58 Mo. App. 272; White *v.* Buffalo, 131 N. Y. App. Div. 531; Ebbetts *v.* New York, 111 N.Y. App. Div. 364; Chattanooga *v.* Reid, 103 Tenn. 616; McCarthy *v.* Syracuse, 46 N. Y. 194; St. Albans *v.* Noble, 56 Vt. 525; Henderson *v.* Minneapolis, 32 Minn. 319.

For failure of a local board to *perform the mandatory duty* under an Act of Parliament to cause to be made such sewers as may be necessary for effectually draining their district, and to cause all sewers to be kept so as not to be a nuisance injurious to health, etc., *the remedy for non-action* was held to be *by mandamus and not injunction*, mandatory, or otherwise. It was admitted, however, that if the board by any act caused a nuisance which, independently of statute, would give a cause of action to any person, they would be liable in damages, or might be restrained by injunction, unless

of efficiency in the PLAN or sewerage or drainage adopted;[1] nor, according to the prevailing view, for the *insufficient size or want of*

the board could justify the act under the powers given to it by the statute. Glossop *v.* Heston & I. Local Bd., L. R. 12 Ch. Div. 102; s. p. Attorney-General *v.* Dorking Union, L. R. 20 Ch. Div. 595, distinguished; Charles *v.* Finchley Local Bd., L. R. 23 Ch. Div. 767; Attorney-General *v.* Acton Local Bd., L. R. 22 Ch. Div. 221. Bill in equity by property owner against municipality sustained. Morse *v.* Worcester, 139 Mass. 389. "Sewer" and "drains," distinguished by Act of Parliament, construed in Bateman *v.* Poplar Dist. Bd. of W., L. R. 33 Ch. Div. 360. "Sewage works" defined. Wimbledon Local Bd. *v.* Croydon R. S. A., L. R. 32 Ch. Div. 421.

Executive officers of a city have no authority to convert a private drain into a public sewer, or to bind the city by promises in relation thereto; and although the city acquires property on which a private drain exists, this, without more, does not make the drain a public sewer so as to impose upon the city the duty to remove obstructions therein for the benefit of a licensee. Kosmak *v.* New York, 117 N. Y. 361. Where an ordinance called for the construction of a dry retaining wall along a street the grade of which had been raised, but granted to the owners of abutting property the privilege of having the wall in front of their property built of masonry at their expense, an owner who refused to avail herself of the privilege was held to have no action against the city for damages caused by the escape of water through the dry wall upon her land. Watson *v.* Kingston, 114 N. Y. 88. *Ante*, §§ 1482, 1493.

[1] Same cases; Johnston *v.* District of Columbia, 118 U. S. 19; Child *v.* Boston, 4 Allen (Mass.), 41, cited *infra*, §§ 1741 *et seq.*, which was three times argued. District of Columbia *v.* Cropley, 23 App. D. C. 232; De Baker *v.* Southern Cal. R. Co., 106 Cal. 257; Aicher *v.* Denver, 10 Colo. 413; Wilson *v.* Waterbury, 73 Conn. 416; Chicago *v.* Norton Milling Co., 196 Ill. 580; Knostman & P. F. Co. *v.* Davenport, 99 Iowa, 589; Hume *v.* Des Moines (Iowa), 125 N. W. Rep. 846; King *v.* Kansas City, 58 Kan. 334; Keeley *v.* Portland, 100 Me. 260; Manning *v.* Springfield, 184 Mass. 245; Robinson *v.* Everett, 191 Mass. 587; Whitten *v.* Haverhill, 204 Mass. 95; Harrington *v.* Woodbridge, 70 N. J. L. 28; Hughes *v.* Auburn, 161 N. Y. 96; Uppington *v.* New York, 41 N. Y. App. Div. 370; Garratt *v.* Canandaigua, 16 N. Y. Supp. 717; s. c. 61 Hun, 623; Schreiber *v.* New York, 11 N. Y. Misc. 551; Siegfried *v.* South Bethlehem, 27 Pa. Super. Ct. 456; Sullivan *v.* Pittsburg, 5 Pa. Super. Ct. 357; Willett *v.* St. Albans, 69 Vt. 330; Hart *v.* Neilsville, 125 Wis. 546; Peck *v.* Baraboo, 141 Wis. 48; 122 N. W. Rep. 740. But see New Albany *v.* Ray, 3 Ind. App. 321; Louisville *v.* Norris, 111 Ky. 903. The admirable opinion of Mr. Justice *Hoar* in Child *v.* Boston, 4 Allen (Mass.), 41, 51, illustrates several phases of the question of corporate liability. "Upon mature deliberation we are all of opinion that the defendants (the city of Boston) are not responsible for any defect or want of efficiency in the *plan* of drainage adopted." Shearm. & Red. Neg. (4th ed.) § 274. In Child *v.* Boston, just cited, the plaintiff's property was repeatedly flooded by the failure of the city of Boston to extend the waste weir, part of its sewer system (which weir originally emptied into the basin of the Back Bay), through new-made land, so as to keep an open place of discharge into the basin (the city having the power to extend it, and notice of the injury). It was held the plaintiff was entitled to recover, on the ground, as the court placed it, that the fault was not in the *plan*, but in the negligent failure of the city to construct the sewer according to the plan, which contemplated that the weir should be extended and kept open to the edge of the upland as changes on the shore might, from time to time, require. In Johnston *v.* District of Columbia, above cited, the plaintiff's lot was overflowed with sewer water. The ground of complaint was that the city had "knowingly constructed and continued upon an unreasonable and defective plan a sewer of inadequate capacity for its purpose." Evidence to show that the sewer was insufficient in case of a freshet or great fall of rain, when it was avowedly offered to show that "the *plan* on which sewer had been constructed by the defend-

capacity of gutters or drains, for the purpose intended, that is, for carrying off surface-water, particularly if the adjoining property is not in any worse position than if no gutters or drains whatever had been constructed.[1] So the text substantially stood in the previous

ant had not been judiciously selected," was held to be incompetent and immaterial. This was the only point in judgment. The opinion refers to Child *v.* Boston, 4 Allen (Mass.), 41, and Mills *v.* Brooklyn, 32 N. Y. 489, and approves, *arguendo*, the principles there laid down. Critically considered, the case is not, as we view it, an authority for or against the proposition that a city may be liable for negligence in continuing a sewer which creates a nuisance upon the adjacent or connected property, because its size is inadequate for its regular and normal requirements. Merrifield *v.* Worcester, 110 Mass. 216; Daniels *v.* Denver, 2 Colo. 669; Horton *v.* Nashville, 4 Lea (Tenn.), 47; Herring *v.* District of Columbia, 2 Mackey, 87; Bannagan *v.* District of Columbia, *Ib.* 285; Johnston *v.* District of Columbia, 1 Mackey, 427; Savannah *v.* Spears, 66 Ga. 304; Wicks *v.* DeWitt, 54 Iowa, 130; Brewster *v.* Davenport, 51 Iowa, 427; Smith *v.* Gould, 61 Wis. 31. The corporation is not responsible for any error or want of judgment upon which its system of drainage was devised. *Per Denio*, C. J., in Mills *v.* Brooklyn, 32 N. Y. 489, who distinguishes such a case from one where there is a *want of skill* in constructing the work when entered upon. McCarthy *v.* Syracuse, 46 N. Y. 194. These cases and others in New York are reviewed, explained, and distinguished by *Ruger*, C. J., in Seifert *v.* Brooklyn, 101 N. Y. 136. See *supra*, § 1675, note; *infra*, §§ 1741 *et seq.* Text approved by *Wagner*, J., Thurston *v.* St. Joseph, 51 Mo. 510, 519; Saxton *v.* St. Joseph, 60 Mo. 153; Foster *v.* St. Louis, 71 Mo. 157.

A sewer which is so constructed that, during rains, it *throws filth upon private property*, is a nuisance for maintaining which a city is liable in damages to the lot-owner. Reid *v.* Atlanta, 73 Ga. 523; Smith *v.* Atlanta, 75 Ga. 110; Toledo *v.* Lewis, 17 Ohio Cir. Ct. 588. Damage includes injury to the health of the owner's family as well as the diminution of the market value of the land. Kellogg *v.* Kirksville, 132 Mo. App. 519. *Supra*, § 1735, note; *infra*, § 1745. Cooley on Torts, chap. xix. Where municipal authorities have adopted a plan for a sewer in good faith and within their authority, the courts will not interfere with it *by injunction*, if injury from it is doubtful, eventual, or contingent. Morgan *v.* Binghampton, 102 N. Y. 500.

In *Indiana* a "municipal corporation is responsible for negligence in devising the plan of a sewer, as well as for negligence in carrying the plan into execution, but it is not responsible for mere errors of judgment. If the inadequacy in the size of a sewer is owing to the omission to exercise ordinary skill and care in planning and performing the work, the municipal corporation is liable; but if the inadequacy of the sewer is attributable to a mere error of judgment, there is no liability." *Elliott*, J., in Rice *v.* Evansville, 108 Ind. 7; *citing* North Vernon *v.* Voegler, 103 Ind. 314; Crawfordsville *v.* Bond, 96 Ind. 236; Evansville *v.* Decker, 84 Ind. 325; Cummins *v.* Seymour, 79 Ind. 491; Weis *v.* Madison, 75 Ind. 241; Indianapolis *v.* Huffer, 30 Ind. 235. The same judge in a later case, where he learnedly reviews the authorities, said: "While our cases have always held that municipal corporations are liable for negligence in devising a plan, they have from first to last declared that there is no liability unless there is negligence." Terre Haute *v.* Hudnut, 112 Ind. 542. It remains to be seen how far the proposition that actionable negligence can be predicated in respect of devising a plan of sewers, irrespective of negligence in maintaining a plan demonstrated to be insufficient, will be accepted elsewhere. See and compare §§ 1740–1746, *infra;* Shearm. &. Red. Neg. (4th ed.) §§ 262, 273, 274, as to liability for sewers defectively planned. City held not liable for damage due to defective sewer constructed and conducted by a private corporation under contract with the city. Thompson *v.* Winona (Miss.), 51 So. Rep. 129.

[1] Same authorities, particularly Mills *v.* Brooklyn, 32 N. Y. 489, which is the leading case on this point. Here

editions. We now add that the later cases tend strongly to establish, and may, we think, be said to establish, and in our judgment

the plaintiff's lot was below the level of the streets; the city built temporary drains and sewers; but these proved to be insufficient in size "to carry off the surface-water from the plaintiff's lot and house, which came down in rain-storms," and they were several times inundated with surface-water. The sewer as laid operated to relieve the plaintiff's lot; but it was not adequate, and it was "in no worse condition than it would have been if no sewer at all had been constructed." The court held that the city was not liable; and the reason was "that city would not have been liable if it had done nothing, and is of course not liable for the insufficient character of the work, which was constructed . . . to discharge all the water which it was intended to carry off." *New York* cases reviewed, 10 Alb. L. J. 401, and by *Ruger*, C. J., in Seifert *v.* Brooklyn, 101 N. Y. 136. See also Barry *v.* Lowell, 8 Allen, 127, distinguished from Child *v.* Boston, 4 Allen (Mass.), 41, *supra;* Hession *v.* Wilmington (Del.), 27 Atl. Rep. 830; Louisville *v.* Knighton (Ky.), 100 S. W. Rep. 228; Cochrane *v.* Malden, 152 Mass. 365; Fewell *v.* Meridian, 90 Miss. 380; Gulath *v.* St. Louis, 179 Mo. 38; Bealafeld *v.* Verona, 188 Pa. St. 627; Pressman *v.* Dickson City, 13 Pa. Super. Ct. 236. But see Chicago *v.* Rustin, 99 Ill. App. 47; Flagg *v.* Worcester, 13 Gray, 601; note to Mills *v.* Brooklyn, 32 N. Y. 489; s. c. 5 Am. Law Reg. (N. S.) 33, 44; Watson *v.* Kingston, 114 N. Y. 88 (establishing grade and adopting plans for improving a street), following Urquhart *v.* Ogdensburg, 91 N. Y. 67, and holding city not to be liable; Atchison *v.* Challiss, 9 Kan. 603; Dermont *v.* Detroit, 4 Mich. 435; Judge *v.* Meriden, 38 Conn. 90 (note dissent of the Chief Justice); McCarthy *v.* Syracuse, 46 N. Y. 194; S. P. Van Pelt *v.* Davenport, 42 Iowa, 308; *ante*, § 1731, note, where this case is referred to; Rozell *v.* Anderson, 91 Ind. 591; German Theol. School *v.* Dubuque, 64 Iowa, 736; Wright *v.* Wilmington, 92 N. Car. 156; Collins *v.* Philadelphia, 93 Pa. 272. In Carr *v.* Northern Liberties, 35 Pa. 324, it was held that a municipal corporation was not liable for neglecting to provide a sufficient number of inlets to its sewers (constructed for drainage purposes), which were sufficient when constructed, but which have ceased to be so in consequence of the greater extent of territory since graded and built upon. Same principle, Grant *v.* Erie, 69 Pa. 420; Fair *v.* Philadelphia, 88 Pa. 309. Text cited and followed, Daniels *v.* Denver, 2 Colo. 669; Denver *v.* Capelli, 4 Colo. 25; Bannagan *v.* District of Columbia, 2 Mackey, 285. See also Ranlett *v.* Lowell, 126 Mass. 431; Steinmeyer *v.* St. Louis, 3 Mo. App. 256. But see and compare on this point, Seifert *v.* Brooklyn, 101 N. Y. 136; Fleming *v.* Manchester, 44 L. T. (N. S.) 517; Garrett *v.* Winterich (Ind. App.), 89 N. E. Rep. 161; Thompson *v.* Winona (Miss.), 51 So. Rep. 129. In Americus *v.* Eldridge, 64 Ga. 524, the court decided that an adjacent property owner was *not entitled to an injunction* to prevent the construction of a sewer by the city, on the ground that as planned it was too small, and threatened, when completed, to flood his lot. A person cannot recover damages from a city for a nuisance caused by a sewer which was built by himself, or jointly by himself and others, on the ground that the city had acquiesced in its construction. Richards *v.* Waupun, 59 Wis. 45. See also Levasseur *v.* Berlin (N. H.), 71 Atl. Rep. 628.

A municipal corporation, it has been observed, would act judiciously in insisting on having drains made under the direction of their officers and by their own workmen and contractors, instead of the private proprietors; for it would not do to allow all persons to break into a main sewer and make drains at their discretion. Besides the inconvenience, the health of the community would suffer from such a course, for the nuisance occasioned by defective drainage may often give rise to a widespread evil, injuring many more than the persons on whose premises the cause of the nuisance exists. It seems a necessary policy, therefore, for such a corporation to keep the matter in its own hands. But then, if the corporation does for such good purposes prevent proprietors from making the drains they require, and oblige them to have

rightly to establish, that a city may be liable on the ground of negligence in respect of public sewers, solely constructed and controlled by it, where by reason of their insufficient size, clearly demonstrated by experience, they result under ordinary conditions in overflowing the private property of adjoining or connecting owners with sewage, and that the principle of exemption from liability for defect or want of efficiency of plan does not, as more fully stated below (§§ 1745, 1746), extend to such a case.[1]

§ 1740 (1047). **Same Subject.** — It is, perhaps, impossible to reconcile all of the cases on this subject, and courts of the highest respectability have held that if the sewer, *whatever its plan*, is so constructed by the municipal authorities as to *cause a positive and direct invasion* of the plaintiff's private property, as by collecting and throwing upon it, to his damage, water or sewage which would not otherwise have flowed or found its way there, the corporation is liable.[2] This exception to the general doctrine, when properly

them done by the corporation engineer and contractors, it is manifestly just and necessary that the corporation should see that the work is done as it ought to be. Reeves *v.* Toronto, 21 Up. Can. Q. B. 157, 160; Harris. Mun. Man. (5th ed.) 439; Biggar, Munic. Man. (Canada, 1900) 645. See on the general subject, Stainton *v.* Metropolitan Bd. of Works, 23 Beav. 225; 3 Jur. N. S. 257; Cator *v.* Lewisham, 5 B. & S. 115; Darby *v.* Crowland, 38 Up. Can. Q. B. 338; Coghlan *v.* Ottawa, 1 App. (Can.) R. 54. Where a drain was so unskilfully constructed by the corporation contractors as not to carry off water, but to carry filth from the main sewer into plaintiff's cellar, which for months he had endured, it was held that he was entitled to sue the corporation for the recovery of substantial damages, though no by-law for the making of the drain was proved. Reeves *v.* Toronto, 21 Up. Can. Q. B. 160. So if, in the construction of a drain by corporation contractors, quantities of earth be thrown up and permitted to continue, so that, in times of rain, mud and water were driven on plaintiff's messuage, he was held entitled to sue the corporation for damages. Farrell *v.* London, 12 Up. Can. Q. B. 343, 347. See also Perdue *v.* Chinguacousy Corp., 25 Up. Can. Q. B. 61; *post*, § 1741. As to power to compel drainage and assess cost thereof under Canadian Municipal Act, McCutchen, *In re*, 22 Up. Can. Q. B. 613; Morse *v.* Haynes, *Ib.* 107.

[1] See cases cited in notes to this section; also §§ 1740, 1745, and notes; Shearm. & Red. Neg. (4th ed.) §§ 273–275, 287. Arndt *v.* Cullman, 132 Ala. 540.

[2] Ashley *v.* Port Huron, 35 Mich. 296; s. c. 24 Am. Rep. 552, and note, where the cases are reviewed and the subject instructively examined by *Cooley*, C. J. The facts are not very fully stated, but the case appears to be one where by means of a sewer cut by the city, water in increased quantities was collected, and discharged upon private property. In such cases, the municipal liability would appear to be much more clear than for liability for *surface-water* set back on private property below the level of the street *solely* by reason of culvert or drains built according to the plan adopted by the council, but which proved to be of insufficient capacity. *Cooley*, C. J., seems to admit that the judgment is in conflict with Wilson *v.* New York, 1 Denio (N. Y.), 595 (*supra*, § 1735, note); but when the facts are regarded, this would seem not necessarily to be so. The case of Seifert *v.* Brooklyn, 101 N. Y. 136, holds the city liable in cases falling within the principle stated in the text.

limited and applied, seems to be founded on sound principles, and will have a salutary effect in inducing care on the part of the municipality to prevent such injuries to private property, and will operate justly in giving redress to the sufferer if such injuries are inflicted. Accordingly, although a municipality having the power to construct drains and sewers may lawfully cause them to be built so as to discharge their refuse matter into the sea, or natural stream of water, yet this right must be so exercised as not to *create a nuisance public or private*. If a public nuisance is created, the public has a remedy by a public prosecution; and any individual who suffers special injury therefrom may recover therefor in a civil action. If, therefore, deposits from sewers constructed by a city cause a peculiar injury to the owner of a wharf or dock, by preventing or materially interfering with the approach of vessels and the accustomed and lawful use of the wharf or dock, the city is liable to the latter in damages.[1]

Post, § 1745, note. Text quoted and approved, Little *v.* Lenoir, 151 N. Car. 415; Chalkley *v.* Richmond, 88 Va. 402. Text cited and applied, Tate *v.* St. Paul, 56 Minn. 527; Buckley *v.* New Bedford, 155 Mass. 64; Mayrant *v.* Columbia, 77 S. Car. 281. See also Pumpelly *v.* Green Bay & Miss. Canal Co., 13 Wall. (U. S.) 166, 168, 181; *ante*, § 1679, note; Arndt *v.* Cullman, 132 Ala. 540; Wilson *v.* Boise City, 6 Idaho, 391; Nevins *v.* Peoria, 41 Ill. 502; Keithsburg *v.* Simpson, 70 Ill. App. 467; Effingham *v.* Surrells, 77 Ill. App. 460; Weis *v.* Madison, 75 Ind. 241; Evansville *v.* Decker, 84 Ind. 325, and cases; North Vernon *v.* Voegler, 89 Ind. 77; Patoka *v.* Hopkins, 131 Ind. 142; Valparaiso *v.* Kyes, 30 Ind. App. 447; Garrett *v.* Winterich (Ind. App.), 84 N. E. Rep. 1006; Louisville *v.* Norris, 111 Ky. 903; Burnside *v.* Everett, 186 Mass. 4; Whitten *v.* Haverhill, 204 Mass. 95; Thurston *v.* St. Joseph, 51 Mo. 510; Gulath *v.* St. Louis, 179 Mo. 38; Carson *v.* Springfield, 53 Mo. App. 289; Andrews *v.* Steele City (Neb.), 89 N. W. Rep. 739; Rowe *v.* Portsmouth, 56 N. H. 291 (obstruction of sewer); Parker *v.* Nashua, 59 N. H. 402; Weidman *v.* New York, 176 N. Y. 586; Prime *v.* Yonkers, 131 N. Y. App. Div. 110; Anchor Brewing Co. *v.* Dobbs Ferry, 84 Hun (N. Y.), 274; Betterly *v.* Scranton, 208 Pa. 370; Pettigrew *v.* Evansville, 25 Wis. 223, and cases; Peck *v.* Baraboo, 141 Wis. 48. Cooley on Torts, chap. xix.; *ante*, §§ 1737, note, 1735, note, 1739, and note, 1741, note. That the defects which cause damage are a part of a general *plan* of construction of sewers as adopted by a city, constitutes no defence to an action for damages caused by an overflow. See Lehn *v.* San Francisco, 66 Cal. 76; Taylor *v.* Austin, 32 Minn. 247. City held not liable for backing up of sewer or flooding of private property during extraordinary or excessive rainfalls. Holzhausen *v.* New York, 116 N. Y. App. Div. 812.

Flooding lands by *neglect to keep sewer in repair* clearly imposes a liability on the corporation. See Barton *v.* Syracuse, 36 N. Y. 54, and cases cited *infra*, § 1741, note; Nims *v.* Troy, 59 N. Y. 500; Gilman *v.* Laconia, 55 N. H. 130, where the previous cases in the State are reviewed, and Ball *v.* Winchester, 32 N. H. 435, explained and limited. Rowe *v.* Portsmouth, 56 N. H. 291; Valparaiso *v.* Cartwright, 8 Ind. App. 429; Parker *v.* Laredo, 9 Tex. Civ. App. 221.

[1] Franklin Wharf Co. *v.* Portland, 67 Me. 46; Davis *v.* Bangor, 101 Me. 311. Text quoted and approved, State *v.* Concordia, 78 Kan. 250; Emery *v.* Lowell, 104 Mass. 13; Haskell *v.* New Bedford, 108 Mass. 208; Brayton *v.* Fall River, 113 Mass. 218; Morse *v.* Worcester, 139 Mass. 389; Smith *v.* Sedalia, 182 Mo. 1; Gilluly *v.* Madison, 63 Wis. 518;

§ 1741 (1048). **Liable for Neglect of Ministerial Duties.** — It is agreed that wherever the *duty as respects drains and sewers ceases to be legislative or judicial, or quasi-judicial, and becomes ministerial,* then, although there be no statute giving the action, a municipal corporation is liable to the same extent and on the same principles as a private person or corporation would be under like circumstances, for the negligent discharge or the negligent omission to discharge such duty, resulting in an injury to others.[1]

Barron *v.* Baltimore, 2 Am. Jur. 203, cited *ante*, § 121, note; Kranz *v.* Baltimore, 64 Md. 491; Ebbetts *v.* New York, 111 N. Y. App. Div. 364; Richardson *v.* Boston, 19 How. (U. S.) 270. The opinion of the court in the Franklin Wharf case, *supra*, delivered by *Dickerson*, J., treats the public right of navigation as paramount to the right of sewerage, recognizes both the wharf and the sewer as lawful and authorized structures, and concludes by holding that the city, under the statute empowering it to construct sewers, "has the right to construct their opening into the public docks, and to use them in a reasonable manner for conducting and depositing therein refuse matters and impurities, but it is its duty to cause such docks to be cleared of such deposits whenever they become an obstruction to navigation or injurious to the public health." In Merrimac River Canal &c. Prop. *v.* Lowell, 7 Gray (Mass.), 223, the city was held liable in tort for draining water through sewers into the canal of a private corporation to the injury of the canal.

The *discharge of sewage into a stream* may be a nuisance for which the city is liable in damages to lower riparian owner, the liability being based on the constitutional doctrine that private property cannot be taken for public use without just compensation. Birmingham *v.* Land, 137 Ala. 538; Waterbury *v.* Platt Bros. & Co., 76 Conn. 435; Dudley *v.* New Britain, 77 Conn. 322; Platt Bros. & Co. *v.* Waterbury, 80 Conn. 179; Kewanee *v.* Otley, 204 Ill. 402; Bennett *v.* Marion, 119 Iowa, 473; State *v.* Concordia, 78 Kan. 250; Louisville & N. R. Co. *v.* Crow (Ky.), 118 S. W. Rep. 365; Georgetown *v.* Kelly (Ky.), 123 S. W. Rep. 251; Stevens *v.* Worcester, 196 Mass. 45; Smith *v.* Sedalia, 182 Mo. 1; Doremus *v.* Paterson, 73 N. J. Eq. 474; Chapman *v.* Rochester, 110 N. Y. 273; Sammons *v.* Gloversville, 175 N. Y. 346; Connolly *v.* New York, 115 N. Y. App. Div. 81; Little *v.* Lenoir, 151 N. Car. 415; Mansfield *v.* Bristor, 76 Ohio St. 270; Markwardt *v.* Guthrie, 18 Okla. 32; Glasgow *v.* Altoona, 27 Pa. Super. Ct. 55. But see to contrary, Phillips *v.* Armada, 155 Mich. 260.

In *Massachusetts*, where, by statute, a public duty to protect the health of the people near a certain river was imposed on the city of Worcester, the city was held not liable for damages for failing to purify sewage before discharging it into the river. Harrington *v.* Worcester, 186 Mass. 594. See also Merrifield *v.* Worcester, 110 Mass. 216; Morse *v.* Worcester, 139 Mass. 389; Rome *v.* Worcester, 188 Mass. 307.

Drainage of surface-water by ditches into a stream which is the natural outlet of such water gives no right of action to a riparian proprietor below. Crane *v.* Roselle, 236 Ill. 97; Doremus *v.* Paterson, 73 N. J. Eq. 474; Waffle *v.* New York Cent. R. Co., 53 N. Y. 11; Penfield *v.* New York, 115 N. Y. App. Div. 502. But see Georgetown *v.* Kelly (Ky.), 123 S. W. Rep. 251; *infra*, § 1049, note.

[1] Barton *v.* Syracuse, 36 N. Y. 54; 37 Barb. (N. Y.) 292; Nims *v.* Troy, 59 N. Y. 500, cites and follows text. Text quoted and approved, Keeley *v.* Portland, 100 Me. 260. Text cited, Woods *v.* Kansas City, 58 Mo. App. 272; Dammann *v.* St. Louis, 152 Mo. 186; Jones *v.* Williamsburg, 97 Va. 722; Kobs *v.* Minneapolis, 22 Minn. 159, 164; Henderson *v.* Minneapolis, 32 Minn. 319; Denver *v.* Capelli, 4 Colo. 25; South Bend *v.* Paxon, 65 Ind. 228; Child *v.* Boston, 4 Allen, 41; Emery *v.* Lowell, 104 Mass. 13; Brayton *v.* Fall River, 113 Mass. 218; Washburn Manuf. Co. *v.* Worcester, 116 Mass. 458; Boston Rolling Mills *v.* Cambridge, 117 Mass. 396; McGregor

§ 1742 (1049). **Same Subject; Liable for Neglect to repair.** — In *accordance with the above distinction between legislative or judicial*

v. Boyle, 34 Iowa, 268. Compare Dermont *v.* Detroit, 4 Mich. 435; Montgomery Council *v.* Gilmer, 33 Ala. 116; s. c. 26 Ala. 665; Jones *v.* New Haven, 34 Conn. 1; Logansport *v.* Wright, 25 Ind. 512; Hamilton *v.* Columbus, 52 Ga. 435; Harper *v.* Milwaukee, 30 Wis. 365; Waters *v.* Bay View, 61 Wis. 642; Dixon *v.* Baker, 65 Ill. 518; Kibele *v.* Philadelphia, 105 Pa. St. 41; Vanderslice *v.* Philadelphia, 103 Pa. St. 102; Savannah *v.* Cleary, 67 Ga. 153; Savannah *v.* Spears, 66 Ga. 304; Fink *v.* St. Louis, 71 Mo. 452; Hardy *v.* Brooklyn, 90 N. Y. 435; Winn *v.* Rutland, 52 Vt. 481; Smith *v.* Alexandria, 33 Gratt. 208; Platt *v.* Waterbury, 72 Conn. 531; Augusta *v.* Mackey, 113 Ga. 64; Chicago *v.* Norton Milling Co., 196 Ill. 580; Murphy *v.* Indianapolis, 158 Ind. 238; Louisville *v.* Norris, 111 Ky. 903; Hamlin *v.* Biddeford, 95 Me. 308; Davis *v.* Bangor, 101 Me. 311; Harrington *v.* Worcester, 186 Mass. 594; O'Brien *v.* Worcester, 172 Mass. 348; Ely *v.* St. Louis, 181 Mo. 723; Clair *v.* Manchester, 72 N. H. 231; Lockwood *v.* Dover, 73 N. H. 209; Wessman *v.* Brooklyn, 133 N. Y. 677; O'Donnell *v.* Syracuse, 102 N. Y. App. Div. 80; King *v.* Granger, 21 R. I. 93. In Harper *v.* Milwaukee, 30 Wis. 365, *supra*, the court say: "In general a municipal corporation has no more right than a natural person *to create and maintain a nuisance*, and is liable for injuries occasioned thereby in any case where a private person would be liable under like circumstances." Note cited, Chalkley *v.* Richmond, 88 Va. 402. See also South Bend *v.* Paxon, 65 Ind. 228; North Vernon *v.* Voegler, 89 Ind. 77; Crawfordsville *v.* Bond, 96 Ind. 236; Quincy *v.* Jones, 76 Ill. 231; Imler *v.* Springfield, 55 Mo. 119; Farrell *v.* London, 12 Up. Can. Q. B. 343; Jones *v.* Bird, 5 B. & Al. 837; Drew *v.* New River Co., 6 C. & P. 754; Grocers' Co. *v.* Donne, 3 Bing. N. C. 34; Coe *v.* Wise, 7 B. & S. 831; but see Ward *v.* Lee, 7 E. & B. 426; Clothier *v.* Webster, 12 C. B. (N. S.) 790; Perdue *v.* Chinguacousy Corp., 25 Up. Can. Q. B. 61, 65, 66; Meek *v.* Whitechapel Bd. of Works, 2 F. & F. 144; Scroggie *v.* Guelph, 36 Up. Can. Q. B. 534; *supra*, §§ 1626, 1740.

Judicial or quasi-judicial and ministerial duties discriminated. Ministerial duties, as distinguished from those which are *discretionary or quasi-judicial*, are such as are "absolute, certain, and imperative." *Per Denio*, C. J., in Mills *v.* Brooklyn, 32 N. Y. 489; Lewenthal *v.* New York, 5 Lans. (N. Y.) 532. See Donohue *v.* New York, 3 Daly (N. Y.), 165; McCarthy *v.* Syracuse, 46 N. Y. 194; Clemence *v.* Auburn, 66 N. Y. 334. All acts involved in the necessary performance of a duty prescribed by ordinance are ministerial. Danbury & N. R. R. Co. *v.* Norwalk, 37 Conn. 109; Amy *v.* Des Moines County, 11 Wall. (U. S.) 136. *Ante*, §§ 433–444, note, as to *personal liability* of officers for torts. A corporation may be said to act *judicially in selecting and adopting a plan* on which a public work shall be constructed; yet *as soon as it begins to carry out that plan, it acts ministerially*, and is bound to see that the work is done in a reasonably safe and skilful manner. Rochester W. Lead Co. *v.* Rochester, 3 N. Y. 463; Barton *v.* Syracuse, 36 N. Y. 54; Lacour *v.* New York, 3 Duer (N. Y.), 406; Lloyd *v.* New York, 5 N. Y. 369; Jones *v.* New Haven, 34 Conn. 1; Parker *v.* Lowell, 11 Gray, 353; Wilson *v.* New York, 1 Denio (N. Y.), 595; Seifert *v.* Brooklyn, 101 N. Y. 136, reviewing and distinguishing previous New York cases. *Infra*, § 1745; Logansport *v.* Wright, 25 Ind. 512; Martin *v.* Brooklyn, 1 Hill (N. Y.), 541, 545; Mellen *v.* Western R. R. Co., 4 Gray, 301; Mills *v.* Brooklyn, 32 N. Y. 489; Child *v.* Boston, 4 Allen (Mass.), 41; Wheeler *v.* Worcester, 10 Allen (Mass.), 591; Eastman *v.* Meredith, 36 N. H. 284; Meares *v.* Wilmington, 9 Ired. L. 73; Delmonico *v.* New York, 1 Sandf. (N. Y.) 222; Munn *v.* Pittsburgh, 40 Pa. St. 364; Memphis *v.* Lasser, 9 Humph. (Tenn.) 757; Detroit *v.* Corey, 9 Mich. 165; Grant *v.* Brooklyn, 41 Barb. 381. See also Holliday *v.* St. Leonard's Par., 11 C. B. (N. S.) 192; Parsons *v.* Bethnal Green, 17 L. T. (N. S.) 211; Harr. Munic. Man. (5th ed.) 522. In *Indiana* it is held that "in actions against municipal corporations for injuries resulting from the negligent construction or maintenance of sewers, the plaintiff must show that he was free

duties on the one hand, and ministerial duties on the other (a distinction plain in theory, but oftentimes difficult of application to particular cases), a municipal corporation *is liable for negligence in the ministerial duty to keep its sewers* (which it alone has the power to control and keep in order) *in repair*, as respects persons whose estates are connected therewith by private drains in consequence of which such persons sustain injuries which would have been avoided had the sewers been kept in a proper condition.[1] If the sewer is *negligently permitted to become obstructed or filled* up, so that it causes the water to back-flow into cellars connected with it, there is a liability therefor on the part of the municipal corporation having the control of it, and which is bound "to preserve and keep in repair erections it has constructed, so that they shall not become a source of nuisance" to others.[2] The *work of constructing gutters, drains, and*

from *contributory negligence.*" Ft. Wayne *v.* Coombs, 107 Ind. 75, and cases cited, disapproving Roll *v.* Indianapolis, 52 Ind. 547, on this point. See also Garrett *v.* Winterich (Ind. App.), 87 N. E. Rep. 161; Levasseur *v.* Berlin, (N. H.), 71 Atl. Rep. 628; Karfiol *v.* New York, 119 N. Y. App. Div. 70; Mayrant *v.* Columbia, 82 S. Car. 273; Parker *v.* Laredo, 9 Tex. Civ. App. 221.

[1] Child *v.* Boston, 4 Allen (Mass.), 41; *supra*, §§ 1665, 1735, 1739, 1740. There is considered to be no liability in *Massachusetts* on the part of a city for failing to keep a public cesspool and sewer in repair, in consequence of which waste water accumulates and flows into neighboring cellars *not connected with the sewer*. Barry *v.* Lowell, 8 Allen (Mass.), 127, distinguished from Child *v.* Boston, 4 Allen (Mass.), 41, *supra*. But where the reason on which this distinction rests does not apply, and where the work would be regarded as a *corporate* one, the duty to prevent it becoming a nuisance might be such, we think, as to impose a liability on the corporation for injuries which would not have been suffered had it been kept in order. *Supra*, § 1673. Brunswick *v.* Tucker, 103 Ga. 233; Cooper *v.* Cedar Rapids, 112 Iowa, 367; Louisville *v.* Gimpel (Ky.), 59 S. W. Rep. 1096; Hamlin *v.* Biddeford, 95 Me. 308; Kidson *v.* Bangor, 99 Me. 139; Keeley *v.* Portland, 100 Me. 260; McCook *v.* McAdams, 76 Neb. 1; 114 N. W. Rep. 596; Weidman *v.* New York, 176 N. Y. 586; Schumacher *v.* New York, 166 N. Y. 103; Gravey *v.* New York, 117 N. Y. App. Div. 773; Burnett *v.* New York, 36 N. Y. App. Div. 458; Munn *v.* Hudson, 61 N. Y. App. Div. 343; Dunstan *v.* New York, 91 App. Div. 355; McHale *v.* Throop, 13 Pa. Super. Ct. 394; Glasgow *v.* Altoona, 27 Pa. Super. Ct. 55; Siegfried *v.* South Bethlehem, 27 Pa. Super. Ct. 456; Murray *v.* Allen, 20 R. I. 263; Dallas *v.* Webb, 22 Tex. Civ. App. 48; Lindsay *v.* Sherman (Tex. Civ. App.), 36 S. W. Rep. 1019; Richmond *v.* Gallego Mills Co., 102 Va. 165; Clay *v.* St. Albans, 43 W. Va. 539; Hart *v.* Neilsville, 125 Wis. 546. See Searing *v.* Saratoga, 39 Hun (N. Y.), 307. Municipal *liability in respect of sewers* is very fully discussed by *Biddle*, J., in Roll *v.* Indianapolis, 52 Ind. 547. But see this case criticized in Ft. Wayne *v.* Coombs, 107 Ind. 75. Text approved by *Wagner*, J., in Thurston *v.* St. Joseph, 51 Mo. 510, 519, and in Kranz *v.* Baltimore, 64 Md. 491; Hitchins *v.* Frostburg (approving text), 68 Md. 100; Semple *v.* Vicksburg, 62 Miss. 63.

[2] Barton *v.* Syracuse, 36 N. Y. 54; Smith *v.* New York (sewer of adequate size obstructed by mud and sand of which city had notice; held liable), 66 N. Y. 295; McCarthy *v.* Syracuse, 46 N. Y. 194; Hines *v.* Lockport, 50 N. Y. 236; Nims *v.* Troy, 59 N. Y. 500; New York *v.* Furze, 3 Hill (N. Y.), 612, explained in Wilson *v.* New York, 1 Denio (N. Y.), 595, and in Mills *v.* Brooklyn, 32 N. Y. 489, and the ground of the decision stated as in the text. Kramer

sewers is ministerial, and when, as is usually the case, the undertaking is a corporate one, the corporation is responsible in a civil action for damages caused by the careless or unskilful manner of performing the work.[1]

v. Los Angeles, 147 Cal. 668; Judd *v.* Hartford, 72 Conn. 350; Katzenstein *v.* Hartford, 80 Conn. 663; Hession *v.* Wilmington, 1 Marv. (Del.) 122; Holmes *v.* Atlanta, 113 Ga. 961; Waycross *v.* Houk, 113 Ga. 963; Valparaiso *v.* Cartwright, 8 Ind. App. 429; Cannelton *v.* Bush (Ind. App.), 91 N. E. Rep. 359; Monarch Mfg. Co. *v.* Omaha, C. B. & S. R. Co., 127 Iowa, 511; Louisville *v.* O'Malley (Ky.), 53 S. W. Rep. 287; Louisville *v.* Gimpel (Ky.), 59 S. W. Rep. 1096; Seaman *v.* Marshall, 116 Mich. 327; Tate *v.* St. Paul, 56 Minn. 527; Woods *v.* Kansas City, 58 Mo. App. 272; Martin *v.* St. Joseph, 136 Mo. App. 316; Talcott *v.* New York, 58 N. Y. App. Div. 514; Munn *v.* Hudson, 61 N. Y. App. Div. 343; O'Donnell *v.* Syracuse, 102 N. Y. App. Div. 80; Downs *v.* High Point, 115 N. Car. 182; Williams *v.* Greenville, 130 N. Car. 93; Siegfried *v.* South Bethlehem, 27 Pa. Super. Ct. 456; Knoxville *v.* Klasing, 111 Tenn. 134; Kolb *v.* Knoxville, 111 Tenn. 311; Kiesel *v.* Ogden City, 8 Utah, 237; Bragg *v.* Rutland, 70 Vt. 606; Richmond *v.* Wood, 109 Va. 75. Seifert *v.* Brooklyn, 101 N. Y. 136, reviewing and distinguishing previous New York cases; *infra,* § 1745, note; s. p. Thurston *v.* St. Joseph, 51 Mo. 510; Imler *v.* Springfield, 55 Mo. 119, 128; Denver *v.* Capelli, 4 Colo. 25. City cannot discharge drainage into a mill-race owned by others (Columbus *v.* Hydraulic Woolen Mills Co., 33 Ind. 435), but may connect its sewerage with any natural flow of water, and is not liable for the falling in of a sewer (with which it has connected its own) which it did not build, and which, being on private property, it has no right to enter to repair, and where the injury is not shown to have resulted from the connection of the city's sewer with the old sewer, the fall of which caused the injury. Munn *v.* Pittsburgh, 40 Pa. St. 364. But see Georgetown *v.* Kelly (Ky.), 123 S. W. Rep. 251; Little *v.* Lenoir, 151 N. Car. 415. *Supra,* § 1740. To establish a liability for defect in sewer, the plaintiff must show fault in construction or negligence in removing obstructions. Smith *v.* New York, 66 N. Y. 295; Seifert *v.* Brooklyn, *supra.*

A municipal corporation cannot discharge its sewers upon private property; and where a city caused its sewers to empty into a small water-course running through the plaintiff's property, thereby conducting to and emptying upon such property a greater body of water than the natural flow through the water-course, to the injury of the property-owner, it is *prima facie* liable therefor. O'Brien *v.* St. Paul, 18 Minn. 176; s. p. Kobs *v.* Minneapolis, 22 Minn. 159, in which the city was held liable for cutting a ditch across a street, thereby causing an unusual quantity of water to be turned with destructive force upon the premises of the plaintiff. Presumption of authority in street commissioners to cut the ditch. *Ib.* In Waffle *v.* New York Cent. R. Co., 58 Barb. (N. Y.) 413, it was decided that a person may drain his own land into a running stream without liability, although such drainage may cause at times an increase of water in the stream to the damage of the owners below. This case distinguished in Gould *v.* Booth, 66 N. Y. 62, 65; *supra,* § 1741. Liability of city for drain at end of wharf. Richardson *v.* Boston, 19 How. (U. S.) 270; *ante,* § 271, note; *supra,* § 1741, and note.

[1] *Supra,* §§ 1626, 1668, 1733, 1739, 1741. Keithsburg *v.* Simpson, 70 Ill. App. 467; King *v.* Kansas City, 58 Kan. 334; Googin *v.* Lewiston, 103 Me. 119; Woods *v.* Kansas City, 58 Mo. App. 272; McAdams *v.* McCook, 71 Neb. 789; Schroeder *v.* Baraboo, 93 Wis. 95. In Child *v.* Boston, 4 Allen, 41, it is held that the mayor and aldermen of Boston, in building sewers, act as public statutory officers, and not as agents of the city; but generally the power to construct sewers is private or corporate, and it was admitted and held to be such in Child *v.* Boston, by *Hoar,* J., *Ib.* p. 52. This is very clearly explained by *Manning,* J., in Detroit *v.* Corey, 9 Mich. 165, 184; Mills *v.* Brooklyn, 32 N. Y. 489; Dermont *v.* Detroit, 4 Mich. 435; Ross *v.* Madison, 1 Ind. 281; Kensington

§ 1743 (1050). **Same Subject.** — The principle, indeed, is a general one, that while there is, in the absence of constitutional or statutory provision, no implied liability for damages necessarily occasioned by the construction of any municipal improvement authorized by law, yet *if the work thus authorized be not executed in a proper or skilful manner*, there will arise a common-law liability for all damages not necessarily incident to the work, and which are chargeable to the unskilful or improper manner of executing it.[1]

§ 1744. **Sewers; Liability for Sickness and Disease.** — In a number of cases the liability of a municipal corporation for *sickness or disease* resulting to the owner of premises connected with a sewer from the negligence of the city in not keeping the sewer so connected in good order and repair, in consequence whereof the premises were flowed with sewage, has been sustained.[2] It is to be observed of these decisions that the negligence or tortious conduct of the city appears to have resulted in a trespass upon the plaintiff's premises.

Com'rs *v.* Wood, 10 Pa. St. 93, 95; Bronson *v.* Wallingford, 54 Conn. 513; *ante*, § 97. The necessity for covered public sewers in streets in cities with compact populations, and their special uses, seem to the author to make the ordinary and usual duties of cities in respect thereof *corporate* rather than *public*, as that distinction has been pointed out in other portions of the present work. *Ante*, §§ 1645, 1646, 1655 *et seq.* *Infra*, §§ 1745, 1746.

A city with express power to construct sewers and to provide drainage, in order to find an *outlet for sewage beyond the city*, was held, in the absence of any restriction, express or implied, to have the incidental right to make a contract with a land-owner, in order to secure such an outlet. Coldwater *v.* Tucker, 36 Mich. 474.

[1] Same authorities cited in last note. *Supra*, §§ 1668, 1675, 1677 *et seq.*; Brine *v.* Great Western R. Co., 2 B. & S. 402, 411, *per Crompton*, J., cited 11 H. L. Cases, 714; Sprague *v.* Worcester, 13 Gray (Mass.), 193, *per Shaw*, C. J.; Perry *v.* Worcester, 6 Gray (Mass.), 544, and cases cited; Hamlin *v.* Biddeford, 95 Me. 308; Proprietors of Locks, &c. *v.* Lowell, 7 Gray (Mass.), 223; Flagg *v.* Worcester, 13 Gray (Mass.), 601, 605; followed in Kennison *v.* Beverly, 146 Mass. 467; McGregor *v.* Boyle, 34 Iowa, 268; Emery *v.* Lowell, 104 Mass. 13; Murphy *v.* Lowell, 128 Mass. 396; Montgomery *v.* Gilmer, 33 Ala. 116; s. c. 26 Ala. 665; Barton *v.* Syracuse, 36 N. Y. 54; Conrad *v.* Ithaca, 16 N. Y. 158; Cowley *v.* Sunderland, 6 H. & N. 565; Carr *v.* Northern Liberties, 35 Pa. 324; Atchison *v.* Challiss, 9 Kan. 603; Judge *v.* Meriden, 38 Conn. 90; Denver *v.* Rhodes, 9 Colo. 554; Thillman *v.* Baltimore, 111 Md. 131; Fewell *v.* Meridian, 90 Miss. 380; Cincinnati *v.* Johnson, 28 Ohio Cir. Ct. 377, aff'd 76 Ohio St. 567; Herr *v.* Altoona, 31 Pa. Super.' Ct. 375; Garland Chain Co. *v.* Rankin, 226 Pa. 389. Further as to the *right to maintain actions against bodies executing public works* under legislative authority, for the improper mode in which their powers have been exercised, see opinion of *Blackburn*, J., in Mersey Docks Cases, 11 H. L. Cases, 687 *et seq.*; Morse *v.* Worcester, 139 Mass. 389; Broom Comm. on Com. Law (4th ed.), 660, where the recent English cases are cited; Shearm. & Red. Neg. (4th ed.) chap. xiv., "Incorporated Public Trustees." As to special constitutional provisions giving a remedy for property "damaged" for public use, see *ante*, §§ 1684, 1685.

[2] Loughran *v.* Des Moines, 72 Iowa, 382; Allen *v.* Boston, 159 Mass. 324; Lockwood *v.* Dover, 73 N. H. 209; Paris *v.* Allred, 17 Tex. Civ. App. 125. See also Randolf *v.* Bloomfield, 77 Iowa, 50.

But under conditions in which, in the view of the court, there was no such trespass, it has been held that a city is not liable for sickness or death resulting from the negligent or careless manner in which it maintains its sewer system, as the construction and maintenance of such system, so far at least as concerns the general community at large, is a governmental function, and in the absence of an invasion or violation of a property or contract right of the plaintiff, no recovery can be had against the city.[1]

[1] In Hughes *v.* Auburn, 161 N. Y. 96, rev'g 21 N. Y. App. Div. 311, the plaintiff brought an action as administratrix of her daughter to recover from the city damages for the daughter's wrongful death through disease alleged to have been contracted by the negligent manner in which the city maintained its sewer. The daughter resided with the plaintiff, her mother, in a house which was the property of the mother. The city had constructed a sewer through the lot prior to the time when the plaintiff purchased the house and had subsequently caused additional sewers to be discharged into the sewer so constructed with the result that sewage leaked into the cellar of the plaintiff's premises and a deposit of sewage was left emitting offensive odors, permeating all the rooms of the house and rendering them damp and unwholesome. The action, as stated above, was brought in the right of the plaintiff's daughter who had died, and who had no legal or equitable estate in the premises, but merely resided there with her mother in the family home. The court considered that the daughter was merely one of the community at large and that as to her the city was performing a governmental duty in constructing and maintaining the sewer, and that no recovery could be had by her administratrix for her death. *O'Brien*, J., said: "The right of the plaintiff to maintain this action depends upon the right of the deceased herself to maintain it had she survived the sickness resulting in her death, and this suggests the inquiry whether an individual who had suffered from disease, superinduced by the negligence of the authorities of a city or village to observe sanitary laws in the construction or maintenance of a system of sewerage, can recover damages for the injuries from the municipality. If one member of a family can, so can every member, and if one family may, so may every family, and every person who can give proof enough to carry the case to the jury. It matters not what the disease may be or the cause, so long as it may be traced by proof to some act or neglect on the part of the municipal authorities. There are few communities where places or conditions may not be found that generate disease, and if the municipality may be charged with the results, traceable to these conditions, it is indeed subject to a liability more serious and far-reaching than has heretofore been recognized. . . . There is no statute that I am aware of that would authorize an action against the defendant by the deceased on the facts disclosed by this record had she lived. If an individual injured by disease produced by the acts or neglect of a city, such as are stated in the complaint, can recover damages at all, it must be upon some principle of the common law; and had it been suggested half a century ago that such a principle existed, the assertion would have been received with some surprise. . . . It is doubtless true that a city may not conduct sewage into the house or upon the premises of an individual, and, if it does, is responsible to him in damages for the trespass or the nuisance. But that is an injury to property for which the owner alone may demand redress, and, since in this case the deceased was not the owner or in possession of the house, but merely a member of her mother's family, she had no right of action for the trespass. Kavanagh *v.* Barber, 131 N. Y. 211. For the personal suffering incident to sickness caused by the defendant's neglect of sanitary precautions to guard against disease, she would have no remedy except such as was common to every other member of the community who was

§ 1745 (1051). **Result summed up as to Municipal Liability for Injuries caused by Surface-water and defective Sewers.** — A review of the authorities, in the light of the true principles of law applicable to the subject of municipal liability for injuries caused by surface-water and defective sewers, justifies the author, he conceives,

similarly afflicted. In the construction and maintenance of a sewer or drainage system a municipal corporation exercises a part of the governmental powers of the State for the customary local convenience and benefit of all the people, and in the exercise of these discretionary functions the municipality cannot be required to respond in damages to individuals for injury to health, resulting either from omissions to act or the mode of exercising the power conferred on it for public purposes to be used at discretion for the public good."

In Metz *v.* Asheville, 150 N. Car. 748, the plaintiff sought to recover damages for the death of an intestate from typhoid fever contracted through the condition of a stream into which the city negligently allowed its sewerage to empty. The stream was not on the plaintiff's property but was near it, and there was no trespass on plaintiff's property. The court held that the city was not liable following Hughes *v.* Auburn, 161 N. Y. 96, *supra*. See also Williams *v.* Greenville, 130 N. Car. 93, where the plaintiff's premises were overflowed through the negligence of the city in maintaining a culvert and the court allowed a recovery for the injury to the property on the theory of damages for a trespass on plaintiff's property but refused to permit a recovery for medical expenses, loss of time and mental anguish, the result of sickness.

In Willett *v.* St. Albans, 69 Vt. 330, sewers, which were submerged in a brook, were not properly connected, and broke and polluted the brook near the plaintiff's home. There was no trespass upon the plaintiff's property, but the noxious and unhealthy vapors emanating from the brook caused the illness of plaintiff's wife. The court denied a recovery upon other grounds, but expressed the opinion that the plaintiff was entitled to recover the expenses caused by his wife's sickness, if it were shown that her illness was due to the defendant's negligence and that it was not necessary that there should be an actual physical trespass upon the plaintiff's property.

In Litchfield *v.* Whitenack, 78 Ill. App. 364, the city sewer emptied into a ravine near the plaintiff's home; there was no trespass on the plaintiff's property. The court allowed the plaintiff to prove how the members of her family and visitors were affected by the noxious odors arising from the sewer, and the extent thereof, to aid the jury in determining whether the plaintiff and her family had been deprived of the wholesome and comfortable use of her home.

In Wharton *v.* Bradford City, 209 Pa. 319, the plaintiff sought to recover for the death of his child due to sickness caused by drinking water from a well into which sewage had percolated from a stream into which the city had drained its sewers. The court refused to hold the city liable because it did not consider the percolation the proximate cause of the death.

In Folk *v.* Milwaukee, 108 Wis. 359, it was alleged that the death of a child, a pupil in a public school, resulted from sewer gas coming from a clogged sewer in the school. The court held that there was no liability because in conducting the school the city was performing a governmental act. See *ante*, § 1658.

In Hollenbeck *v.* Marion, 116 Iowa, 69, the plaintiff brought an action against the defendant city to recover damages for a nuisance caused by the emptying of the city sewage into the creek which ran through plaintiff's farm. The recovery was limited to depreciation in the useable value of the farm, but plaintiff was allowed to introduce evidence by medical men to show the probable effect upon milk cows of drinking the water after its contamination by the sewage.

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in laying down the following general propositions, leaving cases not covered by them to be determined upon their special circumstances:

1. Where the municipality keeps within the limits of its streets and within the limits of its jurisdiction, and the injury caused by surface-water is wholly incidental to and consequential upon the exercise of its lawful powers, there is no implied or common-law liability. This is everywhere admitted.

2. Where the injury is occasioned by the *plan* of the improvement, as distinguished from the mode of carrying the plan into execution, there is not ordinarily any liability. This also is everywhere admitted to be generally true,[1] but it is subject, however, in the judgment of many courts, to the qualifications stated in the subsequent paragraphs of this section.

3. In the case last supposed, there will be a liability if the *direct effect of the work*, particularly if it be a sewer or drain, is to collect an increased body of water, and to precipitate it or sewage on private property, to its injury.[2] But since surface-water is a common enemy, which the lot-owner may

[1] Gilluly *v.* Madison, 63 Wis. 518. In Weis *v.* Madison, 75 Ind. 241, the leading case in *Indiana* upon the subject of this section, *Earl*, J., after quoting paragraph 2, said: "If we are to understand that it refers to the mere plan of the improvement, without reference to the performance of the work under it, there can be no question as to the correctness of the rule as stated. There is, however, a broad and plain distinction between judicial or legislative acts and ministerial ones. The construction of a plan may be a judicial act; the performance of the work is certainly a ministerial act. This court has repeatedly recognized and enforced the doctrine, that a municipal corporation is not liable for the exercise of a legislative power, but that it is liable for the negligent performance of ministerial acts." Text quoted and approved, Chalkley *v.* Richmond, 88 Va. 402. Text cited, Buckley *v.* New Bedford, 155 Mass. 64; Mayrant *v.* Columbia, 77 S. Car. 281; Norfolk & W. R. Co. *v.* Carter, 91 Va. 587; Jordan *v.* Benwood, 42 W. Va. 312; Dudley *v.* Buffalo, 73 Minn. 347.

[2] This sentence of the text is quoted in Seifert *v.* Brooklyn, 101 N. Y. 136, and upon the principle therein expressed, as applied to sewers in cities, the judgment in that case rests. Here the city built a main sewer in 1868. Experience showed, soon after it was completed, that its capacity was not sufficient, and it resulted in overflowing private property. Notwithstanding this the city continued to build and attach new lateral sewers until the inundations of private property occurred eight or ten times a year, — a fact well known to the corporation. The city corporation was, under these circumstances, held liable for inundations of the plaintiff's property in 1884 by sewage. The court rightly held, we think, that the case was not within the principle of exemption from liability for the mistaken exercise of functions of a judicial or legislative character, asserted in Mills *v.* Brooklyn, 32 N. Y. 489, 495; Wilson *v.* New York, 1 Denio, 595, 598; Lynch *v.* New York, 76 N. Y. 60. The review by *Ruger*, C. J., of these and the other principal cases in New York bearing upon the question clears the subject in the State of New York of some obscurity, and places it in a more certain light. Text quoted and approved, Knostman & P. Furniture Co. *v.* Davenport, 99 Iowa, 589; Chalkley *v.* Richmond, 88 Va. 402; Houston *v.* Bryan, 2 Tex. Civ. App. 553. Text cited and applied, Tate *v.* St. Paul, 56 Minn. 527. *Ante*, §§ 1735, 1739.

fight by raising his lot to grade, or in any other proper manner, and since the municipality has the undoubted right to bring its streets to grade, and has as much power to fight surface-water in its streets as the adjoining private owner, it is not ordinarily, if ever, impliedly liable for simply failing to provide culverts or gutters adequate to keep surface-water off the adjoining lots, *below grade*, particularly if the injury is one which would not have occurred had the lots been filled so as to be on a level with the street. The cases are not in harmony on the point last presented, but the above is believed by the author to be the correct doctrine.[1]

4. There is a municipal liability where *the property of private persons is flooded*, either directly or by water or sewage being set back, when this is the result of the *negligent execution* of the plan adopted for the construction of gutters, drains, culverts, or sewers, or of the *negligent failure* to keep the same in repair and free from obstruction, and this whether the lots are below the grade of the streets or not. The cases support this proposition with great unanimity.[2]

5. Perhaps the adjudged cases have not always kept as closely in view as they ought the difference between drains as part of street improvements constructed to dispose of surface-water and common or public sewers constructed to provide for and dispose of the sewage of cities. Where such sewers are built and solely controlled by a municipality, many cases, as shown in the sections of the text relating to this subject, have held that the *municipality is liable for direct inundations of connecting property with water, filth, and sewage*, where the sewer, although it may have been built pursuant to a *plan* adopted by the municipality, is negligently maintained by it after the sewer has been shown by experience to be insufficient, under ordinary conditions, to prevent such a nuisance and direct injury to the plaintiff's property. In view of the purpose of sewers, their indispensableness to property owners in cities,

[1] The text regarded "as a clear and correct statement of the rule, supported by the decided weight of authority." Weis *v.* Madison, 75 Ind. 241. Text quoted, Knostman & P. Furniture Co. *v.* Davenport, 99 Iowa, 589. Text cited, Los Angeles C. Ass'n *v.* Los Angeles, 103 Cal. 461; Hirth *v.* Indianapolis, 18 Ind. App. 673.

[2] Gilluly *v.* Madison, 63 Wis. 518; Hitchins *v.* Frostburg, 68 Md. 100, approving text. Text quoted as "the prevailing rule in the State." Hoffman *v.* Muscatine, 113 Iowa, 332. Text quoted and approved, Houston *v.* Bryan, 2 Tex. Civ. App. 553; Chalkley *v.* Richmond, 88 Va. 402. Text cited specially, Jordan *v.* Benwood, 42 W. Va. 312.

their vital relation to the public health, the exclusive nature (as the power is usually conferred) of the municipal authority to construct and to control them, the power and means (where these exist in the municipality) to provide a remedy, and the utter helplessness of the property owner, if no remedy is provided, liability to a private action for negligence in cases of the character in this paragraph mentioned, is doubtless a salutary rule, and one which in the author's judgment is in the cases and under the conditions above stated, and where no contrary legislative intent appears, entirely consistent with legal principles.[1]

§ 1746 (1051 *a*). **Same Subject.** — In such cases the injury to the property owner is manifest. It is caused by the sole act or neglect of the municipal authorities. They alone have the power to remove the cause. The property owner is substantially remediless unless he can quicken and secure corporate action by means of a civil suit for damages. The city as the corporate representative of the fasciculus of local interests which make sewers a necessity for the benefit of all the inhabitants of the municipality, is the author of the injury which the plaintiff in the cases supposed sustains in the attempt to benefit all. The dictate of justice is that no person should suffer unequally, and, if he does, that all should make compensation. If the city has the power and the means by taxation or otherwise to remedy the defective sewer, and yet, under the conditions above defined and limited, negligently and without necessity or lawful reasons continues such sewer, it must on legal principles be liable, unless it can justify its act or omission by its legislative powers and duties relating thereto. Certain it is that these powers were not given with any such intent. Under the usual constitutional limitations on legislative action it is at least doubtful whether powers so injurious to, and so destructive of, private rights could be directly conferred, and if not, how can they be held to be obliquely granted, or to be embraced in large and general grants of authority? Such delegations of authority are to be construed favorably to the rights of the citizen, and may, we think, reasonably be considered as implying a condition that the authority shall not be exercised so as to inflict unnecessary or at all events negligent injuries upon private property.[2]

§ 1747 (1052). **Conclusion.** — And here, according to its plan, this work is brought to a close. Mr. WILLCOCK, in concluding a similar

[1] *Infra*, § 1746.

[2] Text cited, Los Angeles Cemetery Assoc. *v.* Los Angeles, 103 Cal. 461.

treatise upon the Municipal Corporations of England, before the Reform Act, disgusted with their petty disputes, intrigues, and corruptions, declared that they had long since ceased to have any beneficial operation, and added: "I have travelled through this work as a merchant from Medina to Damascus, — a weary waste of way; there is as little to gratify the mind in the investigation as to please the eye in the desert." Such has not been the author's experience in the present work: on the contrary, the extensive field over which we have passed has presented at every turn and in each successive revision new and interesting subjects for contemplation. Our municipalities, in their creation and operations, stand closely related both to the States and to administrative law. They offer to the statesman, the legislator, and the jurist questions of perplexing intricacy and deepest moment. How thoroughly our municipal institutions are wrought into the framework of our government and administration, how important the functions they are made habitually to perform, how closely, in the exercise of their diversified powers, and in the discharge of their varied duties, they touch the daily life and affect the most important interests of the citizen and of the property owner, cannot fail to impress the most inattentive observer. They are quickened by the spirit of modern times, and in all their multiform purposes, both public and corporate, they illustrate its activity, enterprise, and progress. Walled towns belong to a past age. The violence and insecurity of that age have passed away, but, in their place, our chartered corporations, particularly our large cities, are encountering the perils, not less alarming, of corruption, and fraud on a gigantic scale, engendered by the large revenues and official patronage at their disposal, aided by the disinclination, often the steady refusal, of the substantial citizens to take an active part in the management of municipal affairs. How best to govern our cities is a controverted and complex problem in statesmanship not yet fully solved, as witness the innovations in forms of municipal administration since the last edition of this work, such as Freeholders' Charters, the Commission form of government, the Recall, the Initiative and the Referendum, the value of which is still on probation and can be solved only by time and experience. These innovations would seem to indicate or threaten a weakening of our representative system as applied to our municipal institutions by placing legislative rule directly in the hands of the people instead of their selected representatives. But whatever may be the outcome of these inventions it is clear that for many of the excesses and negligences to which municipal bodies are prone

the courts afford, in the usual state of legislation, the best, and frequently the only, remedy. The author finds it impossible to rise from the survey of the authority of the judicial tribunals over our municipalities to keep them within their chartered limits, to enforce their rights on the one hand, and to enforce rights against them on the other, without profound admiration for the learning and conservative wisdom of the judges, as displayed in their reported judgments, the principles whereof with appropriate illustrations he has sought to extract, arrange and embody in these pages.

END OF VOL. IV

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